



Faculty of Law
DPhil

Fundamental Rights Adjudication in the European Union
Exploring the Jurisprudence of the Court of Justice

Louis Karaolis
Corpus Christi College, Oxford
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ABSTRACT

The protection of fundamental rights by the Court of Justice of the EU (“CJEU”) is no longer a marginal issue, but is the central legal and political issue of coming years, to which all roads in EU scholarship lead back. The objective of this thesis will be to trace the evolution of the CJEU’s jurisprudence, from the application of the general principles to the CJEU’s interpretation of the EU Charter of Fundamental Rights, in a bid to discern the proficiency of the CJEU’s methodology. Along the course of this enquiry, the thesis seeks to explicate judicial developments, rules and techniques governing the CJEU’s review of EU legislative and administrative action, as well as Member State action when executing EU policy objectives and when derogating from EU law obligations, for compliance with fundamental rights. Interlocking themes addressed include: the nature and function of fundamental rights; the enforcement of fundamental rights in the context of the internal market; the horizontal application of fundamental rights; and the elements of interpretation shaping adjudication. Binding these themes together is the scope and method of fundamental rights protection. Eschewing any notion of a grand narrative, it will be shown that the CJEU’s case law and method defy being classified as a natural and linear progression from dark to light, or novice to expert judicial control, in that the CJEU’s initial blueprint for resolving fundamental rights cases has been largely unaltered by constitutional developments.

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TABLE OF ABBREVIATIONS

AG	Advocate General
All ER (EC)	All England Law Reports (European Cases)
Can.J.L.& Society	Canadian Journal of Law and Society
CAP	Common Agricultural Policy
CEAS	Common European Asylum System
CFI	Court of First Instance
CJEU	Court of Justice of the European Union
CLJ	Cambridge Law Journal
CMLR	Common Market Law Reports
CML Rev	Common Market Law Review
CUP	Cambridge University Press
CYELP	Croatian Yearbook of European Law and Policy
CYELS	Cambridge Yearbook of European Legal Studies
EAGF	European Agricultural Guarantee Fund
EARD	European Agricultural Fund for Rural Development
EBL Rev	European Business Law Review
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ECR	European Court Reports
ECST	European Civil Service Tribunal
EEC	European Economic Community
EHRLR	European Human Rights Law Review
ELJ	European Law Journal
EL Rev	European Law Review
EP	European Parliament
EPL	European Public Law
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
EuConst	European Constitutional Law Review
Euro. CJ	European Competition Journal
Fordham Int'l L.J.	Fordham International Law Journal
FRA	Fundamental Rights Agency of the European Union
Hibernian LJ	Hibernian Law Journal
HRL Rev	Human Rights Law Review
ICCLR	International Company and Commercial Law Review
ICLQ	International and Comparative Law Quarterly
IDPL	International Data Privacy Law
IJCL	International Journal of Constitutional Law
ILJ	Industrial Law Journal
ISA	Infectious Salmon Anaemia
JCMS	Journal of Common Market Studies
JIANL	Journal of Immigration, Asylum and Nationality Law

JLS	Journal of Law and Society
JR	Judicial Review
Juris	Jurisprudence
LIEEI	Legal Issues of European Economic Integration
LRB	London Review of Books
MJ	Maastricht Journal of European and Comparative Law
NLR	New Left Review
OJ	Official Journal
OJLS	Oxford Journal of Legal Studies
OUP	Oxford University Press
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UJIEL	Utrecht Journal of International and European Law
UN	United Nations
UNSC	United Nations Security Council
YEL	Yearbook of European Law

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INTRODUCTION: ADJUDICATING FUNDAMENTAL RIGHTS

I. Nature of the Thesis

The entry into force of the Treaty of Lisbon in December 2009 rendered the Charter of Fundamental Rights of the EU (“the EU Charter”) a legally-binding instrument equivalent to the EU Treaties. Prior to the adoption of the EU Charter, however, the Court of Justice of the European Union (“CJEU”) initiated a fundamental rights paradigm within the EU legal order via the general principles of law. The objective of this thesis will be to trace the evolution of that paradigm in a bid to provide an exposition of the proficiency of the CJEU’s *modus operandi*. In particular, the thesis seeks to ascertain whether a methodological framework can be deduced from the CJEU’s jurisprudence and, if so, whether it is adequate.¹

A disquisition on the CJEU’s *modus operandi* in the realm of fundamental rights adjudication is pertinent for several reasons. First and foremost, the Treaty of Lisbon formally places fundamental rights at the epicentre of EU law. According to Article 2 TEU, ‘the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights’. In addition, Article 6(3) TEU stipulates 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 [continue to] constitute general principles of the Union’s law’. It is, therefore, axiomatic that the CJEU must convert these visceral ideals into adjudicative reality. Second and flowing from the first, whilst the overarching general principles of law have been examined through the lens of judicial

¹ The term ‘CJEU’ will be used throughout the thesis and refers exclusively to the ‘Court of Justice’ as distinct from the General Court and the Civil Service Tribunal. The word ‘jurisprudence’ is used interchangeably with ‘case law’. The words ‘fundamental rights’, ‘human rights’ and ‘rights-based’ will also be used interchangeably.

method,² relatively exiguous attention has been paid in the legal literature to the means-by-which the CJEU resolves fundamental rights cases. As such, this thesis sets as its task the aim of distilling the salient legal factors that govern fundamental rights adjudication. In this regard, the CJEU's jurisprudence will be viewed primarily through the prism of legal method rather than through the prism of human rights.³ Third, although the thesis is not explicitly normative, in that it does not seek to prescribe how the trajectory of the CJEU's jurisprudence ought to develop *per se*, it is implicitly normative insofar as a central premise of the thesis is that in order to advocate an alternative way of protecting fundamental rights, it is first necessary to comprehend the existing method. Fourth, Article 6(2) TEU obliges the EU to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"). Yet, the CJEU's recent ruling in *Opinion 2/13*⁴ (that the draft accession agreement contravenes EU law) means that accession has been put on ice. It is thus all the more important to examine the extent to which the CJEU has embedded fundamental rights into the constitutional fabric of EU law on a sound methodological basis.

II. Methodology of the Thesis

The research question of whether a methodological framework can be deduced from the case law focuses on how the CJEU plies its trade and transcends the binary taking-rights-seriously debate, and circumvents any pre-determined belief that the CJEU does not respect

² Takis Tridimas, *The General Principles of EU Law* (OUP 2006); John Usher, *General Principles of EC Law* (Longman 1998), Ulf Bernitz *et al*, *General Principles of EC Law in a Process of Development* (Kluwer Law International 2007); Ulf Bernitz and Xavier Groussot, *General Principles of EU Law and European Private Law* (Kluwer Law International 2013); Jürgen Schwarze, *European Administrative Law* (Revised 1st edn, Sweet & Maxwell 2006).

³ Andrew Williams, *The Ethos of Europe: Values, Law and Justice in EU Law* (CUP 2010); Ian Ward, *The Margins of European Law* (Macmillan Press Ltd 1996); Phillip Alston, *The EU and Human Rights* (OUP 1999).

⁴ *Opinion 2/13 of the court (Re accession to European Convention on Human Rights)* [2015] 2 CMLR 21.

fundamental rights or that it is a venerated guardian of rights.⁵ The thesis is neither a blazing critique of the CJEU nor an attempt to extol its virtues. It is rooted in the philosophical tradition of scepticism in that it is a detached and objective account of the law which suspends final judgment in order to shed light on what is rather than what should be.⁶

To discern the methodology of the CJEU from its jurisprudence, two factors are pre-requisites. First, it is vital to traverse the case law. A key premise of the thesis is that in order to comprehend the CJEU's method, a panoramic overview is required. Instead of anchoring the analysis in one field or on one right, the thesis adopts a peripatetic method and examines different fundamental rights in diverse fields of EU law. Second, in order to detect judicial trends, developments and techniques, it will be indispensable to adopt an expository and law-in-context perspective in place of a theory of adjudication.⁷ Another value judgment therefore is that legal intricacies and legislative context shape the CJEU's decision-making process; opting for a high level of abstraction runs the risk of jettisoning that context.⁸

To avoid casting the net too wide, the thesis will be exclusively concerned with fundamental rights. Analysis on specific general principles such as legal certainty, procedural justice, transparency and legitimate expectations will thus be excluded from the remit of the thesis, except for the principle of non-discrimination (now enshrined in Article 21 of the EU Charter) which will be examined *vis-à-vis* the 'horizontal' application of fundamental rights.

⁵ Jason Coppel and Aidan O'Neill, 'The ECJ: Taking Rights Seriously?' (1992) 29 CML Rev 669; Alan Rosas and Lorna Arnati, 'Taking Rights More Seriously? The EU System of Fundamental Rights' in Alan Rosas and Lorna Arnati (eds.) *EU Constitutional Law: An Introduction* (2nd ed, Hart Publishing 2012).

⁶ Walter Sinnott-Armstrong, *Pyrrhonian Scepticism* (OUP 2004); Alan Bailey, *Sextus Empiricus and Pyrrhonian Scepticism* (OUP 2002); John Greco, *The Oxford Handbook of Skepticism* (OUP 2008).

⁷ Alan Thomson, 'Critical Legal Education in Britain' (1987) 14 JLS 183, 184-185.

⁸ Joxerramon Bengoetxea, *The Legal Reasoning of the European Court of Justice* (Clarendon Press 1993); Suvi Sankari, *European Court of Justice Legal Reasoning in Context* (Europa Law Publishing 2013); Gunnar Beck, *The Legal Reasoning of the Court of Justice of the European Union* (OUP 2012); Hjalte Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Kluwer 1986); Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (CUP 2012); Aida Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (OUP 2009).

III. Road Map of the Thesis

Chapter I: The Nature and Function of Fundamental Rights in the EU Legal Order

The first chapter examines the nature and function of fundamental rights in the EU legal order. In particular, it charts the genesis and development of the general principles and argues that they operate as pabulum for the rule of law which, in the interpretation and application of the Treaties, the CJEU is obligated to ensure. It then highlights the tripartite function of the general principles, namely their utilization by the CJEU to fill gaps in the EU legal system and their use as principles of interpretation and invalidation. An attempt is then made to unpack some of the terminological ambiguities which pervade their application. It argues that if the general principles are to retain conceptual clarity, then they must be distinguished from other fundamental principles including the fundamental Treaty freedoms.

Attention is then drawn to the incorporation of fundamental rights into the general principles, focusing on their legal and non-legal function. In terms of gap-filling, it considers and qualifies the jurisprudential narrative that the CJEU embedded fundamental rights merely to defuse a revolt from the constitutional courts of the Member States. An inspection of the requirement to interpret EU measures as well as national implementing measures in the light of EU fundamental rights is also undertaken by reference to landmark cases. It highlights how the interpretative function of fundamental rights is used as a technique to insulate EU measures from being invalidated and also how interpretation is used to fill any omission overlooked by the Masters of the Treaties or by the legislature. In the final part of the chapter, a recapitulation of some of the criticisms levelled at the CJEU's protection of fundamental rights will be furnished. On a more abstract level, the ideological function of upholding fundamental rights is also reflected upon. It will be suggested that in the midst of postmodern doubts, protecting fundamental rights is linked to the idea of institutional justice.

Chapter II: Adjudicating Fundamental Rights - the Modus Operandi of the CJEU

Building on chapter I, chapter II focuses exclusively on the CJEU's methodological approach. Chapter II is premised on the basis that judicial method and technique can be distilled from the CJEU's jurisprudence. In this regard, chapter II eschews a heuristic analysis of adjudication in favour of a positivist analysis of the CJEU's *modus operandi*.⁹ It will be suggested that in the context of fundamental rights law, adjudication can be viewed as a two-stage process of derivation and enforcement. To reflect this, the first part of the chapter examines how the CJEU derives certain rights, either from the legal traditions of the Member States or from the ECHR and the EU Charter. In relation to the former source of law, the debate on whether the CJEU's approach can be characterised as maximalist or minimalist will be revisited. It will be suggested that the incorporation of a specific right is contingent, not only on the degree of accord amongst the Member States, but also on the aims and tasks of the EU as well as the special characteristics of European integration. In the second part of the chapter, the focus is on how rights are enforced by the CJEU. Attention is drawn to the factors governing adjudication or, in the cryptic language of the CJEU, 'the elements of interpretation' that shape the CJEU's assessment of EU measures and national implementing measures for their compliance with fundamental rights.¹⁰ It will be argued that the elements of interpretation which empirically underpin the case law comprise (i) the scope of EU law (ii) the application of the principle of proportionality and (iii) the utilization of the (EU's own) margin of appreciation principle. As regards the scope of Union law, the chapter examines (first) the field of fundamental rights law as part of the general principles, including

⁹ Gunnar Beck, *The Legal Reasoning of the Court of Justice of the European Union* (OUP 2012) 18-27.

¹⁰ In Case C-159/90 *SPUC v Grogan* [1991] ECR I-4685 [31], it was held that 'where national legislation falls within the field of application of Community law the Court, when requested to give a preliminary ruling, must provide the national court with all the elements of interpretation which are necessary in order to enable it to assess the compatibility of that legislation with the fundamental rights—as laid down in particular in the European Convention on Human Rights—the observance of which the Court ensures'. Also: Case C-260/89 *ERT v DEP* [1994] ECR I-2925 540 [42]; Case C-299/95 *Kremzow v Austria* [1997] ECR I-2629 [15]. In the agency scenario, see: Case 5/88 *Wachauf v The State* [1991] ECR 2609 [22]; Joined Cases C-20/00 and C-64/00 *Booker Aquaculture Ltd v The Scottish Ministers* [2003] ECR I-7411 [39].

scrutiny of situations falling outside the scope of EU law and (second) whether Article 51 of the EU Charter alters that scope. In relation to the proportionality principle, the gaze is on how it is applied *vis-à-vis* EU measures and national implementing law, highlighting in particular the test of limitations on rights derived from the ECHR as well as the CJEU's own EU test on limitations. As regards the margin of appreciation principle, the rationale for its incorporation into EU law will be considered as well as the contexts in which it is applicable.

Chapter III: The Application of Fundamental Rights to EU Legislative and Administrative Action

The imposition of a rigid grid over the flux of the case law runs the risk of distorting judicial reality. Having isolated aspects of the CJEU's legal method in the first two chapters, the third chapter lifts the grid to reveal how adjudication unravels in practice when the CJEU reviews EU legislation and administrative action for compliance with fundamental rights. In particular, it examines the case law of the CJEU before the adoption of the Charter, followed by the period in which the Charter was solemnly proclaimed but not formally binding, and concludes with the current era, post-Lisbon, whereby the Charter has been accorded binding legal status. Against that chronological backdrop, it emerges that the methodological blueprint established in the CJEU's early case law i.e. the sources of inspiration for EU fundamental rights, the test on limitations for assessing restrictions on rights, and the EU objectives of general interest in whose light fundamental rights are to be viewed, paved the way for the judicial approach adopted in subsequent cases over the years. It will be shown, therefore, that the trajectory of the case law ought not to be characterised as a linear development from rudimentary to expert judicial control. On the other hand, it will be argued that even if the Charter may not bring about a sea of change, it does make adjudication more transparent as the CJEU has at its disposal a codified Bill of Rights which provides it with guidance on the scope of the rights contained therein, including the rules of their

interpretation. In addition, it is suggested that the implementation of the Charter by the EU institutions may result in a low-level of scrutiny by the CJEU as checks and balances for rights-based compliance in the enactment of EU legislation will have been taken into account.

Chapter IV: Constitutional Review of State Activity: Executing EU Policy Objectives

In light of the fact that most EU policy objectives are executed by national authorities, chapter IV examines the CJEU's control of Member State action for rights-based compliance. Taking its cue from chapter II, which examined the scope of application of fundamental rights law in relation to Member State action, the fourth chapter focuses on specific cases which showcase the different scenarios in which fundamental rights apply, such as when national authorities adopt domestic measures to implement directives¹¹ and when national authorities apply regulations.¹² In relation to the former, this means that the choice and form of method accorded to State authorities when transposing EU law into national law must respect fundamental rights. In relation to the latter, this means that any power or discretion accorded to State authorities when applying EU law must be exercised in compliance with fundamental rights. The horizontal application of fundamental rights will also be considered.¹³ It emerges that, aside from using fundamental rights to qualify the 'no horizontal direct effect of directives' rule, national measures need not be specifically enacted to transpose directives in order to fall within the scope of EU law; if a national rule falls

¹¹ Joined Cases C-20/00 and C-64/00 *Booker Aquaculture Ltd v The Scottish Minister* [2003] ECR I-7411.

¹² Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department* [2012] All ER (EC) 1011.

¹³ As regards the general principles and the EU Charter of Fundamental Rights: Case C-144/04 *Mangold v Helm* [2005] ECR I-9981; Case C-282/10 *Dominguez v Centre Informatique du Centre Ouest Atlantique* [2012] 2 CMLR 14; Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT* [2014] All ER (EC) 501.

within the material scope of a directive, then upon entry into force of the directive that measure will be caught by Union law and must, therefore, comply with fundamental rights.¹⁴

Chapter V: The Intersection between the Treaty Freedoms and Fundamental Rights

The last chapter ventures into the economic heartland of the EU. In particular, it examines the intersection between the Treaty freedoms and fundamental rights in the so-called derogation scenario. With reference to judicial pronouncements and academic commentary, it considers whether the Treaty freedoms can be categorised as fundamental rights or whether they are (or ought to be viewed as) distinct. It then considers the extent to which the protection of fundamental rights feeds into a pre-existing internal market template in relation to assessing *prima facie* restrictions of EU trade law and determining whether such restrictions may be justified. In so doing, it traces the trajectory of the case law in this area and fleshes out the elements of interpretation isolated in chapter II, such as the application of the proportionality principle and the increased utilisation of the margin of appreciation doctrine. It illustrates that, in order to take account of divergences across the Member States as regards the precise way in which certain fundamental rights are protected, the CJEU accords a definite margin of manoeuvre to the Member States within the limits imposed by the Treaty. It concludes by assessing whether, in the light of the cases examined, there is a market bias which pervades the CJEU's jurisprudence or whether such claims are overstated.

¹⁴ Case C-555/07 *Küçükdeveci v Swedex GmbH and Co KG* [2010] ECR I-365.

CHAPTER I: THE NATURE AND FUNCTION OF FUNDAMENTAL RIGHTS IN THE EU LEGAL ORDER

I. Introduction

The objective of this opening chapter will be to lay the foundation of the thesis by considering the nature and function of fundamental rights in the EU legal order. It is well established that fundamental rights form an integral part of the unwritten general principles of law. As such, an overview of the legal basis and tripartite legal function of the general principles is first required. Whilst the general principles putatively constitute the jewel in the CJEU's crown, conceptual and terminological indeterminacy pervades their application. An attempt will therefore be made to define and distinguish the general principles from other fundamental principles and sources of EU law. This will include an assessment of the curious distinction, both in the CJEU's general principles case law and in the EU Charter of Fundamental Rights, between the ostensibly proximate terms of fundamental rights and human rights. It will be suggested that the CJEU has developed an autonomous conception of fundamental rights which is distinct from a universal notion of human rights. The inclusion of fundamental rights into the general principles is also examined, highlighting in particular their utilization by the CJEU to fill gaps in the EU legal system and their use as principles of interpretation and invalidation. The final part of the chapter pinpoints some of the dominant criticisms levelled at the CJEU's protection of fundamental rights, such as the CJEU's purported manipulation of the language of rights in order to maintain the doctrine of EU primacy and also the alleged existence of a market bias underpinning the CJEU's case law.

II. The General Principles of Law –Pabulum for the Rule of Law

The general principles fall exclusively within the domain of the CJEU. As such, they serve as a potent source of (primary) EU law. It is not the intention here to provide a disquisition on the history and development of the general principles.¹ The salient point is that in order to fill *lacunae* unforeseen by the Masters of the Treaties, the CJEU gleaned principles from the legal systems of the Member States, such as proportionality, legitimate expectations, legal certainty and non-discrimination.² As regards the legal basis for the CJEU's recourse to these unwritten principles, it stems tenuously from specific Treaty provisions.³ The most widely invoked provision is Article 19(1) TEU, which provides that the CJEU 'shall ensure that in the interpretation and application of the Treaties *the law is observed*'.⁴ According to Tridimas, this seemingly 'innocuous' provision vests the CJEU with the authority to ensure that in the interpretation of the Treaties, the EU is bound by 'the rule of law'.⁵ On this basis, the general principles of law constitute pabulum for the overarching ideal of the rule of law.

A. The Legal Function of the General Principles

The general principles serve three non-watertight functions. First and foremost, they have been utilized by the CJEU to fill gaps in the *sui generis* EU legal system. Second, they are

¹ See: John Usher, *General Principles of EC Law* (Longman 1998); Jürgen Schwarze, *European Administrative Law* (Revised 1st edn, Sweet & Maxwell 2006); Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006); Xavier Groussot, *General Principles of Community Law* (Europa Law Publishing 2006); Ulf Bernitz, Joakim Nergelius and Cecilia Cardner, *General Principles of EC Law in a Process of Development* (Kluwer Law International 2008); Ulf Bernitz, Xavier Groussot and Felix Schulyok, *General Principles of EU Law and European Private Law* (Kluwer Law International 2013).

² Case 14/61 *Hoogovens v High Authority* [1962] ECR 283-284; Case 3/54 [1954-56] *ASSIDER v High Authority* ECR 63; Jürgen Schwarze, *European Administrative Law* (Revised 1st edn, Sweet & Maxwell 2006) Chapters 1,2,8.

³ Article 340 TFEU (ex Article 288 EC) states 'in the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties'. Post Lisbon, Article 6(3) TEU.

⁴ (Ex Article 220 EC); Case C-46/93 and C-48/93 *Brasserie du Pecheur SA v Germany* [1996] ECR I-1029.

⁵ Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006) 19.

used as an aid to interpretation. The established rule is that, as far as possible, Treaty provisions and secondary legislation are to be interpreted by the CJEU in compliance with the general principles. Domestic courts are also under a duty to interpret EU measures and national implementing measures in accordance with the general principles and, where necessary, to make a reference to the CJEU for interpretative guidance on the compatibility of those measures with the general principles.⁶ Third and closely related to the second, the general principles serve as grounds to assess the validity of EU measures; if an EU measure cannot be interpreted in compliance with the general principles, it will be declared void.⁷ National measures falling within the scope of EU law that cannot be interpreted in light of the general principles must also be set aside.⁸ (The validity of an EU measure can be challenged directly in an action for annulment via Article 263 TFEU or indirectly in the context of the preliminary reference procedure via Article 267 TFEU with no contestation arising regarding the compatibility of domestic implementing legislation with the general principles *per se*. The national implementing measure may simply operate as a ‘trigger’ for a national court to seek interpretative guidance from the CJEU.⁹) The general principles have moreover been invoked in litigation between private parties in order to disapply national implementing measures.¹⁰

⁶ Koen Lenaerts and Jose A. Gutierrez-Fons, ‘The Constitutional Allocation of Powers and General Principles of EU Law’ 47 CML Rev (2010) 1629.

⁷ A.G. Toth, ‘Human Rights as General Principles of Law, in the Past and in the Future’ in Ulf Bernitz, Joakim Nergelius and Cecilia Cardner (eds.), *General Principles of EC Law in a Process of Development* (Kluwer Law International 2008) 76.

⁸ Koen Lenaerts and Jose A. Gutierrez-Fons, ‘The Place of the Charter in the EU Constitutional Edifice’ in Steve Peers and others (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1559.

⁹ Angela Ward, ‘Article 51 -Scope’ in Steve Peers and others (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1442.

¹⁰ Case C-144/04 *Mangold v Helm* [2006] 5 ECR I-9981; Case C-555/07 *Küçükdeveci v Swedex GmbH and Co KG* [2010] ECR I-365.

B. Hierarchy of Norms

If the role of the general principles is clear, their categorization is somewhat hazy.¹¹ Mercurial in nature, these unwritten general principles are not easy to classify or define. The best-known attempt was posited by De Witte. He defined the general principles as ‘unwritten principles, recognized by the European Court of Justice, that have the status of higher law by the fact that they may be invoked for review of [Union] acts’.¹² Prechal suggests that De Witte’s definition requires three qualifications. First, the existence of a general principle may also be deduced from legal texts and the Opinions of Advocates General. Second, the CJEU’s review on the basis of the general principles extends beyond the remit of Union acts as it also covers domestic action falling within the ambit of EU law. Third, the general principles operate not simply as a direct yardstick to examine EU acts, but also as an aid to interpretation.¹³ Essentially, the definition put forward by De Witte, and qualified by Prechal, hinges on the function of the general principles. For present purposes, however, the key part of the definition is the claim that, in the hierarchy of EU norms, the general principles have the status of ‘higher law’ by virtue of the fact that they can be invoked to annul EU acts. On that note, it has been argued by Toth that the general principles rank even higher than the Treaties insofar as they constitute ‘the law’ which, in the interpretation and application of the Treaties, the CJEU enforces.¹⁴ In a bid to explicate the CJEU’s recourse to

¹¹ Ulf Bernitz, Xavier Groussot and Felix Schulyok, *General Principles of EU Law and European Private Law* (Kluwer Law International 2013).

¹² Bruno de Witte, ‘Institutional Principles: A Special Category of General Principles of EC Law’ in Ulf Bernitz, Joakim Nergelius and Cecilia Cardner (eds.), *General Principles of EC Law in a Process of Development* (Kluwer Law International 2008) 143.

¹³ Sacha Prechal and Magdalena E. De Leeuw, ‘Transparency: A General Principle of EU Law?’ in Ulf Bernitz, Joakim Nergelius and Cecilia Cardner (eds.), *General Principles of EC Law in a Process of Development* (Kluwer Law International 2008) 203.

¹⁴ A.G. Toth, ‘Human Rights as General Principles of Law, in the Past and in the Future’ in Ulf Bernitz, Joakim Nergelius and Cecilia Cardner (eds.), *General Principles of EC Law in a Process of Development* (Kluwer Law International 2008) 78.

the general principles, Lenaerts (speaking extra judicially) has opined that the phrase *the law* in Article 19(1) TEU ‘transcends the Treaties’.¹⁵ If by the use of the word ‘transcends’, Lenaerts was intimating that the law (*viz* general principles) is distinct from the Treaties, then at most the general principles constitute a source of Union law on par with the Treaties. If, however, ‘transcends’ is to be understood in a literal sense, then Toth’s observation, that the general principles rank even higher than the Treaties, would be correct. (Akin to the EU Charter, it is submitted that the general principles have the same legal value as the Treaties.)

C. The Taxonomy of the General Principles

Even if one accepts that the general principles rank alongside the Treaties as a primary source of EU law, determining which principles qualify as general principles of law remains a ‘thorny issue’.¹⁶ Referring to the taxonomy of the general principles, AG Trstenjak opined that:

The terminology is inconsistent both in legal literature and in the case law. To some extent there are differences only in the choice of words, such as where the [CJEU] refer[s] to a generally-accepted rule of law, a principle generally accepted, a basic principle of law, a fundamental principle, a principle, a rule, or a general principle of equality which is one of the fundamental principles of [EU] law.¹⁷

In more concrete terms, the AG contemplated whether ‘the general principles include the fundamental provisions of unwritten primary [EU] law which are inherent in the legal order of the European [Union] itself’.¹⁸ For the AG, a distinction could be drawn between general principles which pertain to, and are developed exclusively from, ‘the spirit and system of the [TFEU] and those general principles which are common to the legal and constitutional orders

¹⁵ Koen Lenaerts, ‘Summer Course of the Law of the European Union’ (6 July 2013) <https://www.youtube.com/watch?v=DOdnDKoPmN8> >accessed 17 April 2015.

¹⁶ Case C-101/08 *Audiolux SA v Groupe Bruxelles Lambert SA* [2009] ECR I-9823, Opinion of AG Trstenjak, [67].

¹⁷ *ibid* [67].

¹⁸ *ibid* [69].

of the Member States'.¹⁹ One can reasonably surmise that in relation to the former the AG had in mind structural principles such as direct effect and primacy, whereas the latter comprise principles such as proportionality, legitimate expectations and the protection of fundamental rights. Elsewhere in the legal literature, it has even been mooted whether the fundamental Treaty freedoms ought to be classified as general principles, albeit not unwritten, on the basis that they have been developed by the CJEU.²⁰ If, however, the general principles are to retain conceptual clarity, then a threshold as to what qualifies as a general principle is apposite. It is suggested that if a purported legal principle does not satisfy the tripartite criteria of the general principles then it ought not to be classified as one.²¹

D. The Incorporation of Fundamental Rights into the General Principles

The original Treaties contained no express provision for the protection of fundamental rights.²² This notwithstanding, the CJEU, in a series of judgments, rejected claims based on rights and principles enshrined in the laws of the Member States.²³ After this frosty reception, however, the CJEU gently warmed to the task. In *Stauder* it was ruled that fundamental rights formed part of the general principles of law which were safeguarded by

¹⁹ *ibid* [69].

²⁰ The Treaty freedoms have been regarded as fundamental rights if not general principles; see: Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, Opinion of AG Stix-Hackl, [50].

²¹ For instance, the Treaty freedoms, whilst general in nature, are codified and not used to fill gaps in the EU legal system. Equally, direct effect is not used by the CJEU as an aid to interpretation of national measures falling within the scope of EU law.

²² For its part, the CJEU confined itself to affirming that the Community Treaties (the EC Treaty, the ECSC and the EAEC) made no reference to the protection of human rights: see Opinion 2/94 *Re the Accession of the Community to the European Human Rights Convention* [1996] ECR I-1759 [1].

²³ Case 1/58 *Stork v High Authority* [1959] ECR 17; Cases 36, 37, 38 & 40 *Geitling v High Authority* [1960] ECR 423; Case 40/64 *Sgarlata and Others v Commission* [1965] ECR 215. Tridimas asserts that the rationale for not accepting human rights claims was not due to a lack of conviction but based on pragmatism, namely a fear of subordinating EU law to the laws of the Member States - see Takis Tridimas, *General Principles of EU Law* (2nd edn, OUP 2006) 301.

the CJEU.²⁴ In *Internationale Handelsgesellschaft* the CJEU was more explicit. It held that ‘the protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the [EU]’.²⁵ In *Nold*, the CJEU cited international human rights treaties as a further source of inspiration for the general principles.²⁶ And, in 1975, after all the Member States ratified the European Convention on Human Rights, the CJEU made its first explicit reference to it in *Rutili*.²⁷ In *Wachauf*, the gap-filling remit of fundamental rights was extended to the sphere of Member State action: when Member States implemented EU rules into national law, they were to respect fundamental rights.²⁸ In *ERT*, the CJEU ruled that when Member States relied on Treaty provisions to derogate from EU law or, more accurately, when they sought to justify national rules restricting one of the Treaty freedoms, they were still acting within the scope of EU law; hence those rules were to be interpreted in the light of fundamental rights.²⁹ And in *Schmidberger*, the CJEU provided ballast for the proposition that national authorities may invoke fundamental rights in order to justify domestic rules restricting the Treaty freedoms.³⁰

Filling *lacunae* is not confined to ensuring compliance with fundamental rights in diverse scenarios: it also comprises the specific rights which form part of the EU’s heritage of rights. Before the adoption of the EU’s own Bill of Rights, the EU Charter of Fundamental

²⁴ Case 29/69 *Stauder v City of Ulm* [1969] ECR 419 [7].

²⁵ Case 11/70 *Internationale Handelsgesellschaft v Einfuhr und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125 [4].

²⁶ Case 4/73 *Nold v Commission* [1974] ECR 491 [13].

²⁷ Case 36/75 *Rutili v Minister for the Interior* [1975] ECR 1219 [32].

²⁸ Case 5/88 *Hubert Wachauf v The State (Bundesamt für Ernährung und Forstwirtschaft) (Federal Office for Food and Forestry)* [1989] ECR 2609 [19].

²⁹ Case C-260/89 *Elliniki Radiophonia Tileorassi v Dimotiki Étairia Pliroforissis* [1991] ECR I-2925 [42]-[43].

³⁰ Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Austria* [2003] ECR I-5659.

Rights,³¹ the CJEU sought to fill the gaps in the EU legal system by accepting, though not always ruling in favour of, arguments based on some of the following rights: freedom of religion,³² freedom of expression,³³ right to respect for property,³⁴ freedom to pursue a trade,³⁵ human dignity,³⁶ right to respect for family life,³⁷ the right to life of the unborn child,³⁸ the right of access to a lawyer,³⁹ non-retroactivity of penal liability,⁴⁰ respect for private life,⁴¹ and the right to a fair hearing.⁴²

Post Lisbon, residual gaps are being filled by recourse to the Charter in place of the general principles, though the former may also operate as a ‘source of authority for the discovery of the general principles’.⁴³ On a pragmatic note, the sheer scope of the Charter entails that the CJEU’s fundamental rights case law has burgeoned.⁴⁴ Arguably, its scope

³¹ Post Lisbon, the Charter enjoys ‘the same legal values as the Treaties’ (Article 6 TEU).

³² Case 130/75 *Prais v Council of the European Communities* [1976] ECR 1589 [6]-[19].

³³ Joined Cases 60/84 and 61/84 *Cinetheque S.A. and Others v Federation Nationale des Cinemas Français* [1986] 1 CMLR 365; Case C-274/99 P *Bernard Connolly v Commission* [2001] ECR I-1611; Case C-260/89 *ERT v DEP* [1991] ECR I-2925; Case C-112/00 *Schmidberger v Austria* [2003] ECR I-5659.

³⁴ Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727; Joined Cases C-20/00 and C-64/00 *Booker Aquaculture Limited (trading as Marine Harvest McConnell) v The Scottish Ministers* [2003] ECR I-7411.

³⁵ Case C-280/93 *Germany v Council* [1994] ECR I-4973.

³⁶ Case C-377/98 *Netherlands v European Parliament* [2001] ECR I-7079; Case C-36/02 *Omega Spielhallen v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

³⁷ Case C-60/00 *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279; Case C-540/03 *European Parliament v Council of the European Union* [2006] ECR I-5769.

³⁸ Case C-159/90 *Society for the Protection of Unborn Children Ireland Ltd v Grogan* [1991] ECR I-4685.

³⁹ Case C-7/98 *Bamburski v Krombach* [2000] ECR I-1932 [35-46].

⁴⁰ C-63/83 *R v Kirk (Kent)* [1984] ECR 2689.

⁴¹ Case C-404/92 P *X v Commission* [1994] ECR I-4737.

⁴² Case 374/87 *Orkem SA v Commission* [1989] ECR 3283.

⁴³ Case C-555/07 *Küçükdeveci v Swedex GmbH and Co KG* [2010] ECR I-365 [22].

⁴⁴ In the context of the preliminary ruling procedure, national courts increasingly make reference to the EU Charter of Fundamental Rights, specifically, such references rose by 65 per cent in 2012 as compared to 2011 (from 27 references to 41). The CJEU itself has also increasingly cited the Charter, specifically, references

creates the risk of litigants attempting to bolster unmeritorious claims by framing a dispute on the basis of Charter rights, or by invoking provisions of the Charter in a bid to bring a matter within the ambit of EU law.⁴⁵ Yet, in vain is the net spread in the sight of a bird. The CJEU will have to devise ways to filter out frivolous claims, as a failure to do so may render fundamental rights some sort of joker in the pack. On the other hand, as fundamental rights issues increasingly infiltrate the CJEU's case law, the more venerated it and the EU as a whole will be as the guardians of such rights. Either way, this proliferation of rights-based claims represents a paradigm shift, insofar as prior to the adoption of the Charter one of the main criticisms levelled at the EU was the lack of visibility of fundamental rights. Now it seems that fundamental rights are, for better or worse, illuminated in bright neon lights.

As part of the general principles, the CJEU may utilize fundamental rights as tool of interpretation in order to fill gaps overlooked the Masters of the Treaties or by the legislature.⁴⁶ The interpretative function of fundamental rights was established in *Stauder*. In that case, the referring German court sought to ascertain whether a Commission decision was in violation of the general principles of (then) Community law. The decision was aimed at mitigating a surplus of butter in the Common Market by making it available to recipients of social assistance at a subsidised price. In the German-language text of the decision, beneficiaries were required to provide their personal details in exchange for the subsidised butter. Aggrieved, the applicant invoked various rights under national constitutional law, though, as noted by AG Karl Roemer, the decision was to be examined not in the light of

increased by over 50 per cent in 2012 from 2011 (from 43 in 2011 to 87 in 2012) – See: Commission, ‘2012 Report on the Application of the EU Charter of Fundamental Rights’ COM (2013) 271 final.

⁴⁵ Case C-339/10 *Estov v Ministerski savet na Republika Bulgaria*, judgment of November 12, 2010, nyr [12].

⁴⁶ Koen Lenaerts and Jose A. Gutierrez-Fons, ‘The Constitutional Allocation of Powers and General Principles of EU Law’ 47 CML Rev (2010) 1629, 1629.

national law but in the light of the general principles of Community law which were based on principles which derived from the national laws of the Member States.⁴⁷

In a rapid judgment, the CJEU observed that the other two language texts of the decision did not require beneficiaries to supply their personal details. On that basis, the CJEU stated that the need for a uniform application and interpretation of the decision required that ‘preference must be given to the least onerous interpretation if it suffices to achieve the purposes served by the decision in question’.⁴⁸ The CJEU concluded: ‘thus interpreted, the decision in question does not contain any element that might jeopardise the fundamental rights of the individual contained in the general principles of the law of the Community of which the Court must ensure the observance’.⁴⁹

The novelty of *Stauder* was the incorporation of fundamental rights into the pre-existing general principles of law, thus filling a gap not contemplated by the Masters of the Treaties. Evidently, however, the CJEU’s methodological approach was rudimentary; to comply with these newly protected fundamental rights, an interpretation which was the least arduous in terms of attaining the aims of the Community measure in question was necessary. Yet, as the CJEU did not state which fundamental rights were being protected, it was not an interpretation of the decision by reference to the scope of those rights, rather, it was a literal interpretation of the decision in the light of unidentified rights, that is, of rights *in abstracto*.

The nexus between judicial interpretation and *legislative* gaps underscores the more recent *Sturgeon* case. Stripped to its core, the dispute hinged on the interpretation of a Regulation regarding a distinction contained therein between a *delay* and a *cancellation*.⁵⁰ In

⁴⁷ Case 29/69 *Stauder v City of Ulm* [1969] ECR 419, Opinion of AG Roemer.

⁴⁸ *ibid*, Opinion of AG Roemer, [4].

⁴⁹ *ibid* [7].

⁵⁰ Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 [2004] OJ L46/1.

accordance with Article 5 of the Regulation, passengers whose flight is cancelled are entitled to compensation, whereas Article 6 of the Regulation makes no provision for compensation to passengers whose flight is delayed. As noted by AG Sharpston, the distinction between a delay, due to external factors, and a cancellation, due to commercial reasons, was outwardly based by the legislature on the extent to which operators were at fault rather than the ‘effect on passengers’.⁵¹ As submitted by the Polish Government, however, the distinction was liable to give rise to a situation whereby passengers whose flight has been significantly delayed, find themselves in a similar position to passengers whose flight has been cancelled, and yet they are to be treated differently.⁵²

The issue before the CJEU, therefore, was whether the distinction contained in the Regulation was in breach of the general principle of equality. The CJEU made clear that ‘according to a general principle of interpretation, a Community act must be interpreted, as far as possible, in such a way as not to affect its validity’.⁵³ Conversely:

All Community acts must be interpreted in accordance with primary law as a whole, including the principle of equal treatment, which requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.⁵⁴

The CJEU concluded that since the objective of the Regulation was to protect all air passengers and to remedy damage suffered by way of inconvenience, passengers who suffered a delay were to be treated in a comparable way to passengers whose flight was cancelled.⁵⁵

⁵¹ Case C-402/07 *Sturgeon v Condor Flugdienst GmbH* [2009] ECR I-10923, Opinion of AG Sharpston, [34].

⁵² *ibid*, Opinion AG Sharpston, [38].

⁵³ *ibid* [47].

⁵⁴ *ibid* [48].

⁵⁵ *ibid* [49]-[61].

The decision in *Sturgeon* generated considerable ire.⁵⁶ The gist of the critique is that the CJEU circumvented the intention of the legislature by artfully interpreting the Regulation as requiring compensation for delays. Stated differently, the CJEU usurped the role of the legislator. In terms of method, the CJEU was equally criticised for opting to interpret the Regulation, such that the principle of equality was not violated, in place of invalidating it.⁵⁷ Yet, accusations of judicial activism may be overstated. The legislature does not have free rein to adopt secondary legislation that breaches primary EU law (i.e. general principles). In addition, as noted by Garben, the decision by the CJEU to press for consistent interpretation instead of invalidating the Regulation may be construed as ‘deference’ towards the legislature, or ‘the lesser evil’.⁵⁸ Rather than engaging in zealous judicial law making, it can be argued that by interpreting the Regulation in accordance with the principle of equal treatment, the CJEU acted more in line with the will of the legislature than had it annulled the Regulation.⁵⁹

A more far-reaching manifestation of the interpretative function of the general principles, and therefore fundamental rights, is the CJEU’s control of Member State activity.⁶⁰ As noted above, the CJEU in *ERT* held that recourse to the Treaty derogations by Member States to justify national rules restricting free movement fell within the scope of (then) Community law, hence those rules were to be interpreted in the light of the general

⁵⁶ Joseph Weiler, ‘Epilogue: Judging the Judges – Apology and Critique’ in Maurice Adams, Henri de Waele, Johan Meeusen, and Gert Straetmans (eds.), *Judging Europe’s Judges: The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013).

⁵⁷ Sacha Garben, ‘Sky-High Controversy and High-Flying Claims? The *Sturgeon* Case Law in Light of Judicial Activism, Euroscepticism and Eurolegalism’ (2013) 50 CML Rev 15, 24-25.

⁵⁸ *ibid*, 34.

⁵⁹ *ibid*, 34.

⁶⁰ Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs GmbH v Bundesstadt Bonn* [2004] ECR I-9609, Opinion of AG Stix-Hackl, [60].

principles which included fundamental rights deriving from the ECHR.⁶¹ In this context, the CJEU may provide exacting guidance on whether an impugned national rule is in breach of fundamental rights, leaving scant room for manoeuvre, if any, to the referring domestic court, or alternatively it may provide general guidance, thereby deferring to the national judiciary.⁶²

E. The Legal Distinction between Fundamental Rights and Universal Human Rights

At this juncture it is apposite to grasp a nettle, namely the curious dichotomy that has emerged between the ostensibly proximate terms of fundamental rights and human rights. Stated simply, the dichotomy pertains to the internal and external dimensions of the Union. In the jurisprudence of the CJEU the term fundamental right is used almost exclusively, whereas the term human right is used in measures and policies regarding the external relations of the EU.⁶³ In scope⁶⁴ and in name, the Charter of Fundamental Rights reinforces the trend established in the CJEU's case law. It has been argued that this reflects the actuality that the Charter is a constitutional rather than international human rights instrument.⁶⁵ It is also instructive to note that human rights are cited in place of fundamental rights in Article 2 TEU establishing the values upon which the Union is founded. Under Article 49 TEU, prospective States must respect the values in Article 2 TEU in order to join the EU. Article 7 TEU also facilitates sanctions against States for violating the values referred to in Article 2

⁶¹ Case C-260/89 *ERT v DEP* [1991] ECR I-2925.

⁶² Takis Tridimas, 'Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction' (2011) 9 *ICON* 737, 739.

⁶³ Articles 3(5) and 21(1) TEU. See also: D Napolini, 'The European Union's Foreign Policy and Human Rights' in N Neuwahl and Allan Rosas (eds.), *The European Union and Human Rights* (The Hague 1995) 297. See further, Andrew Williams, *EU Human Rights Policies: A Study in Irony* (OUP 2004); Vaughne Miller, *The Human Rights Clause in the EU's External Agreements* (House of Commons Library 2004); Philip Alston, *The EU and Human Rights* (OUP 1999).

⁶⁴ According to Article 51 of the Charter, fundamental rights contained therein are addressed to the EU institutions and to the Member States 'only when they are implementing EU law'.

⁶⁵ Alan Rosas, 'The Charter and Universal Human Rights Instruments' in Steve Peers and others (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1685.

TEU ‘independent of the question of whether the situation is otherwise regulated by Union law’.⁶⁶ In contrast, Article 6(3) TEU enacts that fundamental rights, as guaranteed from the ECHR and the constitutional traditions of the Member States, shall constitute the general principles of EU law. Whilst the general principles are derived from the legal systems of the Member States, they are then secured within the EU legal framework and are thus judicially applicable within the ambit of EU law. It seems, therefore, that human rights are, as a legal concept, broader in scope than fundamental rights. Put differently, human rights are not circumscribed to action governed by the field of application of Article 51 of the EU Charter.⁶⁷

III. The CJEU: Taking Rights Seriously?

As already stated, the founding Community Treaties were silent on the issue of fundamental rights, and in order to redress that omission the CJEU fleshed out an *oeuvre* of law that now forms part of a broad EU system of protection. In essence, that system comprises the creation and development of the general principles, political developments,⁶⁸ Treaty amendments,⁶⁹ the adoption and ratification of the EU Charter of Fundamental Rights,⁷⁰ legislative developments in the field of non-discrimination law,⁷¹ the formation of the EU Fundamental Rights Agency,⁷² sanctions against Member States for violating fundamental rights,⁷³ and the

⁶⁶ *ibid*, 1687.

⁶⁷ *ibid*, 1686.

⁶⁸ Joint Declaration by the European Parliament, the Council and the Commission [1977] OJ C103/1.

⁶⁹ Articles 2 and 6 TEU.

⁷⁰ Article 6(1) TEU.

⁷¹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22 and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

⁷² Olivier De Schutter, ‘The EU Fundamental Rights Agency: Genesis and Potential’ in Kevin Boyle (ed.), *New Institutions for Human Rights Protection* (OUP 2009) 93-136.

obligation for EU accession to the ECHR.⁷⁴ This system can be likened to the constituent parts of a ‘mosaic’⁷⁵ of EU fundamental rights law, and iconoclasts have targeted numerous flaws in the system.⁷⁶

A recapitulation of several criticisms levelled at the CJEU’s part in enforcing fundamental rights is warranted here. As is well known, a binary debate as to whether the CJEU took rights seriously emerged in the early-to-mid nineties. Coppel and O’Neill argued that the actual motive for the CJEU’s incorporation of fundamental rights was to maintain the primacy of (then) EC law ‘defensively’, which then led to the CJEU extending its jurisdiction to oversight of Member State activity ‘offensively’. They argued that in both scenarios, under the guise of protecting fundamental rights, the CJEU sought to expedite the process of legal integration.⁷⁷ A central plank of their critique was that the CJEU endowed fundamental rights with enough significance to be credible, but only for the will of the Community to triumph. In that connection, they argued that a dichotomy emerged between the CJEU’s review of Member State rules on the one hand and Community acts on the other, with the CJEU exercising stricter control over the former.⁷⁸ In a rather sardonic response, Weiler and Lockhart asserted that Coppel and O’Neill’s critique was doctrinally flawed, empirically

⁷³ Articles 7(1) and (2) TEU.

⁷⁴ Article 6(2) TEU and Article 219 TFEU; Sionaidh Douglas-Scott, ‘Opinion 2/13 on EU Accession to the ECHR: a Christmas Bombshell from the European Court of Justice’ (*Constitutional Law Group*, 24 December 2014) <<http://ukconstitutionallaw.org/2014/12/24/sionaidh-douglas-scott-opinion-213-on-eu-accession-to-the-echr-a-christmas-bombshell-from-the-european-court-of-justice/>> accessed 28 May 2015.

⁷⁵ Stephen Weatherill, *Cases and Materials on EU Law* (11th edn, OUP 2014) 58.

⁷⁶ Andrew Williams, ‘Taking Values Seriously: Towards a Philosophy of EU Law’ (2009) 29 OJLS 549; Andrew Williams, *EU Human Rights Policies: A Study in Irony* (OUP 2004); Philip Alston, *The EU and Human Rights* (OUP 1999).

⁷⁷ Jason Coppel and Aidan O’Neill, ‘The European Court of Justice: Taking Rights Seriously?’ (1992) 29 CML Rev 669.

⁷⁸ *ibid*, 683.

unsubstantiated and rooted in ‘reductionist motive-analysis’.⁷⁹ However, Weiler and Lockhart’s self-proclaimed ‘critique of a critique’⁸⁰ is itself susceptible to criticism, in that it too is situated in the same liberal-rights paradigm. Indeed, from a post-structuralist perspective, Weiler and Lockhart’s critique is essentially the opposite side of the same coin.⁸¹

As regards the issue of primacy and fundamental rights, the jurisprudential narrative endorsed by Coppel and O’Neill is that, in the face of potential rebellion from national constitutional courts, and in particular the German Constitutional Court⁸² and latterly the Italian Constitutional Court,⁸³ the CJEU artfully incorporated fundamental rights into the *corpus* of Community law in a bid to preserve its primacy.⁸⁴ Another pervasive, though misleading, account of the CJEU’s initial jurisprudence has been posited as follows: in the so-called *Solange I* case, the German Constitutional Court reserved for itself the right to mediate the compatibility of Community law with German Basic Law ‘so long as’⁸⁵ the Community lacked a codified Bill of Rights on par with that of the *Grundgesetz*. The CJEU then reacted by incorporating fundamental rights via the general principles. In response, the German Constitutional Court, in *Solange II*, waived its right to review the compatibility of

⁷⁹ Joseph Weiler and Nicolas Lockhart, ‘Taking Rights Seriously: Seriously: The European Court and its Fundamental Rights Jurisprudence –Part I’ (1995) 32 CML Rev 51-94. For a balanced assessment, see: Alison Young, ‘The Charter, Constitution and Human Rights: Is the Beginning or the End for Human Rights Protections by Community Law’ (2005) 11 EPL 219, 227.

⁸⁰ *ibid.*, (Joseph Weiler and Nicolas Lockhart) 57.

⁸¹ For a postmodern critique of human rights, see: Slavoj Žižek, ‘Against Human Rights’ (2005) 34 NLR 115-131.

⁸² BVerfGE 22,293,298, Judgment of 18 October 1967.

⁸³ *Fontini v Ministero delle Finanze* [1974] 2 CMLR 372.

⁸⁴ Federico Mancini, *Democracy and Constitutionalism in the European Union* (Hart Publishing 2000) 13; Jason Coppel and Aidan O’Neill, ‘The ECJ: Taking Rights Seriously?’ (1992) 29 CML Rev 669, 672.

⁸⁵ *Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratstelle fur Getreide und Futtermittel* [1974] 2 CMLR 540 [23] (*Solange I*).

Community law *vis-à-vis* fundamental rights contained under the Basic Law ‘so long as’⁸⁶ the CJEU continued to adequately protect fundamental rights. As noted by Bryde, however, *Solange I* was decided *after* the CJEU’s seminal tripartite case law of *Stauder*, *Nold* and *Internationale Handelsgesellschaft*.⁸⁷ In addition, the condition stipulated in *Solange I* for a codified Bill of Community Rights had still not materialised when *Solange II* was decided.⁸⁸

Writing extra-judicially, Mancini acknowledged that even before *Solange I*, the CJEU became increasingly aware of an emerging ‘democratic deficit’ in the maintenance of the Community, and therefore of the pressing need to safeguard fundamental rights.⁸⁹ The degree to which the protection of fundamental rights was foisted upon the CJEU is thus debatable. In any event, even if the catalyst for the CJEU’s reversal of engines as regards fundamental rights was (firstly) pressure from the national judiciaries and (secondly) the preservation of primacy, the driving force since then has largely been the CJEU. Whilst the Masters of the Treaties envisaged European economic integration based on trade, the rapid expansion of Community activities coupled with the emergence of direct effect and primacy created patent gaps in fundamental rights protection which the CJEU became motivated to close.⁹⁰ In Mancini’s words, ‘[r]eading an unwritten bill of rights into Community law is...the most striking contribution the Court has made to the development of a constitution for Europe’.⁹¹

⁸⁶ BVerfGE 73, 339 2 BvR 197/83 (*Solange II*).

⁸⁷ Brun-Otto Bryde, ‘The ECJ’s Fundamental Rights Jurisprudence – A Milestone in Transnational Constitutionalism’ in Miguel Poiars Maduro and Loic Azoulai (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 120.

⁸⁸ *ibid*, 120; Paul Craig and Gráinne de Búrca, *EU Law: Text Cases and Materials* (5th edn, OUP 2011) 272-283.

⁸⁹ Federico Mancini, *Democracy and Constitutionalism in the European Union* (Hart Publishing 2000) 13.

⁹⁰ Brun-Otto Bryde, ‘The ECJ’s Fundamental Rights Jurisprudence – A Milestone in Transnational Constitutionalism’ in Miguel Poiars Maduro and Loic Azoulai (eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 120.

⁹¹ Federico Mancini, ‘The Making of a Constitution for Europe’ in Federico Mancini (ed.), *Democracy and Constitutionalism in the European Union* (Hart Publishing 2000) 13.

A flickering ember from the debate is whether there is a market bias that pervades the CJEU's fundamental rights case law.⁹² In essence, there are two strands to this critique. The first is that whilst fundamental rights emanate from the legal systems of the Member States, they are then secured within the framework of the structure and objectives of the EU. In practice, this entails that fundamental rights must yield to, and be interpreted in the light of, economic objectives enshrined in EU secondary legislation. *Prima facie*, this critique is borne out by the very few instances of EU measures being invalidated for infringing fundamental rights, though as we shall see (in chapter III), the advent of the EU Charter has made the CJEU less pusillanimous in its review of EU legislative activity. The second strand is that the CJEU's review of Member State activity in the context of the internal market reveals a tendency for fundamental rights to be subordinated to the fundamental market freedoms. In a consistent line of case law, the CJEU has advanced on the basis that national rules restricting free movement will be valid only if necessary and proportionate, even if the motivating factor is the protection of fundamental rights. In other words, the guiding criterion appears to be whether restrictions placed on EU free movement law, rather than fundamental rights, are proportionate. As noted by Weatherill, the CJEU's recent rulings in *Viking Line* and *Laval* are 'the most vulnerable to the allegation that, for all the rhetoric of respect for non-economic values, EU free movement law is contaminated by an economic bias'.⁹³

⁹² J. Morijn, 'Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of a European Constitution' (2006) 12 ELJ 15-40; Dagmar Schiek, 'Fundamental Rights Jurisprudence Between Member States' Prerogatives and Citizens' Autonomy' in Hans-W. Micklitz and Bruno De Witte (eds.) *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2012) 237.

⁹³ Stephen Weatherill, 'Economic Rights to Fundamental Rights' in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds.), *The Protection of Fundamental Rights in the EU After Lisbon* (Hart Publishing 2013) 26. Post Lisbon, the debate has been largely superseded by non-market related questions regarding: the field of application of EU fundamental rights law; the horizontal application of the general principles and the Charter of Fundamental Rights; the relationship, if any, between fundamental rights and EU citizenship; the function of fundamental rights in the Area of Freedom, Security and Justice; and the EU's protracted accession to the ECHR. See: Flippo Fontanelli, 'National Measures and the Application of the EU Charter of Fundamental Rights –Does curia.eu Know iura?' (2014) 14 HRL; Mirjam De Moi, 'Dominguez: A Deafening Silence' (2012)

A left-of-field challenge to the protection of fundamental rights, which is not epistemological but rather metaphysical, also exists. A spectre of postmodern doubts about universal values looms large, and it is high time for the CJEU to acknowledge it. At the risk of reductionism, it is generally accepted that modernity -- the epoch in social history after the enlightenment -- denotes the secularization of society and the discovery of truth through science and reason, whilst postmodernity signifies the rejection of these notions in favour of indeterminacy, plurality and relativism.⁹⁴ Postmodern jurists have therefore sought to deconstruct grand narratives such as European integration as well as liberal conceptions of the rule of law and human rights.⁹⁵ It has been argued, for example, that the Charter of Fundamental Rights forms part of ‘Europe’s iconography’ which is designed to reinforce ‘the European idea’, but that in reality it is merely part of ‘consumer aesthetics’.⁹⁶ The Charter, it is argued, ‘conjures up an atmosphere of solidarity...and trans-generational community...here is a world resurrected before our eyes that has never known the critique of rights developed by legal realism, Critical Legal Studies, communitarianism, feminism and postmodernism’.⁹⁷

Mindful of the rhetorical and ideological power of fundamental rights, the CJEU has seemingly opted for a black-letter interpretation of rights, which itself is a political move.

8 ECL Rev 280; Armin Von Bogdandy and others, ‘Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States’ (2012) 49 CML Rev 489; Vasiliki Kosta and Nikos Skoutaris, *The EU Accession to the ECHR* (OUP 2014); Article 67(1) TFEU; Massimo Fichers and Ester Herlin-Karnell, ‘The Margin of Appreciation Test and Balancing in the Area of Freedom, Security and Justice: A Proportionate Answer for a Europe of Rights’ (2013) 19 EPL 759; Daniel Halberstam, “‘It’s the Autonomy, Stupid!’ A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward’ (2015) 16 German LJ 106; Opinion 2/13 of the court (Re accession to European Convention on Human Rights) [2015] 2 CMLR 21.

⁹⁴ Wayne Morrison, *Jurisprudence: From the Greeks to Post-Modernism* (Cavendish Publishing Ltd 1997); Alan Thomson, Wade Mansell and Belinda Meteyard, *A Critical Introduction to Law* (3rd edn, Cavendish Publishing Ltd 2004); Terry Eagleton, *The Illusions of Postmodernism* (Blackwell Publishing 2009).

⁹⁵ Gerard Delanty, *Inventing Europe: Ideas, Identity, Reality* (Macmillan Press 1995) 157; Ian Ward, *The Margins of Europe* (Macmillan Press 1996); James Henry Bergerson and Peter Fitzpatrick (eds.), *Europe’s Other: European Law between Modernity and Postmodernity* (Aldershot 1998)

⁹⁶ Ulrich Haltern, ‘On Finality’ in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart Publishing 2011).

⁹⁷ *ibid*, 220.

IV. Conclusion

It has been shown that fundamental rights form an integral part of the overarching, and pre-existing, general principles of law. As a primary source of Union law, the general principles encompass administrative principles that are derived from the legal traditions of the Member States, such as proportionality, legitimate expectations, transparency, legal certainty and non-discrimination. At a conceptual level, the general principles plug gaps in the legal order of the Union, insofar as they constitute sustenance for the rule of law which, in the interpretation and application of the Treaties, the CJEU pledges to ensure. The general principles further serve as principles of interpretation and invalidation; EU measures and national implementing measures that cannot be interpreted in compliance with the general principles will be invalidated by the CJEU or disapplied by a national court. As part of the general principles, fundamental rights, including EU Charter rights, fulfil the same functions as the former.

A summary of several criticisms levelled at the CJEU's enforcement of fundamental rights was also provided. A common reading of the CJEU's early jurisprudence is that fundamental rights were incorporated into the province of EU law in a bid to preserve the doctrine of primacy from the external challenge of national constitutional courts which threatened to review EU measures in the light of nationally protected fundamental rights. It has been shown that the jurisprudential narrative is more nuanced. The CJEU was already aware of the pressing need to safeguard fundamental rights and it had already incorporated fundamental rights into the general principles before the so-called *Solange I* case. Another criticism directed at the CJEU is that of a market bias pervading its case law. Again, the jurisprudential narrative is nuanced. In chapters II and V it will be shown that fundamental rights are not hierarchically subordinate to free movement *per se*, in that Member States are often accorded a variable margin of appreciation within the limits of the Treaty in order to

safeguard national interests which include fundamental rights. A more astute critique is that the cases in this area suffer from a ‘hall of mirrors’ effect, whereby two sets of EU rights, free movement and fundamental rights, potentially cancel each other out.⁹⁸

The CJEU’s autonomous conception of fundamental rights, as distinct from universal human rights, has also been alluded to. It will be shown in subsequent chapters that the CJEU’s judgments are, at times, akin to an echo chamber in that it adopts a monolithic interpretation of fundamental rights. Post Lisbon, the emerging picture is that of the CJEU drawing exclusively on the EU Charter rather than on the human rights case law of other courts and in particular the European Court of Human Rights. Moreover, the Opinions of the Advocates General and the judgments of the CJEU seldom make reference, if ever, to academic analyses on the critique of rights. The end result is a body of law that is somewhat detached and esoteric, which may explain why the CJEU’s jurisprudence is not exactly the cynosure of the so-called human rights movement.⁹⁹ To avoid being regarded as a neophyte in fundamental rights adjudication, the CJEU will, in line with the EU Fundamental Rights Agency, have to draw on a wider array of legal texts and the jurisprudence of other courts.¹⁰⁰

Nevertheless, as the supreme interpreter of EU law, the CJEU has assiduously built a rights dimension within the EU legal order; an exposition of its method will now be provided.

⁹⁸ Steve Peers, ‘Article 52 –Scope of Guaranteed Rights’ in Steve Peers and others (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1467.

⁹⁹ Eric Posner, *The Twilight of Human Rights Law* (OUP 2014); Stephen Hopgood, *Keepers of the Fire: Understanding Amnesty International* (Cornell University Press 2006); Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2010); Costas Douzinas, *The End of Human Rights* (Hart Publishing 2000).

¹⁰⁰ European Union Agency for Fundamental Rights, ‘Bringing the Charter to Life: Opportunities and Challenges of Putting the Charter of Fundamental Rights into Practice’ (Copenhagen Seminar Report Danish Presidency of the Council of the EU and EU Agency for Fundamental Rights, Copenhagen, 15-16 March 2012) <<http://fra.europa.eu/en/publication/2012/bringing-charter-life-opportunities-and-challenges-putting-eu-charter-fundamental>> accessed 17 July 2015.

CHAPTER II: ADJUDICATING FUNDAMENTAL RIGHTS: THE MODUS OPERANDI OF THE CJEU

I. Introduction

The aim of this chapter will be to examine the CJEU's methodological approach to resolving fundamental rights disputes. As will become apparent, the CJEU's fundamental rights jurisprudence has materialised in the absence of clearly defined parameters and without the CJEU establishing a sound philosophical foundation. The amorphous nature of the case law therefore militates against a depiction of the CJEU's methodology as overly scientific or set in stone. Adjudication will hence be presented as a general process of derivation and enforcement. To reflect this, the first part of the chapter will examine how the CJEU derives certain rights from various sources, such as the legal traditions of the Member States, the Convention for the Protection on Human Rights (ECHR) and now the EU Charter of Fundamental Rights (EU Charter). Locating and affirming the existence of a fundamental right is only one step in the process of adjudication. The next step is for that right to be enforced. From a methodological standpoint, enforcement takes the form of interpretation. The second part of the chapter will therefore consider, to quote the CJEU, 'the elements of interpretation'¹ guiding the CJEU's review of EU and national implementing measures. The elements which empirically underpin the case law comprise the principle of proportionality and the margin of appreciation principle. Regarding national implementing measures, the CJEU must also determine whether a dispute falls within the field of EU law. The scope of application of fundamental rights (as part of the general principles) will therefore be examined, including scrutiny of situations falling outside the scope of EU law), followed by

¹ Case C-260/89 *ERT v DEP* [1991] ECR I-2925 [42]; Case C-2/92 *R. v Ministry of Agriculture, Fisheries and Food Ex p. Bostock* [1994] ECR I-955 [16]; Case C-299/95 *Kremzow v Austria* [1997] ECR I-2629 [15]; Case C-617/10 *Åklagaren v Åkerberg Fransson* [2013] 2 CMLR 46 [19], [31].

an inspection of whether the CJEU's interpretation of Article 51 of the EU Charter alters that scope. In relation to the proportionality principle, the focus will be on how it is used to review EU and domestic action, highlighting in particular the test on limitations of rights based on the ECHR, as well as the CJEU's own EU test on limitations (to assess the proportionality of restrictions placed on fundamental rights but also to assess the proportionality of restrictions placed on EU law on the basis of upholding fundamental rights). As regards the CJEU's fledgling use of the margin of appreciation principle which, ostensibly, is an ECHR import and an adjunct to proportionality, the rationale for its incorporation into Union law will be considered as well as the contexts in which it applies.

II. Derivation: The Constitutional Traditions of the Member States, International Human Rights Instruments and the EU Charter of Fundamental Rights

A. Legal Traditions of the Member States

To a large extent, the protection of fundamental rights is determined by a two-step process of derivation and enforcement. First, the CJEU must establish the existence of a right as being justiciable. Second, the CJEU must assess whether that right has been breached. The first step has been made exponentially easier by virtue of the EU Charter which furnishes the CJEU with a codified Bill of Rights. Before the advent of the Charter, however, the CJEU had (in theory) the more taxing task of deriving rights from the legal systems of the Member States and then augmenting them as EU rights as part of the general principles.² However, despite the CJEU's repeated siren call that it draws on the constitutional traditions common to the Member States, it seldom does.³ And it is not hard to discern why. In 1957 there were only six Member States, hence finding a common accord amongst so few States was not

² On a practical note, rights are typically invoked by the parties to the proceedings. To verify the existence of the right, the CJEU examines various legal materials, such as constitutional texts, written submissions by the parties, legislation and case decisions. See further: Hanneke Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System* (Intersentia 2011) 350.

³ Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (5th edn, OUP 2011) 369.

particularly onerous for the CJEU. Today there are 28 Member States, making concurrence less likely. There is, as a result, exiguous evidence of the CJEU drawing inspiration from the legal traditions of the Member States in any meaningful way. Instead, the CJEU relies more frequently on another source for inspiration, namely the ECHR⁴ as well as the case law of the ECtHR.⁵ The two-fold advantage of drawing on the ECHR is that it is a single document which is binding on all of the EU Member States, thus conferring a degree of certainty and uniformity in the application of fundamental rights which form part of the *unwritten* general principles.

Even though the CJEU rarely has recourse to the legal traditions of the Member States, much has been made of the so-called maximalist and minimalist approach to the protection of fundamental rights in EU law.⁶ Stated simply, the maximalist approach entails that the CJEU should recognise a fundamental right at the EU level even if it is protected in only one or a few of the Member States.⁷ By contrast, the minimalist approach operates on the basis that only rights which are safeguarded in all or most of the Member States ought to be protected at the EU level by the CJEU. The recognition of a right is not the only issue. A closely-related issue is the degree to which the CJEU should take cognisance of how a given right is protected by the Member States. In other words, the interpretation of that right by domestic authorities also feeds into the maximalist-minimalist categorisation of the CJEU's *modus operandi*.

⁴ Case 36/75 *Rutili v Minister of the Interior* [1975] ECR 1219 [32].

⁵ Case C-7/98 *Bambarski v Krombach* [2000] ECR I-1935 [39].

⁶ See Joseph Weiler, 'Fundamental Rights and Fundamental Boundaries: On Standards and Values of Human Rights' in Nanette Neuwahl and Alan Rosas (eds.), *The European Union and Human Rights* (Martinus Nijhoff 1995) 66; Leonard F.M. Besselink, 'Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union' (1998) 35 CML Rev 629; Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006) 311-313; Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (5th edn, OUP 2011) 370.

⁷ In support of this view see: H.G. Schermers, 'The European Community Bound by Fundamental Human Rights' (1990) 27 CML Rev 249, 252; Case 7/76 *IRCA vs Amministrazione delle finanze dello Stato* [1976] ECR 1213, Opinion of AG Warner, at 1237.

Whilst the CJEU's formulation of constitutional traditions *common* to the Member States lends support to a minimalist approach, the case law, spanning over four decades against the backdrop of constitutional changes, evinces little clarity on the matter. In *Mannesmannröhren-Werke*, the CFI leaned towards a minimalist approach insofar as it stated that 'the national laws of the Member States do not, in general, recognise a right not to incriminate oneself. It is, therefore, immaterial to the result of the present case whether or not, as the applicant claims, there is such a principle in German law'.⁸ In the ubiquitous *Mangold* case, the CJEU was in maximalist mode; non-discrimination on grounds of age was elevated to the status of being a general principle, despite the fact that only two Member States protected the right.⁹ The decision in *Mangold* was further derided for the CJEU's novel methodological tactic of deducing 'non-discrimination *on grounds of age* from the principle of equality'.¹⁰

On occasion, the CJEU has utilised the absence of harmony amongst the Member States in order to deny the existence, or application of, a general principle of law if to do so runs counter to the EU's objectives, or if the legislature has yet to enact legislation on the matter at issue. In *Hoechst*, the CJEU stated that while the right to inviolability of the home:

Must be recognised in the Community legal order as a principle common to the laws of the Member States in regard to the private dwellings of natural persons, the same is not true in regard to undertakings, because there are not inconsiderable divergences between the legal systems of the Member States in regard to the nature and degree of protection afforded to business premises against intervention by the public authorities.¹¹

Similarly, in *Grant* the CJEU noted that most of the Member States treated cohabitation between two persons of the same sex as equivalent to a stable heterosexual relationship

⁸ Case T-112/98 *Mannesmannröhren-Werke AG v Commission* [2001] ECR II-729 [84].

⁹ Case C-144/04 *Mangold v Helm* [2005] ECR I-9981.

¹⁰ Koen Lenaerts and Jose A. Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU law' 47 (2010) CML Rev 1629, 1654.

¹¹ Cases 46/87 and 227/88 *Hoechst AG v Commission* [1989] ECR 2859 [17].

outside marriage.¹² On this basis the CJEU ruled that, as a matter of Community law, the refusal by an employer (South-West Trains) to confer travel concessions to a person of the same sex with whom an employee had a stable relationship (Ms Grant's female partner), where such concessions had previously been made to an employee's spouse or to a person of the opposite sex with whom an employee had a stable relationship outside marriage, did *not* amount to discrimination prohibited under Article 119 EC (Article 157 TFEU) on equal pay between men and women or Directive 75/117.¹³

In *Omega Spielhallen*,¹⁴ the CJEU erred on the side of judicial maximalism. In contrast to AG Stix-Hackl, who opined that it would be 'impossible...to equate the substance of the guarantee of human dignity under German law with that of the guarantee of human dignity as recognised in Community law',¹⁵ the CJEU held that the adoption of national rules for the protection of human dignity based on German Basic Law was compatible with human dignity as protected under Community law, 'it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right'.¹⁶ In *Dynamic Medien*, the CJEU adopted a similar approach as regards the interpretation of rights. It held that 'it is not indispensable that restrictive measures laid down by the authorities of a Member State to protect the rights of the child...correspond to a

¹² Case C-249/96 *Grant v South West Trains Ltd* [1998] ECR I-621 [32]. For an overview: Timothy C. Connor, 'Community Discrimination Law: No Right to Equal Treatment in Employment in Respect of Same Sex Partner' (1998) 23 EL Rev 378.

¹³ *ibid* [50].

¹⁴ Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609 [32]-[34].

¹⁵ *ibid*, Opinion of AG Stix-Hackl [91].

¹⁶ Case C-36/02, Judgment of the CJEU, [33-34].

conception shared by all of the Member States as regards the level of protection...relating to it'.¹⁷

The maximalist versus minimalist dichotomy is an academic construct insofar as it represents an attempt to pigeonhole the approach of the CJEU. A less-restrictive categorisation, posited by the CJEU itself, is that it adopts an evaluative approach, whereby it draws on the legal traditions of the Member States in order to find a solution at the EU level that is in keeping with the objectives of the EU.¹⁸ Early evidence in support of this approach can be gleaned from the case of *Hoogovens*, where AG Lagrange opined that the CJEU 'is not content to draw on more or less arithmetical common denominators between the different national solutions, but chooses from each of the Member States those solutions which, having regard to the objects of the Treaty, appear to be the best...That is the spirit...which has guided the Court hitherto'.¹⁹ In the more recent *Akzo Nobel Chemicals* case, AG Kokkot opined that:

Recourse to common constitutional traditions or legal principles is not necessarily subject to the precondition that the practice in question should constitute a tendency which is uniform or has clear majority support. It depends rather on an evaluative comparison of the legal systems which must take due account, in particular, not only of the aims and tasks of the European Union but also of the special nature of European integration and of EU law. Accordingly, it is by no means inconceivable that even a legal principle which is recognised or even firmly established in only a minority of national legal systems will be identified by the Courts of the European Union as forming part of EU law. This is the case in particular where, in view of the special characteristics of EU law, the aims and tasks of the Union and the activities of its institutions, such a legal principle is of particular significance, or where it constitutes a growing trend.²⁰

Based on AG Kokkot's observations, the evaluative approach is closely aligned to the maximalist stance insofar as a right which is recognised in only a few of the Member States

¹⁷ Case C-244/06 *Dynamic Medien Vertriebs GmbH v Avides Media AG* [2008] ECR I-505 [44].

¹⁸ Koen Lenaerts, 'The Constitutional Allocation of Powers and the General Principles of EU Law' (2010) 47 CML Rev 1629, 1654.

¹⁹ Case 14/61 *Hoogovens v High Authority* [1962] ECR 253, Opinion of AG Lagrange, [283]-[284].

²⁰ Case C-550/07 P *Akzo Nobel Chemicals Ltd v European Commission* [2011] All ER (EC) 1107, Opinion of AG Kokkot, [94]-[95].

may form part of EU law for the establishment of a general principle. Yet, what AG Kokkot also appears to be saying, is that this is so only if the right in question is consistent with a specific task or objective pursued by the EU. Indeed, AG Kokkot goes on to argue that in the case of *Mangold* (considered in chapter IV), while non-discrimination on grounds of age was not uniformly protected by the majority of the Member States, it was in accordance with a specific task entrusted with the Union, namely combating discrimination pursuant to Article 19 TFEU, which had been given specific expression by the legislature in secondary legislation and was, moreover, enshrined in Article 21 of the Charter of Fundamental Rights.²¹

AG Kokkot's Opinion sheds light on the methodological approach adopted by AG Mischo in *Booker Aquaculture*. In that case, AG Mischo trawled through the legal traditions of the Member States in order to ascertain whether the right to property gave rise to the payment of compensation (for the destruction of fish mandated by a directive in the context of the CAP). Acknowledging that all of the Member States' constitutions enshrined the right to property, the AG endorsed the applicant's claim that Sweden, Finland and France had specific legislation making provision for the payment of compensation in relation to fish diseases²² (even noting that similar legislation existed in Germany, Austria, Belgium, Denmark, Spain, Greece, Italy, the Netherlands and Portugal). Without a kernel of evidence, however, the AG opined that he was 'doubtful whether the Parliaments of these Member States adopted these laws in order to protect private property: they did so, rather, out of national solidarity with the farmers concerned, or in order to obtain their active cooperation in the eradication of diseases likely to spread very widely and very quickly'.²³ It seems, therefore, that the Community

²¹ *ibid*, Opinion of AG Kokkot [96].

²² Joined Cases C-20/00 and C-64/00 *Booker Aquaculture Limited (trading as Marine Harvest McConnell) v The Scottish Ministers* [2003] ECR I-7411, Opinion of AG Mischo, [124].

²³ *ibid*, Opinion of AG Mischo, [124].

objective of eradicating diseased fish from Community waters militated against the establishment of a general principle to compensation linked to the right to property.

General principles including fundamental rights may be derived from the laws of the Member States as well as ‘deduced by a process of interpretation on the basis of legislative texts, the objectives of legislation, or the underlying values of the legal system’.²⁴ In *Audiolux*, the CJEU was asked whether there existed a general principle of equal treatment of minority shareholders under Community law which could be derived from secondary Community legislation. The AG noted that in stark contrast to the general principles which have ‘constitutional status’ and which are ‘common to all the Member States of the Union’, the ‘notion of equal treatment of shareholders’ was ‘restricted to company law in the Community and its Member States, that is to say to a specific area of law, with the result that it has no general validity’.²⁵ For its part, and without reference to the legal traditions of the Member States, the CJEU declined to infer from the Community legislation at issue an underlying general principle of equal treatment for minority shareholders. And in contrast to its approach in *Mangold*, it did not construe the right of minority shareholders from the principle of equality.

(i) Critique

In light of the above analysis a few points can be made. First, it is not only about establishing the existence of a right *per se*, but also about the degree to which that right is safeguarded. Most Member States in western liberal democracies safeguard similar rights, though what often differs, and therefore what the CJEU must take account of, is the degree of protection afforded to those rights. However, it is hard to discern a concrete or consistent approach

²⁴ Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006) 1.

²⁵ Case C-101/08 *Audiolux SA v Groupe Bruxelles Lambert SA (GBL)* [2009] ECR I-9823 Opinion of AG Trstenjak, [94].

adopted by the CJEU. The evaluative approach is perhaps the best catch-all categorisation of how the CJEU draws on legal principles from the national level. Nevertheless, what is clear is that the CJEU makes only fleeting references to the constitutional traditions of the Member States. And when the CJEU does refer to the said traditions, it does so as part of a broader enquiry, which also includes consideration of the ECHR, ECtHR case law and the EU Charter of Fundamental Rights, as well as other relevant international human rights instruments. At best, therefore, reference to the legal and constitutional traditions of the Member States, as a source of inspiration for EU fundamental rights law, ought to be viewed as part of a more general enquiry conducted by the CJEU and, at worst, as mere artistic licence.

Against that, recent developments *may* bring about a revived interest in the constitutional traditions of the Member States in terms of judicial scrutiny. Article 4(2) TEU enacts that the Union is to respect ‘the national identities of the Member States, inherent in their political and constitutional structures’.²⁶ In addition, Article 52 of the EU Charter of Fundamental Rights requires that ‘fundamental rights, as they result from the constitutional traditions of the Member States...shall be interpreted [by the CJEU] in harmony with those traditions’. Moreover, Article 53 of the EU Charter stipulates that ‘nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised in their respective fields of application...by the Member States’ constitutions’. The net result of these aforementioned textual references is that whilst the Charter codifies existing rights, the CJEU will not simply transplant those rights from national to EU level without due consideration of (i) the constitutional and political setting surrounding those rights and (ii) the way in which those rights are interpreted by Member State courts.

²⁶ Case C-208/09 *Sayn-Wittgenstein v Landeshauptmann Von Wien* [2011] 2 CMLR 28 [92].

At present, only a sliver of case law exists on how the notion of national constitutional identity might make inroads into the CJEU's methodology.²⁷ In *Michaniki* (pre Lisbon), AG Maduro opined that a Member State may, in certain situations and subject to review by the CJEU, 'invoke the protection of national identity in order to justify a derogation from the application of the fundamental freedoms of movement'.²⁸ In so doing, a degree of latitude was permissible to a Member State in order 'to develop, within certain limits, its own definition of a legitimate interest capable of justifying an obstacle to a fundamental freedom of movement'.²⁹ Thus, Member States can, to an extent, define what constitutes national identity. To bolster the proposition that the Member States could define national identity, the AG cited the case of *Omega Spielhallen*. In that case Germany invoked the protection of human dignity, *as protected under its constitution*, to justify a restriction on the freedom to provide services. As is well known, the response of the CJEU in *Omega Spielhallen* was that human dignity was also protected under EU law as part of the general principles. AG Maduro highlighted that in *Omega Spielhallen* Germany was accorded a broad margin of discretion by the CJEU to take account of 'specific national features' pertaining to 'the content and scope of human dignity'.³⁰ By relying on *Omega Spielhallen*, that is, by way of analogy, the AG also appeared to be linking the protection of fundamental *constitutional* rights to national *constitutional* identity. However, the AG opined that the EU obligation to respect

²⁷ See: Case C-62/14 *Gauweiler and Others v Deutscher Bundestag* [2015] All ER (D) 222 (Jun), Opinion of AG Cruz Villalón, [59] Case C-391/09 *Runevič-Vardyn and another v Vilnius Miesto Savivaldybės Administracija and others* [2011] 3 CMLR 13 [86]; Case C-566/10 *Italian Republic v European Commission* [2013] 2 CMLR 5, Opinion of AG Kokkot, [86]. For an account of the evolution of the national identity clause, see: Aida Torres Pérez, 'Constitutional Identity and Fundamental Rights: The Intersection between Articles 4(2) TEU and 53 Charter' in Alejandro Saiz Arnaiz and Carina Alcoberto Llivina (eds.), *National Constitutional Identity and European Integration* (Intersentia 2013); Theodore Konstadinides, 'Constitutional Identity as a Shield and as a Sword: The European Legal Order Within the Framework of National Constitutional Settlement' (2011) 13 CYELS 195.

²⁸ Case C-213/07 *Michaniki AE v Ethniko Simvoulío Radiotileorasis* [2008] ECR I-9999, Opinion of AG Maduro, [32].

²⁹ *ibid* [32].

³⁰ *ibid* [32].

constitutional identity could not be understood as ‘an absolute obligation to defer to all national constitutional rules’.³¹ Moreover, national constitutional rules linked to national identity had to comply with the principle of proportionality which, in this case, they did not.³²

In *Melloni*, AG Bot opined that a Member State could, in principle, invoke Article 4(2) TEU to challenge EU secondary law (a Council Framework Decision on the European Arrest Warrant), but that in the case in question *national identity* was not ‘affected’ by the said legislation.³³ AG Bot concurred with the Kingdom of Spain’s submission, at the hearing before the CJEU, that the participation of the defendant at his trial was *not* (under Spanish law) covered by the national identity of the Spanish Kingdom.³⁴ Moreover, while the fundamental right at issue was indeed protected by the Spanish Constitution, that did not entail the application of Article 4(2) TEU.³⁵ In contrast to the approach adopted by AG Maduro in *Michaniki*, AG Bot was therefore averse to conflating, or at the very least linking, fundamental constitutional rights to national constitutional identity *viz* Article 4(2) TEU.

In the light of academic commentary and the smattering of case law, a tentative prognosis of how Article 4(2) TEU might feed into the CJEU’s rights-based jurisprudence can be proffered. It seems likely that certain core rights will either form part of the national identity clause or will be linked to it, and that it may serve as a basis to justify restrictions on free movement as well as a ground of review of EU legislation. At present, the content of the clause, informed by fundamental rights, includes the status of the State as a Republic³⁶ and the

³¹ *ibid* [33].

³² *ibid* [34].

³³ Case C-399/11 *Criminal proceedings against Melloni* [2013] All ER (EC) 475, Opinion of AG Bot, [140]. For an overview, see: Nik de Boer, ‘Addressing Rights Divergences under the Charter: Melloni’ (2013) 50 CML Rev 1083.

³⁴ *ibid*, Opinion of AG Bot, [141].

³⁵ *ibid* [142].

³⁶ Case C-208/09 *Sayn-Wittgenstein v Landeshauptmann Von Wien* [2011] 2 CMLR 28 [92].

protection of a State's official language or, more broadly, multilingualism/linguistic diversity.³⁷ In addition, Article 4(2) TEU will be shaped not only by the CJEU but also by national protagonists such as constitutional courts (when interpreting constitutional texts), governments and national authorities. In terms of *derivation*, therefore, whilst the final arbiter will most likely be the CJEU, that is, in the context of Article 267 TFEU, the clause will also be invoked and defined by Member State authorities and applied by the highest national courts.³⁸

B. Human Rights Instruments

The CJEU has also drawn, albeit infrequently, on human rights instruments adopted at regional and international levels, such as the European Social Charter,³⁹ the Community Charter of Fundamental Social Rights of Workers,⁴⁰ as well as instruments concluded within the remit of the United Nations System, such as the International Covenant on Civil and Political Rights (ICCPR)⁴¹ and the Convention on the Rights of the Child,⁴² the Convention Relating to the Status of Refugees 1951,⁴³ and the International Labour Organisation.⁴⁴ Most commonly, however, the CJEU has relied on the European Convention on Human Rights.

³⁷ Case C-391/09 *Runevič-Vardyn and another v Vilniaus Miesto Savivaldybės Administracija and others* [2011] 3 CMLR 13 [86]; and Case C-566/10 *Italian Republic v European Commission* [2013] 2 CMLR 5, Opinion of AG Kokkot, [86].

³⁸ Alejandro Saiz and Arnaiz Carina Alcoberro Llivina (eds.), *National Constitutional Identity and European Integration* (Intersentia 2013) 149.

³⁹ Case 149/77 *Defenne v Sabena* [1978] ECR 1365 [28].

⁴⁰ Case C-268/06 *Impact v Minister for Agriculture and Food* [2008] ECR I-2483 [112].

⁴¹ Case 374/87 *Orkem v Commission* [1989] ECR 3283 [31].

⁴² Case C-540/03 *European Parliament v Council of the European Union* [2006] ECR I-5769 [37]-[57].

⁴³ Joined Cases C-71/11 and C-99/11 *Germany v Y and Germany v Z* [2013] All ER (EC) 1144 [47]; Cases C-175-179/08 *Abdulla v Germany* [2010] All ER (EC) 799 [3].

⁴⁴ Case C-438/05 *International Transport Workers' Federation v Viking Line ABP* [2007] ECR I-10779 [43].

C. European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

The EU has not yet acceded to the ECHR.⁴⁵ Until then, the role of the ECHR in the EU legal order continues to be governed by the CJEU's fundamental rights case law, Article 6(3) TEU, and Article 52 of the EU Charter of Fundamental Rights. Article 6(3) TEU affirms that the ECHR may serve as a guideline for the elaboration of fundamental rights as part of the general principles. Thus, Article 6(3) TEU serves as a legal basis for the *continuation* of the CJEU's tactic of drawing on the ECHR to adjudicate rights-based disputes. The first explicit reference to the ECHR by the CJEU was in the case of *Rutili*, whilst the first reference to Strasbourg jurisprudence was in the *P v S* case.⁴⁶ In *Rutili*, the CJEU ruled that the ability of Member States to derogate from (then) Community rules (in this case secondary legislation) on grounds of public policy was governed by the limitations set-out in those rules which were, moreover, 'a specific manifestation of the more general principle, enshrined in Articles 8, 9, 10 and 11 on the Convention for the Protection of Human Rights and Fundamental Freedoms'.⁴⁷ Notable cases in which rights contained in the ECHR have infiltrated the CJEU's jurisprudence include: *Familiapress* (Article 10 ECHR),⁴⁸ *Johnston* (Articles 6 and 13 ECHR),⁴⁹ *ERT* (Article 10 ECHR), *National Panasonic* (Article 8 ECHR),⁵⁰ *Prais* (Article 9 ECHR),⁵¹ *Bosphorus* (Article 1 of the First Protocol to the ECHR),⁵² *N.S.* (Article 3 ECHR),⁵³ and *Kamberaj* (Article 14 ECHR).⁵⁴

⁴⁵ Article 6(2) TEU obliges the Union to accede to the ECHR.

⁴⁶ See further: Sionaidh Douglass-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing Human Rights Acquis' (2006) 43 CML Rev 629, 645.

⁴⁷ Case 36/75 *Rutili v Minister of the Interior* [1975] ECR 1219 [26].

⁴⁸ Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689 [18].

⁴⁹ Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651 [18].

⁵⁰ Case 136/79 *National Panasonic (UK) Limited v Commission* [1980] ECR 2033 [20].

⁵¹ Case 130/75 *Prais v Council of the European Communities* [1976] ECR 1589 [11], [14]-[18].

D. Charter of Fundamental Rights of the European Union

Another *source* of EU human rights is, of course, the Charter of Fundamental Rights which was solemnly proclaimed in 2000 and given binding legal force in 2009 under the Treaty of Lisbon. Arguably, the EU Charter heralds a new dawn in the CJEU's human rights jurisprudence insofar as it has been used to review and invalidate EU legislation in a series of judgments.⁵⁵ Leaving aside the distinction contained therein between rights and principles (Article 52(5)), and the textual field of application of the Charter (Article 51(1)), the point to note here is that not only do the national courts increasingly make reference to the Charter when referring questions to the CJEU for interpretative guidance, but the CJEU itself increasingly cites the Charter in its judgments as well.⁵⁶ Even prior to acquiring binding legal force the Charter was cited by the CJEU and its AGs in several cases, albeit in a perfunctory manner.⁵⁷

The relationship between the EU Charter and the ECHR is governed by Article 52(3) of the former, which stipulates that 'insofar as this Charter contains rights which correspond to rights guaranteed by the [Convention], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more protection'. Thus, the first sentence of Article 52(3) makes clear that rights

⁵² Case C-84/95 *Bosphorus v Minister for Transport* [1996] ECR I-3953 [55].

⁵³ Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department* [2012] All ER (EC) 1011 [48].

⁵⁴ Case C-571/10 *Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others* [2013] All ER (EC) 125, [60].

⁵⁵ Pre Lisbon, the CJEU never invalidated EU secondary legislation for being in breach of EU fundamental rights. Post Lisbon, see: Case C-92/09 *Volker and Schecke* [2012] All ER (EC) 127; Case C-236/09 *Test-Achats v Conseil des Ministres* [2012] All ER (EC) 441; Allan Rosas and Lorna Armati, *EU Constitutional Law: An Introduction* (2nd edn, Hart Publishing 2012) 172.

⁵⁶ Commission, '2012 Report on the Application of the EU Charter of Fundamental Rights' COM (2013) 271 final.

⁵⁷ E.g. Case C-540/03 *European Parliament v Council of the European Union* [2006] ECR I-5769; Joined Cases C-402 and C-415/05 P *Kadi v Council of the European Union* [2008] ECR I-6351.

contained in the Charter which are also guaranteed in the ECHR are to be accorded the same meaning and scope. But this is so *only* in relation to those matching rights. While the ECHR is the basis for many rights contained in the Charter, the latter contains more rights than the former (the Charter contains 54 Articles under 7 Titles, of which 50 are substantive, whereas the ECHR contains 24 Articles, of which 14 are substantive).⁵⁸ In terms of *derivation*, therefore, the EU Charter furnishes the CJEU with a greater array of rights than the ECHR. In relation to the second sentence of Article 52(3) (which pertains to *enforcement*), a literal interpretation denotes that Charter provisions which correspond to rights enshrined in the ECHR are to be given, if necessary, a more generous interpretation by the CJEU. In a sprinkling of post-Lisbon cases, this has been affirmed by numerous AGs. In *DEB*, AG Mengozzi opined that ‘Article 52(3) of the Charter...could allow me to go further than the guarantee offered thus far by the ECHR and by the case law of the Court of Human Rights’.⁵⁹ AG Sharpston also opined, in the case of *Radu*, that ‘it is open to Union law to provide more extensive protection than that laid down by the Convention’.⁶⁰ And in *Melloni*, AG Bot opined that, based on the second sentence of Article 52(3), the first sentence ‘does not preclude EU law from providing more extensive protection’⁶¹ (in this case AG Bot was referring to Articles 47 and 48(2) of the EU Charter *vis-à-vis* Articles 6(1) and 6(3) of the ECHR). AG Bot continued ‘I shall therefore examine the case law of the European Court of Human Rights concerning the guarantees which must accompany judgments rendered in

⁵⁸ Kieron Beal and Tom Hickman, ‘*Beano No More: The EU Charter of Rights after Lisbon*’ (2011) 16 JR 116.

⁵⁹ Case C-279/09 *Deutsche Energiehandels- und Beratungsgesellschaft mbH v Germany* [2010] ECR I-13849, Opinion of AG Mengozzi, [98].

⁶⁰ Case C-396/11 *Criminal proceedings against Radu* [2013] All ER (EC) 410, Opinion of AG Sharpston, [80].

⁶¹ Case C-399/11 *Criminal proceedings against Melloni* [2013] All ER (EC) 475, Opinion of AG Bot, [74].

absentia, before determining whether or not EU law should afford greater protection in the matter'.⁶²

Despite reference to the ECHR in Article 52(3) of the Charter which, in accordance with the text of explanatory note, covers 'both the Convention and the Protocols to it' as well as the interpretation of those instruments (i.e. their scope and meaning) by the CJEU and ECtHR, it has been noted by De Búrca⁶³ that, post Lisbon, the CJEU's engagement with the ECHR and ECtHR case law has been almost infinitesimal. The emerging picture is that of the EU Charter displacing the ECHR in terms of citation/reliance by the CJEU. De Búrca states, in addition, that 'apart from a very occasional and increasingly selective use of the case law of the European Court of Human Rights, there have been virtually no references to other human rights jurisprudence or rulings'.⁶⁴ De Búrca warns that such an approach runs the risk of creating 'a detached, autonomous and potentially insufficiently informed case law on a growing range of important human rights issues'.⁶⁵ With prophetic utterance, the Council of the EU and the EU Fundamental Rights Agency (FRA) previously articulated similar sentiments by stating that 'if the number of cases involving fundamental rights continues to increase...the CJEU will have to consult on a wide range of legal texts...and the case law of other courts'.⁶⁶

One might also add that solipsism by the CJEU may lead to soliloquy, insofar as the ECtHR will be disinclined to draw on an impoverished rights-based case law in return. On

⁶² *ibid* [74].

⁶³ Gráinne de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 MJ 168.

⁶⁴ *ibid*, 173.

⁶⁵ *ibid*, 174.

⁶⁶ European Union Agency for Fundamental Rights, 'Bringing the Charter to Life: Opportunities and Challenges of Putting the Charter of Fundamental Rights into Practice' (Copenhagen Seminar Report Danish Presidency of the Council of the EU and EU Agency for Fundamental Rights, Copenhagen, 15-16 March 2012) <<http://fra.europa.eu/en/publication/2012/bringing-charter-life-opportunities-and-challenges-putting-eu-charter-fundamental>> accessed 17 July 2015.

the other hand, the CJEU's reliance on the Charter need not be construed as insular *per se*. As noted above, the explanations relating to the Charter affirm that the ECHR and ECtHR case law have been integrated into the Charter, which may be viewed as an opportunity for the CJEU to really establish its own rights-based paradigm by building on the foundations of the ECHR.

E. Concluding Remarks

In terms of judicial method, the CJEU has drawn on the legal systems of the Member States in order to establish the general principles of EU law, which include fundamental rights. As regards the latter, it is hard to trace the CJEU's methodological approach as fundamental rights are numerous and therefore the CJEU must adopt a holistic rather than scientific approach to deriving rights from the legal traditions of the Member States (which then form part of the EU's arsenal of rights). Hence the CJEU's approach ought not to be categorised as maximalist or minimalist, but rather as a comparative and evaluative. In addition, the CJEU has drawn extensively on the ECHR which still remains 'organically independent of the Union structure'.⁶⁷

⁶⁷ Stephen Weatherill, *Cases and Materials on EU Law* (11th edn, OUP 2014) 64.

III. Enforcement via Interpretation: Articles 51 and 52 of the EU Charter of Fundamental Rights, and the Margin of Appreciation Principle

Affirming the existence of a fundamental right is the first stage in the process of adjudication. The next stage is the enforcement of that right. From a methodological perspective, enforcement takes the form of interpretation.⁶⁸ In this section, the focus will be on how the protection of fundamental rights fits into the CJEU's methods of interpretation, followed by an exposition of the *elements of interpretation* which pervade its jurisprudence.

A. Interpreting Union Law and Fundamental Rights in Theory

At this point it is prudent to proceed with caution. As noted by Senden (in her critique of the CJEU's interpretation of fundamental rights),⁶⁹ many authors fail to grasp the nettle when analysing the CJEU's jurisprudence in that they 'do not speak about interpretation. Instead they refer to the elaboration or development of fundamental rights...making it difficult to get a grip on the exact manner of interpretation or development of fundamental rights by the CJEU'.⁷⁰

With that in mind, it is important to consider how the protection of fundamental rights fits into the CJEU's classical methods of interpretation. In accordance with Article 19 TEU, the function of the CJEU is to 'ensure that in the interpretation and application of the Treaties *the law is observed*'. As noted by Lenaerts, the phrase *the law* 'transcends the Treaties'⁷¹ and has been taken to mean that provisions of Union law are to be interpreted in compliance with fundamental rights. In terms of derivation, it has already been shown that the CJEU has had

⁶⁸ Case C-34/09 *Ruiz Zambrano v Office National de L'Emploi* [2011] ECR I-1177, Opinion of AG Sharpston, [155].

⁶⁹ Hannecke Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System* (Intersentia 2011).

⁷⁰ *ibid*, 82-83.

⁷¹ Case C-2/92 *R. v Ministry of Agriculture, Fisheries and Food Ex p. Bostock* [1994] ECR I-955 [30].

recourse to an evaluative method of interpretation in order to fill gaps in the EU legal system by drawing on the legal traditions of the Member States. As regards the enforcement stage, it seems that the protection of fundamental rights is ensured via teleological and textual methods of interpretation.⁷² Teleological interpretation can be defined as interpretation ‘in accordance with the object, purpose, aim, or underlying rationale of the document or the provision in question’.⁷³ Given that fundamental rights initially only formed part of the *unwritten* general principles, it might be thought that the CJEU’s teleological and textual approach would be inapplicable to rights-based disputes.⁷⁴ However the CJEU has employed its teleological method in several ways. As alluded to above, it may be argued that the very basis for resorting to a comparative and evaluative approach, of deriving rights from the legal systems of the Member States, stems from the CJEU’s teleological method of interpretation, that is, as a means of ensuring that in the interpretation and application of the Treaties the law (rights-based protection) is observed. It has been argued that ‘the alliance of the comparative method and the teleological approach has created situations in which the CJEU sometimes dismisses the rule of the common denominator and adopts the rule most conducive to the ultimate objective of Community integration’.⁷⁵ In terms of textual interpretation, the first *explicit* reference to fundamental rights was contained in the Maastricht Treaty in 1992, which cited the constitutional traditions of the Member States and the ECHR as sources of inspiration. In that connection, by drawing on the ECHR, the CJEU was able to determine the scope of provisions of EU law by reference to the textual rules on limitations of rights contained in the former. In *Internationale Handelsgesellschaft*, the CJEU had already established a foundation for its own EU test of limitations of rights, in that whilst certain rights originated from the

⁷² Case C-26/62 *Van Gend en Loos v Administratie der Belastingen* [1963] ECR 3 [12].

⁷³ Hannecke Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System* (Intersentia 2011) 368.

⁷⁴ *ibid*, 368.

⁷⁵ Nial Fennelly, ‘Legal Interpretation at the European Court of Justice’ (1996) 20 *Fordham Int’l LJ* 656, 667.

legal traditions of the Member States, they were then to be secured ‘within the framework of the structure and objectives of the Community’.⁷⁶ Recourse to teleological and textual interpretation has thus enabled the CJEU to interpret the Treaties and other EU acts in light of the aims and objects of the EU which comprise, symbiotically, integration, pluralism and fundamental rights.⁷⁷ The adoption of the Charter now makes this process more transparent.

B. Interpreting Union Law and Fundamental Rights in Practice

In practice, the interpretative function of fundamental rights takes various forms. A classic scenario is when it is alleged that a provision of EU secondary legislation conflicts with a fundamental right protected under EU law. In such a situation, the CJEU will, as far as possible, seek an interpretation of that act which is in accordance with fundamental rights. If the provision can be thus interpreted, the onus will be on the Member States to ensure that the provision is applied. If, however, the provision cannot be interpreted in compliance with fundamental rights, it will be annulled by the CJEU.⁷⁸ In order to make that determination, the CJEU must establish the objective of the EU provision *and* the scope and interpretation of the right in question. This requires the CJEU to draw on the ECHR to determine the meaning and scope of the right, including the rules on limitations of that right. Post Lisbon, the CJEU has at its disposal Article 52(3) of the EU Charter which states that insofar as rights contained in the Charter correspond to rights guaranteed under the ECHR, their meaning and scope is to be interpreted as being equivalent, though more extensive protection may be provided under EU law. Article 52(1) of the Charter also lays down the detailed rules on limitations of rights which, according to the text of explanatory note on Article 52, are based on the CJEU’s (pre-

⁷⁶ Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125 [4].

⁷⁷ Nial Fennelly, ‘Legal Interpretation at the European Court of Justice’ (1996) 20 *Fordham Int’l LJ* 656, 670.

⁷⁸ Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, Opinion of AG Stix-Hackl, [62].

Lisbon) case law. As part of the general principles and as enshrined in the EU Charter, fundamental rights further operate as a criterion of interpretation of national provisions which fall within the ambit of EU law. National courts must therefore interpret domestic provisions which implement or derogate from EU law in the light of EU standards of fundamental rights protection and, if necessary, must make a reference to the CJEU for interpretative guidance.⁷⁹ If so, interpretative guidance by the CJEU is to be understood broadly. The CJEU has no jurisdiction to apply a rule of EU law, such as a general principle or a provision of the EU Charter, to a provision of domestic law. Rather, it will provide the national court with an interpretation of EU law, be it a regulation, a directive, or a Treaty provision, to which provisions of national legislation pertain, in order to enable the national court to assess the effects of those provisions.⁸⁰ In particular, the CJEU will provide the national court ‘with all the elements of interpretation which are necessary in order to enable it to assess the compatibility of that legislation with fundamental rights, the observance of which the CJEU ensures’.⁸¹ A detailed analysis of these *elements* which pervade the case law is thus necessary.

IV. Element I: Interpreting the Scope of EU (Fundamental Rights) Law - the General Principles and Article 51 of the EU Charter of Fundamental Rights

It is trite law that fundamental rights protected in the EU legal order apply in all situations falling within the field of application of EU law, but not outside such situations.⁸² A lot of academic ink has been spilt trying to decipher the CJEU’s case law in a bid to posit a precise, or at least workable, definition of when exactly a situation falls within the scope of EU law in order for the general principles, and now the EU Charter of Fundamental Rights, to apply.

⁷⁹ Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006) 31.

⁸⁰ Case C-349/07 *Soprope - Organizacoes de Calcado Lda v Fazenda Publica* [2008] ECR I-10369 [43].

⁸¹ Case C-159/90 *SPUC v Grogan* [1991] ECR I-4685 [31].

⁸² Case C-617/10 *Åklagaren v Åkerberg Fransson* [2013] 2 CMLR 46 [19].

A. Overview

An account of the factors which are necessary to establish a connection between a provision of domestic law and EU law in order to bring the former within the field of application of the latter will be given in chapter IV. The objective in this section will be to sketch out the *contours* of the CJEU's case law in relation to the scope of EU fundamental rights law, pre and post-Lisbon. As such, this requires an appraisal of the relationship between the general principles and the EU Charter, an issue which has generated much speculative scholarship. The two (main) contentious issues regarding the relationship are (i) whether the Charter affirms the field of application of the general principles, that is, whether the Charter (also) applies in the so-called derogation scenario, and (ii) whether the Charter (also) applies in certain horizontal situations (examined in chapter IV). In what follows, an overview of the CJEU's pre-Lisbon case law based on the general principles will be provided, including an account of situations falling outside the scope of EU law, followed by an assessment of whether Article 51 of the EU Charter alters the ambit of the CJEU's pre-Lisbon jurisprudence.

B. Pre Lisbon: the Scope of Fundamental Rights as Part of the General Principles

In principle, the application of EU fundamental rights to Member State action is clear, namely, the CJEU is not vested with the power to assess for compliance with fundamental rights, either as part of the general principles or as enshrined in the EU Charter, domestic legislation lying outside the scope of EU law.⁸³ Equally, national courts and authorities are not under an obligation to apply EU standards of fundamental rights to situations of purely national concern. In such circumstances, national courts and authorities remain free to apply domestic standards of protection as well as applicable international human rights instruments. In reality, however, and as the case law reveals, the line demarcating Union law and national

⁸³ Case C-390/12 *Pfleger and others (European Commission and others, intervening)* [2014] 3 CMLR 47 [33].

law is not easily defined. On the one hand, and as noted by Rosas, a lot of ‘common ground’ exists between national, international and EU standards of protection.⁸⁴ Thus in terms of ‘substance’ the distinction between EU and national law need not be ‘overemphasised’, since in many situations the result may almost be the same, that is, regardless of whether the EU Charter, the general principles, or national or international standards of protection are applied.⁸⁵ On the other hand, it is important not to conflate the legal landscape of rights as differences do exist between the Member States and between human rights instruments.⁸⁶ Leaving aside the issue of substantive protection, now enacted in Article 53 of the EU Charter, and the specific factors which are necessary to establish a connection with EU law, the intention here will be to delineate the scenarios in which EU fundamental rights are applicable.

(i) The Contours of Fundamental Rights as Part of the General Principles

As we shall see, the Charter is not an inflection point in that it codifies existing case law. It is well established that the obligation to respect fundamental rights is binding on national authorities when they apply regulations.⁸⁷ In addition, when domestic authorities enact national rules to transpose directives, they are bound to adhere to fundamental rights.⁸⁸ If a piece of secondary legislation grants Member States a discretionary power or a margin of appreciation, that power/appreciation must be exercised in accordance with fundamental

⁸⁴ Allan Rosas, ‘When is the EU Charter of Fundamental Rights Applicable at National Level?’(2012) 19 *Juris* 1269, 1273.

⁸⁵ *ibid*, 1273.

⁸⁶ *ibid*, 1273.

⁸⁷ Case 5/88 *Wachauf v The State* [1989] ECR 2609.

⁸⁸ Joined Cases C-20/00 and C-64/00 *Booker Aquaculture Limited (trading as Marine Harvest McConnell) v The Scottish Ministers* [2003] ECR I-7411.

rights.⁸⁹ Moreover, any national rule which restricts one of the Treaty freedoms must be interpreted in the light of fundamental rights.⁹⁰ Member States may also rely directly on fundamental rights grounds as a free-floating justificatory category in order to defend national rules or practices restricting one of the Treaty freedoms.⁹¹ Recent case law also illustrates that national rules need not be specifically enacted to transpose directives in order to fall within the scope of EU law. If a national measure falls within the material scope of a directive then, upon entry into force of the directive, the measure will be caught by EU law, even in the context of a horizontal dispute, and even if the matter is only partially governed by EU Treaty law, and will therefore have to be interpreted in the light of fundamental rights.⁹²

(ii) Measures Falling Outside the Ambit of EU Law

In general, the CJEU evinces a tendency to interpret the scope of Union law broadly which, *prima facie*, triggers the application of EU fundamental rights. However, the CJEU is not averse to throwing caution to the wind, that is, by not reviewing the compatibility of (purely) domestic provisions for compliance with (Union) standards of fundamental rights protection.

In *Hans Moser*,⁹³ the CJEU held that the refusal of national authorities (the Land Baden-Württemberg) to permit a German national from sitting State examinations to qualify as a teacher fell outside the scope of (then) Community law. Hans Moser was a German

⁸⁹ Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department* [2012] All ER (EC) 1011 [65]; Case C-2/92 *R. v Ministry of Agriculture, Fisheries and Food Ex p. Bostock* [1994] ECR I-955 [14]; Case 5/88 *Wachauf v The State* [1989] ECR 2609 [22].

⁹⁰ Case C-260/89 *ERT v DEP* [1991] ECR I-2925.

⁹¹ Case C-112/00 *Schmidberger v Austria* [2003] ECR I-5659.

⁹² E.g. Case C-555/07 *Küçükdeveci v Swedex GmbH & Co KG* [2010] ECR I-365, Opinion of AG Bot, [75]; Case C-617/10 *Åklagaren v Åkerberg Fransson* [2013] 2 CMLR 46 [27]-[28].

⁹³ Case 180/83 *Hans Moser v Land Baden-Württemberg* [1984] ECR 2539.

national residing in the Federal Republic. He had passed the first State examination, however, in order to practise as a teacher he had to undertake post-graduate training and pass the second State examination. He applied to do so but was denied on the grounds that he was a member of the German Communist Party – his fidelity to the Communist Party apparently running counter to the Land’s legislation regarding public labour, namely that he would not adhere to the democratic principles of the Constitution of the Republic.⁹⁴ The question for the CJEU was whether Mr Moser could rely on Art.48 of the EEC Treaty (Art.45 TFEU) on the freedom of movement of workers to set aside the legislation in question on the basis that the refusal would prevent him from teaching in another Member State which required successful completion of the second State examination. The CJEU ruled that since Mr Moser had always worked and lived in the Federal Republic, ‘a purely hypothetical professional prospect’ of him applying to work in another Member State and being denied a job due to not having completed the second State examination did not constitute a ‘sufficiently strong connection with Community law’.⁹⁵ Hence, no review of the compatibility of the refusal with the ECHR (a source of inspiration for the general principles of law) could be undertaken by the CJEU.

In the oft-cited case of *Kremzow*⁹⁶ the CJEU held that a purely hypothetical prospect of exercising a right to free movement owing to unlawful incarceration (between 3 July 1986 and 30 September 1993) did not create a sufficient link with EU law, thus foreclosing any review by the CJEU of Austrian legislation for its compliance with fundamental rights. In addition, Kremzow (an Austrian judge) was convicted (for murder of a lawyer and possession of a fire-arm) under provisions of national law (paragraph 75 of the Criminal Code and section 36 of the Act on Weapons) ‘which were not designed to secure compliance with rules

⁹⁴ *ibid* [3].

⁹⁵ *ibid* [16]-[19].

⁹⁶ Case C-299/95 *Friedrich Kremzow v Austria* [1997] ECR I-2629.

of [Union] law'.⁹⁷ As noted recently by AG Sharpston (reflecting on *Kremzow* in the post-Lisbon case of *Ruiz Zambrano*) the inference is that had the national legislation been adopted to secure compliance with an EU policy objective which was enshrined in a regulation or a directive, then the situation could have fallen within the scope of EU law.⁹⁸

A case of Byzantine factual complexity is *Annibaldi*. Cited in the official explanations relating to Article 51(1) of the Charter, the former (UK) Attorney General Lord Goldsmith invoked *Annibaldi* to dispel the idea that the CJEU could expand its jurisdiction beyond existing powers via the Charter in order to declare domestic laws incompatible with EU law.⁹⁹

Mr Annibaldi owned 65 hectares of land in the Municipality of Guidonia - 35 hectares of which were situated in the Inviolata Nature and Archaeological Park ("the Park"). Mr Annibaldi applied to the authorities to plant an orchard (3 hectares in size) within his 35 hectares holding in the Park. His application was rejected pursuant to Art.7 and Art.8 of the Lazio Regional Law No.22 of 20 June 1996 ("the Regional Law"). Art.7 prohibited certain activities in the park including 'changes in cultivation and earth-moving operations', while Art.8 permitted 'certain light activities, for research and scientific purposes'.¹⁰⁰ The question for the CJEU was whether the national legislation fell within the scope of (then) Community law, in particular Art.40(3) EC (Art.39 TFEU) and, if so, whether it breached Mr Annibaldi's property rights as protected under the general principles. The CJEU declined to assess the compatibility of the Regional Law with Community rights. Although Art.40(3) EC covered policy objectives relating to the common organisation of the agricultural markets, the

⁹⁷ *ibid* [17].

⁹⁸ Case C-34/09 *Ruiz Zambrano v Office National de l'Emploi (ONEm)* [2011] 2 CMLR 46, Opinion of AG Sharpston, [161].

⁹⁹ Lord Goldsmith, 'A Charter of Rights, Freedoms and Principles' (2001) 38 CML Rev 1201, 1205.

¹⁰⁰ Case C-309/96 *Annibaldi v Sindaco del Comune di Guidonia and Presidente Regione Lazio* [1997] ECR I-7493, Opinion of AG Cosmas, [2].

Regional Law was not intended ‘to implement a provision of Community law’¹⁰¹ in the agricultural sphere. The objective of the Regional law was specific to the park in question, namely, to guard and improve the value of the environment, which was distinct from those covered in the common agricultural policy.¹⁰² And, in the absence of specific Community rules on expropriation, the Regional Law fell solely within the remit of the Member State.¹⁰³

The decision in *Annibaldi* is at odds with recent case law in which the CJEU has adopted an expansionist approach to the field of application of EU fundamental rights law.¹⁰⁴ Lenaerts validates *Annibaldi*’s placement in the Charter’s explanations and distinguishes it from cases falling within the scope of EU law on the basis that whilst the (then) Community pursued ‘objectives in the fields of the environment, culture, and agriculture...the Regional Law was not intended to implement a provision of EU law in any of those fields’.¹⁰⁵ In a raft of recent cases, however, the CJEU has held that the national rules in question fell within the ambit of EU law despite the fact that they were not enacted to transpose provisions of EU law.¹⁰⁶

A landmark case regarding the scope of fundamental rights is *SPUC v Grogan*.¹⁰⁷ At its core, the question for the CJEU was whether medically-terminated pregnancy lawfully

¹⁰¹ Case C-309/96 *Annibaldi v Sindaco del Comune di Guidonia and Presidente Regione Lazio* [1997] ECR I-7493 [21].

¹⁰² *ibid* [22].

¹⁰³ *ibid* [23].

¹⁰⁴ E.g. Case C-617/10 *Åklagaren v Åkerberg Fransson* [2013] 2 CMLR 46.

¹⁰⁵ Koen Lenaerts and Jose Antonio Gutierrez-Fons, ‘The Place of the Charter in the EU Constitutional Edifice’ in Steve Peers and others (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1569-1570.

¹⁰⁶ See: Case C-617/10 *Åklagaren v Åkerberg Fransson* [2013] 2 CMLR 46, Opinion of AG Cruz Villalón, [56]; Case C-279/09 *DEB v Germany* [2010] ECR I-13849 [33]; Case C-555/07 *Kücükdeveci v Swedex GmbH & Co KG* [2010] ECR I-365 [51].

¹⁰⁷ Case C-159/90 *Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and Others* [1991] ECR I-4685. For an overview, see: Siofra O’Leary, ‘Freedom of Establishment and Freedom to Provide Services: the Court of Justice as a Reluctant Constitutional Adjudicator: An Examination of the Abortion Information Case’ (1992) 17 EL Rev 138.

conducted in clinics in one Member State (the UK) was a service within the meaning of Art.60 EEC (now Art.56 TFEU) and, if so, whether it was contrary to EU law for another Member State where termination of pregnancy is illegal (Ireland) to prohibit associations (students' unions) from disseminating information about the clinics carrying out terminations, where no collaboration between the unions and the clinics about distribution of the said information existed.¹⁰⁸ The unions invoked EU trade law and their rights under Art.10 ECHR on freedom of expression to no avail. The CJEU ruled that while medically-terminated pregnancy was a service under EU law, the 'link' between the unions and the clinics was 'too tenuous' for the ban to be regarded as a restriction on the freedom to supply services.¹⁰⁹ The unions were neither paid nor acting on behalf of the clinics and, as such, they were exercising their freedom to convey information in a manner unrelated to the economic realm of the EU.

Law dictates that lines have to be drawn somewhere. Yet a link could have been established had the unions been paid even the most nominal of fees by the abortion clinics. Effectively, the CJEU circumnavigated the tidal wave of balancing the right to life of the unborn child (protected in the Irish Constitution) on the one hand with EU trade law and the unions' Art.10 Convention rights on the other by adopting a narrow approach to the field of EU law. The limits of EU economic law thus denote the limits of EU fundamental rights law.

(iii) Critique

The factors required to establish a nexus with EU law will be examined in chapter IV. For present purposes, and based on the above, various situations will not suffice to bring national activities within the ambit of EU fundamental rights law, such as a purely hypothetical prospect of exercising the right to free movement. In addition, the absence of a 'market

¹⁰⁸ *ibid* [22].

¹⁰⁹ *ibid* [24].

element',¹¹⁰ no matter how tenuous, will also fail to trigger EU fundamental rights law, as will national rules which are not enacted to implement or secure compliance with EU rules.

C. Post Lisbon: Interpreting the Scope of Article 51 of the Charter of Fundamental Rights

An outpouring of legal scholarship has materialised over the issue of whether the textual reference to the scope of the Charter (enacted in Article 51 of the Charter) corresponds to the scope of the general principles as determined by the CJEU in its case law pre-dating the adoption of the Charter.¹¹¹ Article 51(1) of the Charter stipulates as follows: 'the provisions of this Charter are addressed to...the Member States only when they are implementing Union law'. The question which arises, therefore, is whether the Charter applies only in the implementation of EU law, that is, literally in the agency situation, or whether it also applies to Member States when acting within the scope of EU law, that is, in the derogation scenario. In order to answer that question, it is necessary to examine whether the CJEU has opted for a narrow or a broad interpretation of Article 51(1) of the Charter and the basis for doing so.

(i) Narrow Interpretation

The case for a narrow interpretation of the Charter is an admixture of case law and policy analysis. The political wrangling during the drafting of Article 51 of the Charter seemingly pointed towards a narrow interpretation of that provision.¹¹² A conservative reading of that provision stemmed also from the insertion of the word 'only' which suggests that the

¹¹⁰ See further: Stephen Weatherill, 'From Economic Rights to Fundamental Rights' in Sybe de Vires, Ulf Bernitz and Stephen Weatherill (eds.), *The Protection of Fundamental Rights After Lisbon* (Hart Publishing 2013) 13.

¹¹¹ E.g. Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 *EuConst* 375-403; Leonard F.M Besselink, 'The Member States, The National Constitutions and the Scope of the Charter' (2001) 8 *Maastricht J. Eur. & Comp. L* 68.

¹¹² H Kaila, 'The Scope of Application of the Charter of Fundamental Rights of the EU in the Member States' in Pascal Cardonnel, Allan Rosas and Nils Wahl (eds.), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart Publishing 2012) 291, 291-302. See also Gráinne de Búrca, 'The Drafting of the EU Charter of Fundamental Rights' (2001) 26 *ELR* 126, 137.

obligations placed on the Member States by the Charter were designed to be minimalist.¹¹³ In addition, the (former) Attorney General Lord Goldsmith, the UK's representative during the negotiations for the Charter, was at pains to stress the limited scope of the Charter. He argued that the Charter was primarily directed at the EU institutions.¹¹⁴ Moreover, and making reference only to the classic *Wachauf* agency scenario as opposed to the *ERT* derogation scenario, Lord Goldsmith asserted that Member States were bound by the Charter only 'to the limited extent that they are acting in the implementation of Community law'.¹¹⁵ Also echoing a narrow approach to the scope of Article 51 was Francis G Jacobs (writing extra-judicially). According to Jacobs, Article 51 'did not add, as might be thought to follow from the Court of Justice's case law, that the provisions of the Charter are addressed to the Member States also where they are derogating from the Treaty'.¹¹⁶ On the basis of a narrow interpretation, then, the Charter would apply only when (i) national authorities adopt domestic measures to apply regulations (*Wachauf* and *McB*) and (ii) when domestic authorities enact national rules to transpose directives (*Booker Aquaculture*), but not when State authorities rely on Treaty provisions to derogate from EU rules (*ERT* and *Omega Spielhallen*).

(ii) Broad Interpretation

A broad interpretation of Article 51 is certainly more desirable from a normative perspective. First, it would be odd if a dual regime were to emerge between the fields of application of the general principles and the EU Charter, whereby the latter would not apply in a derogation

¹¹³ T von Danwitz and K Paraschas, 'A Fresh Start for the Charter: Fundamental Questions on the Application of the European Charter of Fundamental Rights' (2012) 35 *Fordham Int'l LJ* 1396, 1401.

¹¹⁴ Lord Goldsmith, 'A Charter of Rights, Freedoms and Principles' (2001) 38 *CML Rev* 1201, 1205.

¹¹⁵ *ibid.*, 1205.

¹¹⁶ Francis G. Jacobs, 'Human Rights in the European Union: the Role of the Court of Justice' (2001) 26 *ELR* 331, 336.

scenario whilst the former would, especially as both constitute higher sources of Union law. Though, as noted by Craig, given that the Charter has the same legal value as the Treaties, ‘it is possible, in principle, for the Treaty to overrule prior case law’.¹¹⁷ Yet, as Craig also states, ‘there is nothing in the Lisbon Treaty that expressly overrules the CJEU’s case law’.¹¹⁸

Second, the text of explanatory note on Article 51 which, in accordance with Article 6(1) TEU must be afforded due regard when interpreting Charter provisions, affirms that the Charter was not designed to curtail the scope of the CJEU’s jurisprudence. The text states as follows:

As regards the Member States, it follows unambiguously from the case law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is binding on the Member States when they *act in the scope of Union law* (judgment of 13 July 1989, Case 5/88 *Wachauf* [1989] ECR 2609; judgment of 18 June 1991, Case C-260/89 *ERT* [1991] ECR I-2925; judgment of 18 December 1997, Case C-309/96 *Annibaldi* [1997] ECR I-7493).

A few deductions can be made from the wording of the explanations. The phrase ‘it follows unambiguously from the case law of the Court of Justice’ indicates that the scope of the Charter shadows the scope of the judge-made general principles. In addition, the reference to *ERT* in the explanatory memorandum suggests that the phrase ‘implementing Union law’ contained in Article 51 of the Charter is synonymous with the phrase ‘act in the scope’. Implementing EU law thus encompasses both the agency and derogation situations.

Third, it has been posited by Craig that the *ERT* derogation scenario can equally be categorised as an implementation scenario in terms of ‘strict legal reality’.¹¹⁹ Craig asserts that:

The Member State in a case such as *ERT* is *prima facie* caught by a violation of free movement law, and is then seeking to act on a power given by EU law to provide a defence to that violation. It is in that sense implementing a power of

¹¹⁷ Paul Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (OUP 2010) 212.

¹¹⁸ *ibid*, 212.

¹¹⁹ Paul Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (OUP 2010) 211.

defence or derogation, which only operates when certain conditions, including compliance with fundamental rights, are satisfied.¹²⁰

Craig's view chimes with the CJEU's ruling in *Pfleger*. The CJEU, concurring with AG Sharpston, held that where Member States make use of exceptions provided for by the Treaty to justify national legislation liable to restrict one of the fundamental freedoms, that reliance must be regarded as 'implementing Union law within the meaning of Article 51(1) of the Charter'.¹²¹

A final nail in the coffin for a narrow interpretation was delivered in *Iida* by AG Trstenjak who opined that 'the reference in the explanations relating to the Charter to the case law of the Court in which the applicability of the fundamental rights to measures restricting fundamental freedoms militates in favour of applying fundamental rights enshrined in the Charter also to restrictions on freedom of movement under Article 21 TFEU'.¹²² More explicitly, in *Akerberg Fransson* the CJEU ruled also that Article 51(1) 'confirms the Court's case law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the EU'.¹²³ And in *Scattolon*, AG Bot opined that, based on the explanations pertaining to the Charter, 'implementing Union law' is to be interpreted as 'acting within the framework of EU law'.¹²⁴

D. Concluding Remark

Textual ambiguity aside, the CJEU has interpreted Article 51 of the Charter broadly and, as such, it has not altered the scope of fundamental rights *vis-à-vis* the general principles.

¹²⁰ *ibid*, 211.

¹²¹ Case C-390/12 *Pfleger and others (European Commission and others, intervening)* [2014] 3 CMLR 47, Opinion of AG Sharpston, [46]; Judgment of CJEU [36].

¹²² Case C-40/11 *Iida v Stadt Ulm* [2014] All ER (EC) 619, Opinion of AG Trstenjak, [7].

¹²³ Case C-617/10 *Åklagaren v Åkerberg Fransson* [2013] 2 CMLR 46 [18].

¹²⁴ Case C-108/10 *Scattolon v Ministero dell'Istruzione, dell'Università e della Ricerca* [2012] 1 CMLR 17, Opinion of AG Bot, [118]-[119].

V. Element II: Interpreting Rules on Limitations of Rights – The Principle of Proportionality and Article 52 of the EU Charter of Fundamental Rights

If a right is justiciable, and the dispute falls within the scope of EU law, the next criterion in the interpretative process is the test on limitations of rights applied by the CJEU. Whilst the CJEU's approach to limitations of rights is not crystal clear, a linchpin in the jurisprudence is the proportionality principle: a principle which is deeply entrenched in the CJEU's case law¹²⁵ and now enacted in Article 5(4) TEU and enshrined in Article 52(1) of the EU Charter.

A. Overview

In what ensues, an attempt will be made to unpack how the principle is applied by the CJEU. First, an overview of vexed issues surrounding the principle will be stated, followed by an appraisal of the conceptual distinction between *direct* and *indirect* proportionality. The focus then switches to the CJEU's methodological approach when interpreting whether national measures which derogate from Union law (e.g. on grounds of public policy) comply with fundamental rights, and also when interpreting whether national measures which restrict the Treaty freedoms (on the basis of protecting fundamental rights) are proportionate. The last section then examines whether Article 52(1) of the Charter enhances transparency in the application of the principle. In particular, it will outline the key tenets of Article 52(1) which, according to the text of explanatory note on Article 52, constitute an amalgamation of the CJEU's pre-Lisbon case law on the scope and rules on limitations of fundamental rights.

¹²⁵ Case C-189/01 *Jippes v Minister van Landbouw* [2001] ECR I-5689 [80]-[81]; Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125; In general, see: Tor-Inge Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16 ELJ 158; Michael Wimmer, 'The Dinghy's Rudder: General Principles of European Union Law Through the Lens of Proportionality' (2014) 2 EPL 331; Herman Voogsgereed, 'The EU Charter of Fundamental Rights and its impact on Labor Law: a Plea for a Proportionality-Test "Light"' (2012) 4 GJIL 293.

(i) Vexed Issues

Proportionality is applicable in rights-based disputes in order to assess the legality of limitations placed on rights, but also to assess the legality of limitations placed on EU objectives on the basis of safeguarding rights. As a result, some of the cases in this area suffer from what Peers aptly describes as a ‘hall of mirrors effect’ whereby two sets of rights potentially cancel each other out e.g. EU free movement rights vs. EU fundamental rights.¹²⁶

In addition, the CJEU has developed two distinct tests for assessing limitations placed on rights, namely, an EU test and an ECHR test, which are applied either in conjunction or individually, resulting in two tests potentially applying in three different situations. Another bone of contention is an alleged double standard between control of EU action and Member State action. The gist of this critique is that the CJEU applies a light proportionality test when reviewing activity by the EU institutions and a strict test when reviewing domestic activity.

B. Review of EU Action

As a point of departure, a useful conceptual distinction is that between direct and indirect proportionality.

(i) Direct Proportionality

Stated simply, *direct* proportionality pertains to situations where the principle of proportionality is invoked as an independent ground for review of EU legislation, often with no fundamental rights element. In this context, it has been observed, most notably by Tridimas, that when the CJEU reviews EU legislation, and in particular broad discretionary choices made by the legislature in an area of complex social and economic policy, for compliance with the principle of proportionality, it will only invalidate the said measure if it

¹²⁶ Steve Peers, ‘Article 52 –Scope and Interpretation of Rights and Principles’ in Steve Peers and others (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1467.

is ‘manifestly inappropriate to achieve its objectives,’¹²⁷ rather than using the stricter test of appropriateness and necessity. The lingering rationale for this light-touch level of scrutiny is that the CJEU ought not to replace the choices of the legislature on issues of complex policy with its own preferences. In addition, the CJEU itself has justified such leniency because ‘the [EU] legislator has a discretionary power which corresponds to the political responsibilities imposed by Articles 40 and 43’.¹²⁸ Moreover, and from a pragmatic perspective, given the magnitude of the EU’s administrative function, it has been argued that exacting *ex-post facto* review of EU legislation would be overly time-consuming as the CJEU would have to ascertain whether alternative means of achieving the same result were viable.¹²⁹ As noted by De Búrca, however, a stricter test of proportionality could pay dividends as neither the Council nor the Commission are democratically elected: hence the CJEU’s deference to the EU institutions is not entirely akin to that of national courts with their respective elected bodies.¹³⁰ Nonetheless, the case law illustrates a deferential approach by the CJEU in the form of a low-intensity proportionality test and wide margin of discretion to the legislature.¹³¹

(ii) Indirect Proportionality

In contrast, *indirect* proportionality refers to situations where the ground for review is based on fundamental rights. In this situation, the CJEU seeks to ascertain whether the interference with the right in question stemming from an EU act is proportionate and therefore whether it

¹²⁷ Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006) 138; Case C-331/88 *R v Minister for Agriculture, Fisheries and Food, ex p Fedesa* [1990] ECR I-4023 [14].

¹²⁸ Case 265/87 *Hermann Schröder HS Kraftfutter GmbH & Co. KG v Hauptzollamt Gronau* [1989] ECR 2237 [22].

¹²⁹ Gráinne De Búrca, ‘The Principle of Proportionality and its Application in EC law’ (1993) 13 YEL 116.

¹³⁰ *ibid*, 116.

¹³¹ Paul Craig and Gráinne De Búrca, *EU Law: Text, Cases, and Materials* (5th edn, OUP 2011) 527; Yutaka Arai-Takahashi, ‘Scrupulous but Dynamic—the Freedom of Expression and the Principle of Proportionality under European Community Law’ (2005) 24 YEL 27.

can be interpreted in accordance with fundamental rights. Most fundamental rights are not unfettered prerogatives and may be restricted, subject to limitations. To gauge the proportionality of restrictions, the pivotal, if not philosophical, question is whether the *substance* of the right at play is left intact. To make that determination, the CJEU typically poses the following two-fold question, namely, whether (i) the restriction introduced by an EU measure in fact corresponds to objectives of general interest pursued by the EU and (ii), if so, whether there exists a reasonable relationship between the measures required and the aim pursued (EU limitation test).¹³² As regards the latter, which is more of a value judgment made on a case-by-case basis (compared to the former which is a question of fact), the CJEU has frequently drawn on the Strasbourg Court's case law on limitations, particularly in relation to the right to property, in order to determine whether the relationship between the intended objective and the means used to attain the objective is proportionate.¹³³

As noted by Craig, these two limitation tests are not axiomatically the same,¹³⁴ making the CJEU's approach hard to distil, especially when the EU test is applied in conjunction with the limitations set out in the ECHR. In addition, the CJEU has, on occasion, resolved disputes without recourse to the EU test of assessing limitations on rights, relying instead solely on the ECHR's codified approach of whether limitations are prescribed by law and necessary in a democratic society.¹³⁵ As we shall see, Article 52(1) of the EU Charter effectively amalgamates the EU's approach to restricting rights with the ECHR approach,

¹³² E.g. Case C-280/93 *Germany v Council* ECR 4973[78]; Case C-37 and 38/02 *Di Lenardo* [2004] ECR I-6911 [80]; Case 265/87 *Hermann Schröder HS Kraftfutter GmbH & Co. KG v. Hauptzollamt Gronau* [1989] ECR 2237 [15]; Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727 [23]; Cases C-404 and 415/05 *Kadi v Council of the EU* [2008] ECR I-6351 [355]; Case C-404/92 *X v Commission of the European Communities* [1994] ECR I-4737 [18]; Case T-176/94 *K v. Commission* [1995] ECR-SC I-A-203 II-621 [33].

¹³³ E.g. Joined Cases C-404 and C-415/05 *Kadi v Council of the EU* [2008] ECR I-6351 [360].

¹³⁴ Paul Craig, *EU Administrative Law* (2nd edn, OUP 2012) 610.

¹³⁵ Case C-274/99 *Connolly v EC Commission* [2001] ECR I-1611 [40]; Joined Cases C-465/00, C-138/01 and C-139/01 *Rechnungshof and Others v Österreichischer Rundfunk and Others* [2003] ECR I-4989 [83]-[84].

which should make the CJEU's method more consistent and easier to discern in future disputes.

(iii) Direct and Indirect Proportionality

The distinction between direct and indirect proportionality is not watertight. In some cases, an applicant will assert that an EU measure breaches his/her fundamental rights and also that it violates the principle of proportionality. In such a scenario, the CJEU tends to proceed on the basis that fundamental rights and proportionality constitute one ground for review, though it may consider each ground separately.¹³⁶ If taken together, however, the CJEU will utilise the indirect proportionality test as opposed to that of direct proportionality. In terms of *fundamental rights* adjudication, the concept of indirect proportionality is therefore of greater significance.

C. Member State Activity: Proportionality, Fundamental Rights and Treaty Freedoms

We now turn to the Member States. It is well established that Member States are obligated to comply with the general principles of law, including fundamental rights and proportionality when (i) adopting domestic measures to transpose EU rules and (ii) acting within the field of Union law i.e. when restricting Treaty rules, either via an express Treaty derogation or a judge-made mandatory requirement.

(i) The Internal Market Template

When the CJEU reviews domestic measures which restrict one of the Treaty freedoms, it applies a strict test of proportionality in that the said measure will be in breach of EU law

¹³⁶ Joined Cases C-20/00 and C-64/00 *Booker Aquaculture Ltd v The Scottish Ministers* [2003] ECR I-7411 [50], Opinion of AG Mischo [78]-[79]; Case C-84/95 *Bosphorus Hava Yollari Turizm Ve Ticaret As v Minister for Transport, Energy and Communications, Ireland and Another* [1996] ECR I-3953 [26], Opinion of AG Jacobs, [49], [62], [69].

unless it is (i) necessary to fulfil a legitimate objective in the public interest and (ii) provided that the objective cannot be attained by alternative means less restrictive to intra-EU trade.¹³⁷ The rationale for this strict review is that the Treaty freedoms constitute the bedrock of market integration; hence the CJEU watchfully monitors restrictions that might erode free movement.¹³⁸

The protection of fundamental rights feeds into this pre-existing internal market template as the CJEU will interpret, or require national courts to interpret, not only whether a national measure disproportionately interferes with EU trade law, but also whether it disproportionately interferes with EU human rights (if that measure is justified on grounds of public policy).¹³⁹ If, however, one of the EU Treaty freedoms is restricted by a national rule which is justified on the basis of protecting a fundamental right, the CJEU will assess the proportionality of the restriction on the Treaty freedom, albeit in the light of safeguarding the right in question.

The seeds were sown in *ERT*. In that case, the CJEU held that reliance by a Member State on Treaty provisions to justify national rules restricting the freedom to provide services ‘must be interpreted in the light of the general principles of law and in particular of fundamental rights’ (Art.10 ECHR).¹⁴⁰ The CJEU left it to the referring court to make that determination, however the specific reference to Art.10 ECHR implied an application of the ECHR rules on limitations contained under Art.10(2) rather than the EU test, or perhaps both.

A more complex scenario arose in *Familiapress*. In that case, the national law in question banned publishers from enticing customers with generous cash rewards. The

¹³⁷ Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689 [12].

¹³⁸ Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (5th edn, OUP 2011) 532.

¹³⁹ Case C-60/00 *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279.

¹⁴⁰ Case C-260/89 *ERT v DEP* [1991] ECR I-2925 [41]-[43].

legislation was justified under the *Cassis de Dijon* doctrine (protection of overriding requirements) as its purported objective was the maintenance of press diversity which was, moreover, linked to Art.10 ECHR (freedom of expression). In particular, it was argued by the domestic authorities that the prohibition would safeguard smaller publishers from being ousted from the market by well-heeled publishers, who were able to offer larger cash prizes.

Acquiescing that maintenance of press diversity could help safeguard freedom of expression, as protected under Art.10 ECHR, the CJEU nevertheless observed that in order to be a justifiable restriction on free movement, the legislation had to be proportionate to the objective pursued and no more restrictive of intra-Community trade than necessary.¹⁴¹ In other words, it was the proportionality of restricting trade that was to be determined. At the same time, the CJEU, drawing on *ERT*, noted that reliance on overriding requirements to justify restrictions on trade had to be interpreted in the light of fundamental rights. The CJEU reasoned that the legislation at issue could ‘detract’¹⁴² from the Art.10 ECHR rights of larger publishers. In this regard, Art.10 ECHR came into play on both sides of the litigation. The CJEU then observed that, in the light of the Strasbourg Court’s jurisprudence, Art.10 ECHR could be restricted so long as any such restrictions were prescribed by law and necessary in a democratic society. The CJEU ultimately left it to the referring court to ascertain whether the legislation at issue was proportionate, not only to intra-Community trade, but also to Art.10 ECHR.

In *Carpenter*, the CJEU built on *ERT* by affirming that restrictions (in this case, a deportation order) on the fundamental freedoms (services) on grounds of public interest (UK immigration policy) must be interpreted in the light of fundamental rights protected under EU

¹⁴¹ Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689 [18]-[19].

¹⁴² *ibid* [26].

law (the right to respect for family life under Art.8 ECHR).¹⁴³ In contrast to *Familiapress*, however, the focus was not on whether the deportation order was proportionate to the aim pursued and no more restrictive to intra-Community trade than necessary, but solely on whether it disproportionately infringed Art.8 ECHR. In addition, the CJEU did not leave it to the referring national court to adjudicate the proportionality of the restriction on Art.8 ECHR.

A different scenario to *ERT* and *Carpenter* is when national measures are justified, not on traditional grounds of public policy or public security, but on human rights grounds. The landmark case of fundamental rights *clashing* as opposed to *converging* with the Treaty freedoms is *Schmidberger*.¹⁴⁴ In that case, the protection of freedom of expression formed a free-floating justificatory category for a restriction on free movement. Mirroring the approach in *Familiapress*, whereby maintenance of the press (for the purposes of safeguarding freedom of expression) was the basis for restricting EU trade law, AG Jacobs opined that ‘where a Member State invokes the necessity to protect a given fundamental right the normal test of proportionality should be applied’.¹⁴⁵ The AG did, however, advocate a light proportionality test as the restriction at issue was ‘primarily attributable to private individuals’.¹⁴⁶ Without placing the restriction based on fundamental rights into one of the established justificatory categories, the CJEU observed that restrictions placed on Treaty freedoms were justifiable, either under Treaty derogations or overriding requirements in the public interest. While noting that EU trade law could be restricted, the CJEU drew on the limitation clause housed in Art.10(2) ECHR, permitting restrictions on freedom of expression if provided by law, necessary and proportionate to the aim pursued.¹⁴⁷ The CJEU then

¹⁴³ Case C-60/00 *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279 [40].

¹⁴⁴ Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006) 337.

¹⁴⁵ Case C-112/00 *Schmidberger, Internationale Transporte und Planzüge v Austria* [2003] ECR I-5659, Opinion of AG Jacobs, [105-106].

¹⁴⁶ *ibid*, Opinion of AG Jacobs, [106].

switched to the EU test on limitations, permitting restrictions on fundamental rights so long as the restriction corresponded to objectives of general interest (free movement of goods) and as long as it did not constitute a disproportionate interference, impairing the very substance of the right. Ultimately, it was the proportionality of restricting trade, albeit in the name of ring-fencing fundamental rights, which was the focus of the CJEU, rather than the proportionality of restricting fundamental rights *per se*. After taking account of the Member States' margin of discretion, the CJEU ruled that the restriction did not disproportionately affect free movement.

The tenor of the CJEU's judgment in *Omega Spielhallen* echoed its approach in *Familiapress*. In *Omega Spielhallen*, the national rule in question was linked to the fundamental right of respect for human dignity which then formed part of the public policy derogation. While recourse to public policy derogations had to be strictly interpreted, the Member States were permitted a margin of discretion within the limits set by the Treaty: in this case, in order to safeguard the right to human dignity enshrined in the German Constitution. However, measures restricting the freedom to provide services could be justified on grounds of public policy only if (i) necessary for the protection of the interest at stake and (ii) those objectives could not be attained via less-restrictive measures to intra-Community trade. Akin to *Schmidberger*, therefore, it was the proportionality of restricting trade that was being examined. Unlike *Schmidberger*, however, the right of free movement was not viewed as a permitted ground of limitation of the right to human dignity. The CJEU ruled that the restriction placed on trade was proportionate to the legitimate aim pursued.

In *Viking Line*, the CJEU adopted the view that the right to collective action, and in particular the right to strike, constituted, in principle, a legitimate restriction of freedom of establishment as it was 'one of the ways in which trade unions protect the interest of their

¹⁴⁷ Case C-112/00 *Schmidberger, Internationale Transporte und Planzüge v Austria* [2003] ECR I-5659, Judgment of the CJEU, [66].

members'.¹⁴⁸ In line with the ethos of *Schmidberger*, the CJEU found that a restriction of EU trade on the basis of a Treaty exception or overriding requirement could be justified only if it was suitable for the attainment of the objective pursued (in this case, the protection of worker rights) and if it did not exceed necessity. As to whether the restriction could have been executed via means less restrictive to intra-EU trade, the CJEU left it to the referring national court to make that determination, though it provided exacting guidance and, strikingly, no formal margin of manoeuvre was accorded in order to take account of 'local circumstances'.¹⁴⁹ In *Laval*, the CJEU did not leave it to the referring court and ruled that the restriction in question (collective action) on the free movement of services was disproportionate.¹⁵⁰ As we shall see in chapter IV, the utilization of the proportionality test to the right to strike has given rise to criticism, not least because of the truism that the more effective a strike is from the perspective of those taking strike action, the more disproportionate it will be. As noted candidly by Bogg, 'the right to strike is an unusual fundamental right in that its very exercise involves the intentional infliction of economic harm on the other party'.¹⁵¹ Strike action and proportionality seem 'unlikely bedfellows'.¹⁵²

(ii) Critique

Cases like *ERT*, *Carpenter* and *Familiapress* illustrate that Member States must comply with fundamental rights when deviating from EU free movement obligations, though they may

¹⁴⁸ Case C-438/05 *International Transport Workers' Federation v Viking Line ABP* [2007] ECR I-10779 [86].

¹⁴⁹ Stephen Weatherill, 'From Economic Rights to Fundamental Rights' in Sybe de Vires, Ulf Bernitz and Stephen Weatherill (eds.), *The Protection of Fundamental Rights in the EU After Lisbon* (Hart Publishing 2013) 28.

¹⁵⁰ Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767 [110].

¹⁵¹ Alan Bogg, '*Viking* and *Laval*: The International Labour Law Perspective' in Mark Freedland and Jeremias Prassl (eds.) *Viking, Laval and Beyond* (Hart Publishing 2015) 54.

¹⁵² Catherine Barnard, 'A Proportionate Response to Proportionality in the Field of Collective Action' (2012) 37 *EL Rev* 117-135. See also: Phil Syrpis and Tonia Novitz, 'Economic and Social Rights in Conflict: Political and Judicial Approaches to their Reconciliation' (2008) 33 *ELR* 411, 425.

rely on limitation clauses contained in the ECHR in so doing.¹⁵³ In contrast, cases like *Schmidberger*, *Omega Spielhallen*, *Viking Line* and *Laval* represent a different scenario whereby free movement rights constitute a permitted ground of limitation of the fundamental right in question. The CJEU's approach to limitations in the latter category mirrors the CJEU's approach to proportionality when reviewing EU action for compliance with fundamental rights. In *Schmidberger*, for instance, the CJEU ruled that fundamental rights are not absolute and could be restricted (in that case, on the basis of the EU objective of free movement) so long as the substance of the right in question remained untrammelled, which is identical to the approach taken in relation to the right-to-property cases like *Hauer*, *Booker Aquaculture*, and *Kadi Al Barakaat*, whereby, in relation to the last case, the EU objective of international peace and security served as a permitted ground of limitation. On the other hand, in cases like *Omega*, *Viking Line* and *Laval*, no determination was made by the CJEU as to whether the protection of the EU objectives at play impaired the very substance of the rights in question.

A remedy to this outwardly hierarchical relationship between Treaty freedoms and fundamental rights was prescribed by AG Trstenjak in *Commission v Germany*.¹⁵⁴ The AG opined that, in the light of *Viking Line* and *Laval*, the CJEU ought to adopt a dual test of proportionality in order to assess, not only whether a restriction placed on a Treaty freedom is proportionate, but also whether a restriction on a fundamental right in the exercise of a Treaty freedom is proportionate, namely, whether it is 'appropriate, necessary and reasonable for the attainment of the interests protected by that fundamental freedom'.¹⁵⁵ As we shall see, Article

¹⁵³ Steve Peers, 'Article 52 –Scope and Interpretation of Rights and Principles' in Steve Peers and others (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1468.

¹⁵⁴ Case C-271/08 *European Commission v Germany* [2011] All ER (EC) 912.

¹⁵⁵ Case C-271/08 *European Commission v Germany* [2011] All ER (EC) 912, Opinion of AG Trstenjak, [190]-[192].

52(1) of the Charter *may* also help the CJEU mediate Treaty freedoms with fundamental rights.

D. Enshrining Proportionality in the EU Charter

The CJEU's interpretation of limitations on fundamental rights has been made more transparent as a consequence of Article 52(1) of the legally-binding EU Charter which states as follows:

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

(i) The Tenets of Article 52(1) of the EU Charter

Article 52(1) of the Charter is effectively an assimilation of the CJEU's fundamental rights jurisprudence. It is, however, a densely-worded provision which necessitates unpacking. In essence, there are three core tenets comprising Article 52(1) of the Charter. The first is the 'provided for by law' requirement. The second is the 'objectives of general interest recognised by the EU' and the 'protection of the rights and freedoms of others' requirement. The third is the 'test of limitations for restricting rights' requirement. Each will be considered in turn.

(ii) Provided for by Law

The explanatory note on Article 52(1) of the Charter makes clear that that provision is based on the CJEU's fundamental rights case law for the limitation of rights. As noted above, the CJEU has applied two tests regarding limitations of rights, namely, the EU test and the ECHR test. The incorporation of the 'provided for by law' requirement is a nod to the ECHR test insofar as the CJEU seldom made reference to that requirement, except for when it

applied the ECHR test in conjunction with the EU test or when the CJEU applied the ECHR test on its own. Given that the focus of this section is on the proportionality principle, the CJEU's post-Lisbon case law on the 'provided for by law' requirement will not be considered here.¹⁵⁶ Suffice it to say, the requirement ought to be easily satisfied insofar as restrictions placed on rights typically stem either from EU legislation or national legislation implementing or derogating from EU rules. In addition, the mere fact that the 'provided for by law' requirement has been incorporated in Article 52(1) of the Charter fosters enhanced judicial transparency.

(iii) Objectives of General Interest and Protecting the Rights and Freedoms of Others

Article 52(1) of the Charter makes clear that there are two categories which constitute permitted grounds for restricting Charter rights, namely, 'objectives of general interest recognised by the Union' and 'the need to protect the rights and freedoms of others'. At first glance, and as noted by Peers, it seems that these two categories can be conflated into one category insofar as the need to protect the rights and freedoms of others may also amount to the pursuit of EU objectives of general interest,¹⁵⁷ though the explanations pertaining to Article 52(1) cite them as being distinct. As regards the first category, the explanations state that the reference to EU objectives encompass, amongst other things, the objectives cited in Article 3 TEU. Article 3 TEU is very broad and includes, *inter alia*, the establishment of the internal market and an economic and monetary union, a highly competitive social market, and an area of freedom, security and justice. Two points can be made in this regard. First, the potential grounds for restricting fundamental rights in the light of EU objectives are wide ranging. Second, the reference to the internal market in Article 3 TEU suggests that, in line

¹⁵⁶ Steve Peers, 'Article 52 – Scope and Interpretation of Rights and Principles' in Steve Peers and others (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014), 1470.

¹⁵⁷ *ibid*, 1475.

with the CJEU's pre-existing fundamental rights case law, the Treaty freedoms may serve as a permitted ground to justify a restriction of fundamental rights. As regards the second category (protecting the rights and freedoms of others), the reference to the word 'rights' denotes that Charter rights can be restricted by other Charter rights and presumably other rights forming part of the general principles. Logic dictates that reference to the word 'freedoms' applies to the internal market freedoms which, as noted above, may fall into the former category of EU objectives. Post Lisbon, the CJEU has accepted some of the following justifications for restricting Charter rights in the light of EU objectives: transparency and accountability of EU expenditure *vis-à-vis* the right to personal data;¹⁵⁸ preventing the falsification of passports to avert illegal entry into the EU *vis-à-vis* the right to respect for private life;¹⁵⁹ the retention of data for the prevention, detection and prosecution of serious crime to ensure international peace and security *vis-à-vis* the right to personal data;¹⁶⁰ and the right to freedom of movement under Article 21 TFEU *vis-à-vis* the right to respect for private and family life.¹⁶¹ It remains to be seen whether Article 52(1) of the Charter will result in a more balanced approach to reconciling Charter rights with Treaty freedoms.¹⁶²

¹⁵⁸ Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR v Land Hessen* [2012] All ER (EC) 127.

¹⁵⁹ Case C-291/12 *Schwarz v Stadt Bochum* [2014] 2 CMLR 5.

¹⁶⁰ Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources* [2014] All ER (EC) 775.

¹⁶¹ Case C-400/10 PPU *McB v E* [2011] All ER (EC) 379.

¹⁶² Early signs point towards a status quo. In *McB*, the Article 21 TFEU rights of a mother who removed her child without informing the father were not balanced against the father's Charter rights.

(iv) Proportionality and Preserving the Essence of Fundamental Rights

Although the ‘provided for by law’ requirement was not present in the CJEU’s case law before the advent of the Charter, the ‘objectives of general interest’ requirement in Article 52(1) matches the EU test on limitations which required that restrictions of fundamental rights in fact corresponded to EU objectives. Yet, even if a restriction which stems from EU legislation does pursue a legitimate aim, it must still be proportionate. The EU test on limitations necessitated that there must have been a reasonable relationship between the measures required and the aim pursued, such that they did not constitute a disproportionate interference impairing the substance of the right (indirect proportionality). In the sprinkling of post-Lisbon cases, the word ‘substance’ has been replaced with the word ‘essence’. Moreover, the proportionality test on whether the essence of a right has been left intact *vis-à-vis* a restriction stemming from EU legislation seems more rigorous and more in line with the test of direct proportionality. To assess the proportionality of restrictions in the light of their aim, the CJEU has examined whether they are *appropriate* and whether they exceed *necessity* in attaining them.¹⁶³ This two-fold test of appropriateness and necessity constitutes, therefore, an improvement and a departure from the prior EU test of indirect proportionality stated above. Conversely, a curious aspect of the CJEU’s case law, and a further departure from the EU test on limitations, is that the CJEU appears to proceed on the basis that a determination of whether the essence of a right has been left intact can be made *before* assessing whether a restriction is appropriate and necessary, which is illogical.¹⁶⁴ Put simply, a restriction on a right might respect the essence of that right and yet still be deemed to be disproportionate.

¹⁶³ Case C-291/12 *Schwarz v Stadt Bochum* [2014] 2 CMLR 5 [40].

¹⁶⁴ *ibid*, [39].

E. Concluding Remarks

The pre-Lisbon case law reveals that when the CJEU examined the proportionality of restrictions on rights stemming from EU rules, it seldom examined whether they were appropriate or necessary; rather, it engaged in a value judgment of whether the substance of the right in question had been preserved (EU test). When it reviewed State action restricting one of the Treaty freedoms, however, the CJEU applied a strict test in order to determine whether those restrictions were necessary and whether they could have been achieved via less onerous restrictions on EU trade. Stated simply, in the former category proportionality is being applied to restrictions placed on rights whereas in the latter it is being applied to restrictions on Treaty freedoms. Hence, the critique of a double standard regarding the proportionality of EU activity and Member State activity is a bit misplaced as it is akin to comparing apples and oranges. Post Lisbon, the CJEU has had recourse to Article 52(1) when reviewing EU measures for rights-based compliance and has seemingly abandoned its previous EU test on limitations in favour of assessing whether those restrictions are necessary and appropriate. Yet the CJEU's methodology is not set in stone. It is apparent from the above that the CJEU employs proportionality differently depending on the field of law, the facts of the dispute, and 'the type of act subject to challenge'.¹⁶⁵ In addition, a survey of less well-known cases illustrates that, even with the advent of the Charter, the CJEU is able to resolve many disputes without recourse to the principle, or by making only fleeting references to it.¹⁶⁶

¹⁶⁵ Stephen Weatherill, *Cases and Materials on EU Law* (10th edn, OUP 2012) 51.

¹⁶⁶ Commission, '2012 Report on the Application of the EU Charter of Fundamental Rights' COM (2013) 271 final: See E.g. Case C-214/10 *KHS AG v Schulte* [2011] ECR I-11757; Case C-155/10 *Williams and others v British Airways Plc* [2012] 1 CMLR 23; Case C-145/10 *Painer v Standard Verlags GmbH* [2012] ECDR 6; Case C-451/11 *Dülger v Wetteraukreis* [2012] 3 CMLR 50; Joined Cases C-71/11 and C-99/11 *Germany v Y & Germany v Z* [2013] All ER (EC) 1144.

VI. Element III: The Margin of Appreciation Principle in EU Rights-Based Adjudication

As noted by Craig¹⁶⁷ and Peers,¹⁶⁸ a key interpretative issue pertaining to Article 52(1) of the Charter is the role, if any, of the margin of appreciation principle. In contrast to proportionality, the darling of liberal rights theory, the function of the margin of appreciation principle in the realm of EU law, and rights-based law in particular, is relatively under-theorised.¹⁶⁹

A. Overview

The margin of appreciation principle operates as a flexible interpretative tool which is continually being utilised by the CJEU, albeit in a fragmented way, in order to ensure compliance with EU rights.¹⁷⁰ In this section, a few words on the margin of appreciation *doctrine* as applied by the ECtHR will be stated followed by analysis of how the EU *principle* is applied by the CJEU.

¹⁶⁷ Paul Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (OUP 2010) 225.

¹⁶⁸ Steve Peers, 'Article 52 –Scope and Interpretation of Rights and Principles' in Steve Peers and others (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1481.

¹⁶⁹ Notable exceptions: Massimo Fichers and Ester Herlin-Karnell, 'The Margin of Appreciation Test and Balancing in the Area of Freedom Security and Justice: A Proportionate Answer for a Europe of Rights?' (2013) 19 EPL 759; Niamh Nic Shuibhne, 'Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law', (2009) 34 EL Rev 230; Magdalena Forowicz, 'State Discretion as a Paradox of EU Evolution' (EUI Working Papers 2011/27); James A. Sweeney, 'A Margin of Appreciation in the Internal Market: Lessons from the European Court of Human Rights' (2007) 34 LIEEI 27; Janneke Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2010) 17 ELJ 80.

¹⁷⁰ E.g. Case C-2/92 *R v Ministry of Agriculture, Fisheries and Food Ex p. Bostock* [1994] ECR I-955 [14]; Case C-186/01 *Dory v Bundesrepublik Deutschland* [2003] ECR I-2479 [34]; Case C-285/98 *Kreil v Bundesrepublik Deutschland* [2000] ECR I-69 [14],[24]-[25],[29]; Joined Cases C-465/00, C-138/01 and C-139/01 *Rechnungshof and Others v Österreichischer Rundfunk and Others* [2003] ECR I-4989 10 [83]; Case C-42/11 *Criminal proceedings against Lopes Da Silva Jorge* [2012] 3 CMLR 54, Opinion of AG Mengozzi, [40].

(i) The Incunabula of the Margin of Appreciation Concept

The CJEU can lay no exclusive claim to the margin of appreciation doctrine. The doctrine is deeply entrenched in jurisprudence of the European Court of Human Rights.¹⁷¹ As noted by Hutchinson, it is applied by the ECtHR, with varying degrees of leniency, in order to balance ‘the need to protect a Convention right against some legitimate reason for restricting it, such as the need to protect morals, or to protect the rights of others’.¹⁷² The rationale for the leniency granted to States is that they are more acutely informed and hence better placed than the ECtHR to determine whether limitations are required in order to protect certain societal interests, which are commonly referred to as ‘the vital forces’ in the ECtHR’s jurisprudence. Thus, the principle ‘is more a matter of who takes the decisions, rather than what those decisions might be’.¹⁷³ However the discretion is not unfettered. While the ECtHR is mindful of State sovereignty, when the latter ‘has exceeded its discretion’¹⁷⁴ the former will intervene.

In the realm of EU law, the CJEU has developed its own version of the doctrine which, for ease of reference, will be classified as the EU margin of appreciation ‘principle’.¹⁷⁵ Arguably, there are theoretical commonalities regarding the role of the concept in the armoury of the two European Courts. First, the concept is not cited anywhere in the Convention¹⁷⁶ and neither is it enshrined in the Treaties or in the EU Charter; rather it has

¹⁷¹ For a detailed exposition of the doctrine see: Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR (Intersentia 2001)*; Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (OUP 2012); George Letsas, ‘Two Concepts of the Margin of Appreciation’ (2006) 26 OJLS 705.

¹⁷² Michael Hutchinson, ‘The Margin of Appreciation Doctrine in the European Court of Human Rights’ (1999) 48 ICLQ 638.

¹⁷³ *ibid*, 640.

¹⁷⁴ *ibid*, 640.

¹⁷⁵ Steve Peers, ‘Article 52 –Scope and Interpretation of Rights and Principles’ in Steve Peers and others (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1481.

¹⁷⁶ Michael Hutchinson, ‘The Margin of Appreciation Doctrine in the European Court of Human Rights’ (1999) 48 ICLQ 638.

been judicially developed.¹⁷⁷ In addition, akin to the ECtHR and domestic authorities, the concept operates as a tool to define relations between the CJEU and the Member States. Indeed, the concept serves as a means of balancing State sovereignty with obligations which both European Courts Lord it over. Yet, as we shall see, comparisons end there due to the *sui generis* nature of the EU. First, and foremost, the CJEU has never explicitly linked the EU margin of appreciation principle to the ECtHR's margin of appreciation doctrine. In addition, the principle applies to the EU Member States not in order to assess limitations of rights *per se* but as a tool for ensuring rights-based compliance when acting as agents of the Union, though also, it may be argued, as a means of re-allocating responsibility for rights-based compliance from the institutions of the EU to the Member States. Similarly it applies to the Member States when they derogate from EU free movement obligations on the basis of *protecting* rights rather than as a tool for gauging limitations placed on fundamental rights.¹⁷⁸

B. The Margin of Appreciation Principle and Member State Activity

The first explicit, albeit fleeting, reference to the principle by the CJEU came in the seminal *Wachauf* case. The CJEU was asked to interpret Commission Regulation 1371/81. Stripped to its core, the underlying issue was whether the absence of compensation for the discontinuance of milk production by a lessee pursuant to German law implementing the Regulation was compatible with the right to property protected under Community law.¹⁷⁹ At

¹⁷⁷ *Engel and Others v Netherlands* (1976) Series A no 22; *De Wilde, Ooms and Versyp v Belgium* (1971) Series A no 12; *Handyside v the United Kingdom*, (1976) Series A no 24; *Egeland and Hanseid v Norway* (2010) 50 EHHR 2; *Horvath and Kiss v Hungary* (2013) 57 EHHR 31.

¹⁷⁸ Case C-112/00 *Schmidberger, Internationale Transporte und Planzüge v Austria* [2003] ECR I-5659. cf Case C-159/90 *Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and Others* [1991] ECR I-4685, Opinion of AG Van Gerven, [37]- [38] and Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689, Opinion of AG Tesouro, [28].

¹⁷⁹ Francis G Jacobs, 'ERT and Wachauf' in Miguel Poiares and Loïc Azoulay (eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 135.

first blush, and in line with the CJEU's previous case law, it appeared that it was the Regulation which was to be examined for compliance with the right to property owing to the absence of compensation. However, as is well known, the gaze shifted to the Member States. In particular, the CJEU held that since the obligation to respect fundamental rights was 'also' binding on the Member States when they implemented Community rules, they were to interpret those rules, as far as possible, in compliance with that obligation. On that basis, the CJEU ruled that the Regulation in question left 'the competent national authorities a sufficiently wide margin of appreciation to enable them to apply those rules in a manner consistent with the requirements of the protection of fundamental rights'.¹⁸⁰ What this meant in practice was that the margin of appreciation accorded to the Member States *in this particular case* enabled them to interpret the Regulation in compliance with fundamental rights.¹⁸¹

At a more abstract level, it seems that the margin of appreciation principle operated to transfer responsibility away from the Community institutions to the Member States. On the other hand, and as noted by Francis Jacobs (writing extra-judicially), if the margin of manoeuvre accorded by the Regulation wasn't sufficiently wide so as to enable the Member States to comply with fundamental rights, then the Regulation *itself* would be deemed 'unlawful', that is, it would be incapable of being interpreted in compliance with fundamental rights.¹⁸²

In the post-Lisbon *N.S.* case, AG Trstenjak drew extensively on *Wachauf* for the purposes of interpreting a so-called sovereignty clause housed in Art.3(2) of Regulation

¹⁸⁰ Case 5/88 *Wachauf v The State* [1989] ECR 2609.

¹⁸¹ Francis G Jacobs, 'ERT and Wachauf' in Miguel Poiares and Loïc Azoulay (eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 137.

¹⁸² *ibid*, 137.

343/2003 (granting Member States a discretionary power to assume responsibility for an asylum application even if it is not the responsible State within the meaning of the Regulation). The pivotal issue was whether the discretionary power fell within the remit of Article 51 of the EU Charter of Fundamental Rights. In the light of *Wachauf*, the AG affirmed the (now) well-established principle that the protection of fundamental rights is also binding on the Member States when implementing EU rules into domestic law. Applied to the facts of the case, the AG opined that the discretionary power formed an integral part of the exhaustive rules (for determining the responsible State for assuming responsibility of an asylum application) stipulated in the Regulation. As such, decisions taken by States pursuant to that discretionary power were to be regarded as ‘implementing measures’.¹⁸³ In addition, given the exhaustive nature of those rules, Art.3(2) of the Regulation granted the Member States ‘a margin of discretion which is sufficiently wide to enable them to apply that Regulation in a manner compatible with the requirements of the protection of fundamental rights’.¹⁸⁴ The CJEU essentially followed the same path as the AG. First, it ruled that that the discretionary power ‘implements EU law for the purposes of Article 51 of the Charter’¹⁸⁵ as it formed an integral part of the Common European Asylum System which was developed by the EU legislature and hence that power had to be exercised in the light of the other provisions of the Regulation. In addition, though without mention of the margin of discretion stemming from the Regulation’s provisions, the CJEU ruled that Member States were bound not to rely on an interpretation of secondary legislation which would violate fundamental rights.¹⁸⁶

¹⁸³ Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department* [2012] All ER (EC) 1011, Opinion of AG Trstenjak, [80].

¹⁸⁴ *ibid*, Opinion of AG Trstenjak [119].

¹⁸⁵ Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department* [2012] All ER (EC) 1011, Judgment of the CJEU, [69].

¹⁸⁶ *ibid* [77].

In keeping with the aforesaid critique posited by Jacobs, it is reasonable to surmise that whilst the margin of discretion granted to Member States is to be regarded as an implementing measure, and therefore to be exercised in compliance with fundamental rights, the buck is passed to the Member States only insofar as the key provisions of the *EU legislation* in question are capable of being interpreted harmoniously with fundamental rights.

The tale of the principle's role in relation to directives is equally pithy. It is trite law that directives are binding on Member States as regards *the result to be achieved*, but that domestic authorities are granted a leeway to decide the *choice of form and methods*.¹⁸⁷ In essence, these two tenets comprise the margin of discretion which is permitted to Member States in order to implement directives into national law. The key question is whether that discretion necessitates compliance with fundamental rights. In *Booker Aquaculture*, no direct reference was made to the margin of discretion principle, however AG Mischo invoked academic analysis on *Wachauf* to support the proposition that the choice of form and methods accorded to Member States when adopting domestic measures to implement a directive did not equate to the choice of whether or not to comply with fundamental rights. On that basis, the application of the *Wachauf* line of case law to directives was 'logical'.¹⁸⁸ In addition, the AG endorsed the view that compliance with fundamental rights ought to be viewed as an *implicit* part of the result to be achieved under a directive, even if it was not its *explicit* objective.¹⁸⁹

In *Lindqvist*¹⁹⁰ the CJEU was bolder. Called upon to interpret Directive 95/46, which was enacted to harmonise national laws on the free flow of personal data while

¹⁸⁷ Article 288 TFEU.

¹⁸⁸ Joined Cases C-20/00 and C-64/00 *Booker Aquaculture Limited (trading as Marine Harvest McConnell) v The Scottish Ministers* [2003] ECR I-7411, Opinion of AG Mischo, [53].

¹⁸⁹ *ibid* [53].

¹⁹⁰ Case C-101/01 *Criminal Proceedings against Lindqvist* [2004] All ER (EC) 561.

simultaneously safeguarding the privacy rights of the individuals concerned, the CJEU held that the Directive itself, whilst general in nature, was not contrary to the general principles or fundamental rights. To the contrary, given that ‘Member States have a margin of manoeuvre in implementing the Directive...it is, rather, at the stage of the application at national level of the legislation implementing Directive 95/46 in individual cases that a balance must be found between the rights and interests involved’.¹⁹¹ Simply stated, this meant that the domestic authorities were under an obligation to interpret national implementing measures in accordance with the objectives of the Directive, which included compliance with fundamental rights.¹⁹² Taken together, *Booker Aquaculture* and *Lindqvist* suggest that the ‘choice and form of methods’ granted to Member States when transposing directives can be regarded as a margin of discretion which must comply with fundamental rights. Moreover, the ‘result to be achieved’ requirement entails compliance with fundamental rights in the pursuit of that result.

In the sphere of free movement the principle has been applied so as to permit national authorities a degree of latitude when they adopt, or permit, national rules restricting one of the Treaty freedoms on the basis of public policy.¹⁹³ The protection of fundamental rights slots into this pre-existing internal market paradigm. In *Dynamic Medien*, the German national rules at issue, designed to safeguard young children, constituted a *prima facie* breach of Article 28 EC (now Article 34 TFEU) on the free movement of goods. Those rules were justified by the German Government pursuant to Article 30 EC (now Article 36 TFEU) on the

¹⁹¹ *ibid* [85].

¹⁹² *ibid* [86]. Similarly, in Joined Cases C-468/10 and C-469/10 *Asociación Nacional de Establecimientos Financieros de Crédito v Administración del Estado* [2011] ECR I-12181, the CJEU cited *Lindqvist* as authority for the assertion that the margin of discretion which Member States had pursuant to Directive 95/46 had to be exercised in accordance with the objectives of the Directive of balancing the fundamental right to protection of private life with the free movement of data [34]-[35].

¹⁹³ Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337 [18]; Case 30/77 *Regina v Pierre Bouchereau* [1977] ECR 1999 [33]-[34]; Case C-275/92 *H.M. Customs and Excise v Gerhart and Jörg Schindler* [1994] ECR I-1039; Case C-124/97 *Läärä and Others v Kihlakunnansyyttaja* [1999] ECR I-6067 [14]-[15]; Case C-67/98 *Questore di Verona v Diego Zenatti* [1999] ECR I-7289 [33]-[34].

basis of public morality. The CJEU affirmed that the protection of the child was safeguarded under EU law.¹⁹⁴ Accordingly, the protection of that right was, in principle, a legitimate interest justifying a restriction of Article 28 EC. Making reference to the case of *Omega Spielhallen*, the CJEU noted that, by analogy, national rules adopted to safeguard the rights of the child need not ‘correspond to a conception shared by all Member States as regards the level of protection and the detailed rules relating to it. As that conception may vary from one Member State to another on the basis of, *inter alia*, moral or cultural views, Member States must be recognised as having a definite margin of discretion’.¹⁹⁵ In accordance with the CJEU’s established jurisprudence, however, that margin of discretion had to be exercised within the limits imposed by the Treaty. National rules designed to safeguard children must therefore be proportionate.¹⁹⁶

A crystallization of the principle is readily transparent in *Sayn-Wittgenstein*. At stake was a potential obstacle to the EU right of free movement in the shape of an Austrian law abolishing titles of nobility.¹⁹⁷ The national law was of constitutional status and apotheosized the principle of equal treatment for all Austrian citizens in the eyes of the law. In terms of judicial methodology, a striking component of the case is the porous nature of the internal market edifice. The Austrian Government sought to rely on the concept of public policy to justify the restriction. The CJEU then affirmed its established mantra that recourse to public policy must be strictly policed in order to preclude its ambit from being unilaterally defined

¹⁹⁴ AG Mengozzi opined that the protection of young persons was closely linked to the general principle of human dignity and also that the Convention on the Rights of the Child served as a source of inspiration for the application of the general principles (Opinion of AG Mengozzi, Case C-244/06 [70], [90]). The CJEU also cited Article 24 of the EU Charter which enshrined the Rights of the Child (Case C-244/06 [41]).

¹⁹⁵ Case C-244/06 *Dynamic Medien Vertiebs GmbH v Avides Media AG* [2008] ECR I-505 [44].

¹⁹⁶ *ibid* [45-46].

¹⁹⁷ For an overview see: Leonard F.M. Besselink, ‘Case C-208/09, Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien’ (2012) 49 CML Rev 671.

by Member States without EU oversight.¹⁹⁸ At this juncture, three factors permeated the edifice. First, as in *Omega Spielhallen*, the CJEU stated that a margin of discretion must be accorded to the Member States in order to take account of the specific reasons necessitating recourse to the concept of public policy.¹⁹⁹ Second, the Austrian law was enacted to implement the principle of equality before the law. The EU legal system also protected equal treatment, both as a general principle of law and under Article 20 of the EU Charter of Fundamental Rights.²⁰⁰ Third, Article 4(2) TEU required the EU to respect the national identities of its Member States, which includes ‘the status of the State as a Republic’.²⁰¹ As regards judicial technique, whether the margin of appreciation principle was informed by fundamental rights (Article 20 of the Charter and the general principles) and national identity (Article 4(2) TEU), or whether the principle operated in conjunction with the latter two, the end result was the same, namely the restriction on EU free movement was proportionate.²⁰²

(i) Critique

First, while the ECtHR assesses whether limitations of *Convention rights* are permissible in the light of the margin of appreciation accorded to States for protecting certain societal interests and/or rights of others, the CJEU assesses whether restrictions on *Treaty freedoms* (also rights) are permissible in the light of the margin of appreciation accorded to Member States when safeguarding rights and national interests. Unlike the ECtHR’s case law on the width of the margin, however, which is contingent on, *inter alia*, the degree of consensus amongst the Member States regarding the protection of the right or interest, the CJEU’s case

¹⁹⁸ Case C-208/09 *Sayn-Wittgenstein v Landeshauptmann Von Wien* [2011] 2 CMLR 28 [86].

¹⁹⁹ *ibid* [87].

²⁰⁰ *ibid* [89].

²⁰¹ *ibid* [92].

²⁰² *ibid* [93].

law is too slender and opaque to draw any conclusions.²⁰³ Second, to determine whether the interference with a Convention right is permissible, the ECtHR will assess its proportionality. Equally, to determine whether the restriction on a Treaty freedom is permissible, the CJEU will assess its proportionality. Thus, in the context of free movement, the principle operates to regulate limitations on EU obligations, whereas the ECtHR uses the doctrine to mediate limitations on Convention rights. Sweeney posits that the danger posed by the margin of appreciation doctrine, as applied by the ECtHR, is that it undermines the universality of human rights, whereas the danger posed by the margin of appreciation principle, as applied by the CJEU, is that it undermines the functioning of the internal market.²⁰⁴ A better view is that the principle actually serves as a safety valve enhancing the efficacy of the internal market.

C. The Margin of Appreciation Principle and the Institutions of the Union

There is, *prima facie*, an incommensurability regarding how the margin of appreciation doctrine is applied by the ECtHR and the how the EU margin of appreciation principle is applied by the CJEU in relation to the institutions of the Union. It has been argued that since the doctrine was designed to be applied by an international court in order to take account of diverse approaches to regulating cultural and legal traditions, it has ‘no place’ in the context of the EU.²⁰⁵ While it is axiomatic that the ECtHR’s doctrine cannot be analogously transplanted into the realm of the EU, and applied to the EU institutions in particular, Article 52(3) of the Charter does stipulate that Charter rights which correspond to rights contained in the ECHR are to be given the same meaning and scope. Given that the ECtHR utilises the

²⁰³ On the width of the margin applied by the ECtHR see: Janneke Gerards, ‘Pluralism, Deference and the Margin of Appreciation Doctrine’ (2010) 17 ELR 80.

²⁰⁴ James A Sweeney, ‘A Margin of Appreciation in the Internal Market: Lessons from the European Court of Human Rights’ (2007) 34 LIEEI 27.

²⁰⁵ Steve Peers, ‘Article 52 –Scope and Interpretation of Rights and Principles’ in Steve Peers and others (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1481.

margin of appreciation doctrine to assess limitations on key ECHR rights, the CJEU may have to tailor its approach to limitations on rights *flowing from EU acts* in order to avoid divergences in the jurisprudence of the two Courts which, in the light of pending EU accession to the ECHR, makes it all the more expedient. However, Article 52(1) of the Charter has not incorporated the concept of a margin of appreciation principle and therefore provides no interpretative guidance as to whether, and to what extent, it ought to be applied.

Despite its absence from the Charter there are sporadic references to it in the case law. In *Parliament v Council* - less formally known as the *Family Reunification* case - the European Parliament (“EP”) sought to annul various provisions of a Council Directive.²⁰⁶ The Directive conferred the right for lawfully resident third-country nationals residing in the EU to be reunited with their spouse or children. The Directive also permitted, in certain situations, the Member States to derogate from the right to family reunification, and it was these derogations that the EP sought to annul. The EP asserted that since the provisions (or rather derogations) of the Directive permitted the Member States to apply legislation which might breach the right to family reunification, it was those provisions which were the target of the litigation.²⁰⁷ The Council argued that the Directive conferred a margin of appreciation to the Member States to adopt legislation derogating from the basic rules of the Directive or to refrain from doing so; hence the target of the action was not the institutions (the Directive was adopted by the Council unanimously though the EP was consulted), and thus *inadmissible*.²⁰⁸

The CJEU disagreed. It held that the margin of appreciation granted to the Member States could not insulate the provisions of the Directive from review for rights-based

²⁰⁶ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification OJ L251/12.

²⁰⁷ Case C-540/03 *European Parliament v Council of the European Union* [2006] ECR I-5769 [15].

²⁰⁸ *ibid* [16].

compliance. It held that ‘a provision of a Community act could, in itself, not respect fundamental rights if it required, or expressly or impliedly authorised, the Member States to adopt or retain national legislation not respecting those rights’.²⁰⁹ The action was admissible.

In terms of substance, the EP argued that the Directive’s provisions allowed Member States to adopt legislation restricting Article 8 ECHR by allowing for ‘a condition of integration’ which amounted to an unjustifiable interference under Article 8(2) ECHR.²¹⁰ Drawing on the ECtHR’s case law on limitations, the CJEU held that ‘a fair balance between the competing interests of the individual and of the community as a whole’²¹¹ had to be struck. Applied to the facts, this meant that the right to family life and family reunification could not ‘be interpreted as denying Member States a certain margin of appreciation when they examine applications for family reunification’.²¹² Turning its gaze to the Member States, the CJEU held, in usual laconic fashion, that the margin of discretion conferred to them by the Directive was ‘sufficiently wide’ to ensure compliance with the fundamental rights at issue.²¹³

At the risk of esotericism, the three-fold role of the principle in *Family Reunification* is as follows. First, the margin of appreciation granted to the Member States could not ring-fence the Directive from the CJEU’s control. Second, the Directive itself was not invalid as it granted the Member States a margin of manoeuvre to balance the right to family reunification. Third, the margin of appreciation accorded to the Member States was sufficiently wide to enable them to comply with fundamental rights which, in line with *Wachauf* and *Booker Aquaculture*, they are obligated to do when implementing Union legislation into national law.

²⁰⁹ *ibid* [21-23].

²¹⁰ *ibid* [41-42].

²¹¹ *ibid* [54].

²¹² *ibid* [59].

²¹³ *ibid* [104].

In the ubiquitous *Connolly* case, Staff Regulations mandating authorization prior to publication were under the CJEU's spotlight. Drawing on the ECtHR's case law on Article 10(2) ECHR, the CJEU noted that although limitations of that right were to be strictly interpreted, contracting States had a 'margin of appreciation in assessing whether such a need exists'.²¹⁴ Noting that Article 10 ECHR could be limited on grounds of protecting the rights of others, the CJEU proclaimed that, by analogy, at issue here were the rights of the Community institutions to execute their tasks in the service of EU citizens, that is, to secure public faith.²¹⁵ Hence, the pivotal issue was whether the restrictions on Article 10 ECHR, flowing from the Regulations, were justified by the requirement for the Community institution 'to ensure that its officials and agents observe the duties and responsibilities implicit in the performance of their tasks'.²¹⁶ The CJEU opaquely held that permission to publish could be refused, but only in exceptional circumstances, such that might 'cause serious harm to the Communities' interests'.²¹⁷ In terms of methodology, the tone of the judgment leaves much to be desired.

D. Concluding Remarks

A principle of judicial deference forms an integral part of supranational adjudication. As observed by Lenaerts, although the CJEU has the final word on interpreting EU law, that is, in a unitary fashion, the Union is, nevertheless, 'united in diversity'. It is, therefore, the degree of diversity which is compatible with the unity of EU law which is a matter of interpretation for the CJEU.²¹⁸ In the realm of cross-border movement, the EU margin of appreciation

²¹⁴ Case C-274/99P *Connolly v Commission* [2001] ECR I-1611 [41].

²¹⁵ *ibid* [46].

²¹⁶ *ibid* [48].

²¹⁷ *ibid* [53].

²¹⁸ Koen Lenaerts, Summer Course on the Law of the European Union' (6 July 2013) <<https://www.youtube.com/watch?v=itlDH5MozF8>> accessed 01 February 2015.

principle facilitates value diversity which is rooted in rights-based protection (human dignity, freedom of expression and equality of citizens etc) so long as such diversity is proportionately pursued.²¹⁹ More generally, while the CJEU has been willing to grant Member States and the EU institutions a margin of discretion, it has been laconic in terms of fleshing out the factors shaping the degree of its application. Moreover, the principle lacks categorical clarity. The CJEU uses the terms margin of *manoeuvre*, margin of *appreciation* and margin of *discretion* interchangeably. With the advent of Article 52 of the Charter, the CJEU ought to clarify the scope of the principle if it is to avoid judgments at odds with the case law of the ECtHR. Lastly, whilst *explicit* references to the principle in relation to the institutions of the EU are scant, the CJEU, ever mindful of complex social, political and economic choices, grants the EU legislature an *implicitly* wide procedural-based margin of discretion. As stated, this discretion operates as pabulum for the application of the proportionality principle, in that restrictions placed on EU rights ‘are generally held justifiable’.²²⁰ This begs the as-yet-unanswered question of how broad or narrow the EU principle should be applied, and in what contexts.²²¹

²¹⁹ *ibid.*

²²⁰ Ferdinand Wollenschlager, ‘Article 17 –Right to Property’ in Steve Peers and others (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 484. E.g. Case 44/79 *Hauer v Land Rheinland-Pflaz* [1979] ECR 3727; Case C-295/03 *Alessandrini Spl et al v Commission of the European Communities* [2005] ECR I-5673 [89]-[91]. Cf. Joined Cases C-402 and 415/05 P *Kadi v Council of the European Union* [2008] ECR I-6351 [359-360].

²²¹ Trending analysis considers the potential role of the margin of appreciation principle in conjunction with proportionality in the context of the Area of Freedom, Security and Justice (AFSJ): Massimo Fichers and Ester Herlin-Karnell, ‘The Margin of Appreciation Test and Balancing in the Area of Freedom Security and Justice: A Proportionate Answer for a Europe of Rights?’ (2013) 19 EPL 759.

VII. Conclusion

The exclusive objective of this chapter has been to examine whether a methodological framework can be distilled from the CJEU's case law. It has been demonstrated that adjudication in this context can be viewed as a two-stage process of derivation and enforcement via interpretation.

Pre-Charter proclamation, the CJEU drew on the legal traditions of the Member States as well as the ECHR for the derivation of EU fundamental rights, with the occasional reference to other human rights instruments. Yet despite the rhetorical value placed on the Member States' legal traditions, there is in practice scant evidence to suggest that the CJEU draws on these legal traditions in a rigorous way. Moreover, the CJEU's method of deriving rights does not lend itself to simplistic classifications such as maximalist or minimalist. In reality, the CJEU's approach is best described as evaluative and comparative in that in order to be secured at the EU level, account must first be taken of the specific objectives and tasks of the Union; a fundamental right or a legal principle that is not compatible with those objectives will not automatically form part of the autonomous general principles. On the other hand, by anchoring the general principles in the legal traditions of the Member States, the CJEU has circumnavigated accusations of foisting fundamental rights onto the Member States which are alien to them. Similarly, the EU Charter now furnishes the CJEU with a codified Bill of Rights which, according to Article 52(4), requires the CJEU to interpret EU Charter provisions in harmony with the constitutional traditions common to the Member States. Moreover, Article 4(2) TEU enacts that the EU is to respect the national identities of the Member States inherent in their political and constitutional structures. In addition, Article 53 of the EU Charter precludes an interpretation of EU Charter provisions which is liable to adversely affect human rights and fundamental freedoms recognised in the Member States' constitutional traditions. The net-result of these textual references to the legal traditions of

the Member States is a body of jurisprudence that is (theoretically) rooted in, and legitimised by, national pluralism. As regards the enforcement stage of adjudication, it has been shown that three dominant factors or ‘elements of interpretation’ underpin the CJEU’s decision making process, namely: the scope of fundamental rights law (now enshrined in Article 51 of the EU Charter); the application of the proportionality principle (now enacted in Article 52 of the EU Charter); and the utilization of the margin of appreciation principle (which originates from the ECtHR).

To avoid recidivism, *prescriptive* remarks will be made in relation to each of the elements. As regards the scope of EU law, the CJEU has yet to posit a precise test of when exactly a situation falls within the scope of EU law in order to trigger the application of fundamental rights. In part, this stems from the diverse nature of litigation arising before the CJEU, but also because of the truism that there is no clear-blue-line demarcating EU law and national law. Nevertheless, early indications suggest that the Charter has facilitated a proliferation of rights-based references to the CJEU from national courts for interpretative guidance, many of which concern the issue of whether the Charter is applicable to the dispute at hand.²²² For the sake of legal certainty and expediency, the CJEU should grasp the nettle and posit a clearer test. In the absence of a clear test emanating from the CJEU’s case law, the Fundamental Rights Agency of the EU has called upon the EU institutions and national authorities to enact a ‘Guide’²²³ to clarify the scope of Union law and thus to serve as a tool for legal practitioners, policy makers and non-governmental organisations. On a similar note, the CJEU could heed the advice of AG Trstenjak and formally introduce ‘a dual test of

²²² Angela Ward, ‘Art 51 –Scope’ in Steve Peers and others (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing OUP 2014) 1453.

²²³ European Union Agency for Fundamental Rights, ‘Bringing the Charter to Life: Opportunities and Challenges of Putting the Charter of Fundamental Rights into Practice’ (Copenhagen Seminar Report Danish Presidency of the Council of the EU and EU Agency for Fundamental Rights, Copenhagen, 15-16 March 2012) <<http://fra.europa.eu/en/publication/2012/bringing-charter-life-opportunities-and-challenges-putting-eu-charter-fundamental>> accessed 17 July 2015.

proportionality' into its *modus operandi* in order to assess not only whether a restriction placed on a Treaty freedom is proportionate, but also whether a restriction on a fundamental right in the exercise of a Treaty freedom is proportionate, namely, whether it is 'appropriate, necessary and reasonable for the attainment of the interests protected by that fundamental freedom'.²²⁴ After all, both the Treaty Freedoms and fundamental rights constitute primary sources of EU law; hence the CJEU ought to place them on an equal footing in its decision-making process. Lastly, the CJEU should grab the bull by the horns in relation to the margin of appreciation principle which, in contrast to the scope of EU law and proportionality, has not been enshrined in the EU Charter. The absence of a codified reference to the principle inevitably places the onus on the CJEU to be explicit regarding not only the situations in which the principle is applicable, but also how wide or narrow the principle ought to apply.

²²⁴ Case C-271/08 *Commission v Germany* [2011] All ER (EC) 912, Opinion of AG Trstenjak, [190]-[192].

CHAPTER III: THE APPLICATION OF FUNDAMENTAL RIGHTS TO EU LEGISLATIVE AND ADMINISTRATIVE ACTION

I. Introduction

The Charter of Fundamental Rights of the European Union is addressed, first and foremost, to the institutions of the Union.¹ The intention of this chapter will be to examine the application of fundamental rights to EU legislative and administrative action. In particular, it will trace the evolution of the CJEU's jurisprudence over three distinct phases, namely, the epoch pre-dating the adoption of the Charter; followed by the period in which the Charter was solemnly proclaimed; concluding with the current, post-Lisbon, era, in which the Charter has binding legal force. As regards the first phase, the aim will be to assess the methodological blueprint established by the CJEU, which includes: the incorporation of fundamental rights into the general principles of law; the rule that fundamental rights are to be secured within the framework of the structure and objectives of the Union; and the different sources of inspiration for the protection of fundamental rights. In conjunction, an appraisal of the CJEU's review of administrative action for compliance with fundamental rights will be undertaken. In relation to the second phase, the objective will be to highlight the fleeting and reticent references made to the Charter by the EU Courts and by the Advocates General. Analysis of the third phase will then centre on whether the legal status of the Charter has enhanced the protection of fundamental rights when reviewing EU measures. In keeping with the ethos of the thesis, the gaze of the chapter will be on judicial enforcement rather than law and policy making. Nonetheless, percolating beneath this judicial narrative is the implementation and integration of fundamental rights in general and of the Charter in

¹ Article 51 of the EU Charter of Fundamental Rights.

particular by the EU political institutions (the European Parliament,² the European Commission³ and the Council of the EU),⁴ and also independent oversight from the Fundamental Rights Agency of the EU.⁵ This integration process should, in theory, enhance legislative protection of rights and, in turn, minimize judicial invalidation of EU legislation.

II. The Early Blueprint for Reviewing EU Legislation on Fundamental Rights Grounds

In order to review the validity of EU measures, the CJEU had recourse to the general principles of law.⁶ The incunabula of specific general principles, such as proportionality and non-discrimination, can be traced back to litigation arising before the CJEU under the Coal and Steel Community Treaty.⁷ As an overarching legal category, therefore, the general principles pre-date the emergence of fundamental rights as grounds for reviewing secondary legislation. As stated in chapter I, the validity of an EU measure, be it a regulation or directive, can be challenged via the general principles either directly on the basis of Article

² The European Parliament may file an action for annulment under Article 263 TFEU on grounds of human rights (see e.g. Case C-540/03 *Parliament v Council* [2006] ECR I-5769). As a co-legislator, the Parliament can also entrench the role of fundamental rights in the legislative process. Moreover, the Parliament may seek guidance from the EU Fundamental Rights Agency as regards pending legislative proposals. In addition, Article 36 of the Rules of Procedure of the European Parliament states that the Parliament, in all its activities, shall fully respect the EU Charter of Fundamental Rights and the general principles of EU law.

³ Commission, 'Report on the Practical Operation of the Methodology for a Systematic and Rigorous Monitoring of Compliance with the Charter of Fundamental Rights' COM (2009) 205 final. The Commission also undertakes impact assessments which take into consideration human rights and annual reports on the implementation of the Charter. See also: J Butler, 'Ensuring Compliance with the Charter of Fundamental Rights in Legislative Drafting: The Practise of the European Commission' (2012) 37 ELR 397.

⁴ For compliance by the Council with fundamental rights in relation to legislative action see: Council of the European Union, 'Council conclusions on the Council's actions and initiatives for the implementation of the Charter of Fundamental Rights of the EU' (23 May 2011) <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/genaff/122181.pdf> accessed 25 August 2014.

⁵ Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights [2007] OJ L53/1 - stipulates that the Agency is to 'provide the relevant institutions, bodies, offices and agencies of the Community...with assistance and expertise relating to fundamental rights'.

⁶ Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (5th edn, OUP 2011) 519.

⁷ Case 8/55 *Federation Charbonniere de Belgique v High Authority* [1955] ECR 292 (proportionality); Case 14/59 *Pont-a-Mousson v High Authority* [1959] ECR 215 (non-discrimination); Case 9/56 *Meroni v High Authority* [1958] ECR 133 (rule of law); Case 13/57 *Eisen- und Stahlindustrie v High Authority* [1958] ECR 265 (equality).

263 TFEU or indirectly on the basis of Article 267 TFEU. Moreover, in some cases a national court may make a reference under Article 267 TFEU with no question arising regarding the compatibility of a national implementing measure with the general principles *per se*. National implementing measures may serve simply as the ‘trigger’ for a domestic court to make a reference to the CJEU for interpretative guidance with respect to the impugned EU measure.⁸

The jurisprudential narrative is notorious. In *Geitling v High Authority of the ECSC* the CJEU explicitly rejected the applicant’s submission, based on Art.14 of the Basic Law of Germany guaranteeing the right to property, in order to challenge the validity of a decision of the High Authority. The CJEU held that it was not its role to ensure the observance of ‘rules of internal law, even constitutional rules, enforced in one or other of the Member States’. It further held that, ‘Community Law, as it arises under the ECSC Treaty, does not contain any general principle, express or otherwise, guaranteeing the maintenance of vested *rights*’.⁹

The ambit of the general principles was extended in *Stauder v City of Ulm*. The referring court sought to ascertain whether a Commission decision was compatible with ‘the general principles of Community law in force’.¹⁰ The aim of the decision was to provide subsidised butter, owing to a surplus in the Common Market, to nationals on social welfare. However, Art.4 of the German version of the decision made entitlement to the subsidy conditional upon disclosure of the recipient’s name. Through reliance on the French and Italian versions of the decision, which did not require divulgence of the beneficiary’s name, the seminal, yet laconic, response of the CJEU was that ‘the decision in question does not contain any element that might jeopardise the *fundamental rights* of the individual contained

⁸ Angela Ward, ‘Article 51 -Scope’ in Steve Peers and others (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014) 1442.

⁹ Cases 36, 37, 38 and 40/59 *Geitling v High Authority* [1960] ECR 423, 439.

¹⁰ Case 29/69 *Stauder v City of Ulm* [1969] ECR 419 [1].

in the general principles of the law of the Community of which the Court must ensure the observance'.¹¹

The novelty of the judgment was not the materialisation of the general principles, relied on by the national court, but rather the CJEU's assertion that fundamental rights formed part of them, albeit without elaboration as to where the said rights derived from. While the CJEU did not flesh out the nature or origin of these newly-minted fundamental rights, AG Roemer did stress that the Community measure was to be assessed not in the light of national constitutional rights (Mr Stauder relied on Articles 1 and 3 of German Basic Law), but in the light of the general principles, which were informed by a 'comparative evaluation' of the 'common conceptions' of national constitutional law, and of 'national basic rights'.¹²

Further guidance was furnished on the method by which fundamental rights were to be safeguarded as part of the general principles in the seminal case of *Internationale Handelsgesellschaft*. The material issue, according to the referring national court, was whether a Community Regulation¹³ infringed the principles of freedom of action and disposition, of economic liberty and of proportionality as protected under German Basic Law.¹⁴ The CJEU stressed that the validity of Community measures could not be assessed against the threshold of national law. It also re-affirmed that fundamental rights formed an integral part of the general principles. However, and building on *Stauder*, while those rights

¹¹ *ibid* [7].

¹² Case 29/69 *Stauder v City of Ulm* [1969] ECR 419, Opinion of AG Roemer, [1].

¹³ Council Regulation (EEC) 120/67 of 13 June 1967 on the common organisation of the market in cereals [1967] OJ 117/33.

¹⁴ Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125 [2].

were ‘inspired by the Constitutional traditions common to the Member States’, they were to be secured ‘within the framework of the structure and objectives of the Community’.¹⁵

The CJEU’s declaration that Community measures could not be reviewed in the light of domestic law affirmed the primacy of Community law but also, as a corollary, the autonomous status of the general principles. By rooting the general principles in the constitutional traditions of the Member States, the CJEU also circumnavigated any accusation of concocting fundamental rights alien to the Member States. Conversely, those rights were to be secured within the Community’s framework, which meant that fundamental rights could be lawfully restricted *vis-à-vis* the economic objectives enshrined in secondary legislation.

A milestone in the CJEU’s jurisprudence is the *Nold v Commission* case. The dispute concerned an annulment action of a Commission decision. The applicant, a coal wholesaler, argued that revised sales conditions pertaining to contract duration (two years) and minimum purchase quantities (6,000 tonnes of coal) brought about by the decision excluded it from direct supply in the coal industry. The applicant invoked a raft of property right sources in its defence, including the German Constitution, the constitutions of the Member States, and international instruments: in particular, the ECHR.¹⁶ The CJEU swiftly dismissed the claim that the decision could be reviewed in the light of national law. In line with prior case law, it stated that based on the constitutional traditions of the Member States, fundamental rights formed an integral part of the general principles. Two tenets were then added to its fledgling case law. First, without *explicit* reference to the ECHR, it held that international treaties to which Member States were contracting parties could ‘also supply indications which may be taken into account within the framework of Community law’.¹⁷ Second, and taking its cue from *Internationale Handelsgesellschaft*, it held that while fundamental rights common to the

¹⁵ *ibid* [4].

¹⁶ Case 4/73 *Nold v Commission* [1974] ECR 491[12].

¹⁷ *ibid* [13].

Member States were safeguarded within the Community legal order, they were not absolute and could be limited by the objectives of general interest pursued by the Community ‘so long as the substance of the rights [was] not impaired.’¹⁸

The CJEU’s recourse to international treaties, albeit as a non-binding guideline, coupled with the requirement that the substance of the right in question be left unimpaired constituted, in large measure, a reversal of engines by the CJEU as regards the protection of fundamental rights in the Community legal order, that is, from mere lip service to having legal bite. The CJEU now had at its disposal a test on limitations of rights akin to that under the ECHR.

In *Hauer v Land Rheinland-Pfalz*, the formula adopted in *Nold v Commission* was cemented. The litigation concerned Art.2 of a Community Regulation¹⁹ which precluded the plantation of vines for a fixed period of three years owing to a surplus of wine in the Community. Mrs Hauer - the applicant - owned a plot of land for wine growing, and sought to challenge the Regulation by invoking her right to property and freedom to pursue a trade under Arts.12 and 14 of the Constitution of the Federal Republic of Germany.

The CJEU reiterated its now familiar melody that measures adopted by the Community institutions could only be reviewed in the light of Community law, namely via the general principles of law, but that international treaties could also ‘supply guidelines’.²⁰ Hot on the heels of earlier case law, in particular *Rutili v Minister of the Interior*,²¹ and the

¹⁸ Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727 [14]-[15].

¹⁹ Council Regulation (EEC) 1162/76 of 17 May 1976 on measures designed to adjust wine-growing potential to market requirements [1976] OJ L135/1

²⁰ Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727 [15].

²¹ Case 36/75 *Roland Rutili v Minister of the Interior* [1975] ECR 1219 [32].

joint declaration made by the European Parliament, the Council and the Commission in 1977 to uphold human rights,²² reference was also made to the ECHR as an instructive guideline.

In terms of adjudication, the CJEU drew on the first Protocol of the ECHR, finding that the contested Regulation did not constitute a *deprivation* of property (precluded by the ECHR) since the applicant remained free to utilise her plot of land for alternative purposes. However it did amount to a *restriction* which, under Art.1 of the Protocol, was permissible in order to enable the State to enforce laws controlling the use of property ‘in accordance with the general interest’.²³ The issue, therefore, was whether the restriction related to the objective of general interest pursued by the Regulation, and whether it impaired the substance of the right to property. The CJEU affirmed that the objective of the Regulation, in the context of the common organisation of the market in general and the wine-sector in particular, was to control surpluses. It was also a measure of temporary nature. Moreover, if continuous over-production had been permitted, it would have entailed more onerous measures in the future. On that basis, the limitation imposed by the Regulation was justified by the objectives pursued.²⁴

A. Critique

In hindsight, it can be seen that the path blazed by the CJEU in these early cases paved the way for the judicial method, or perhaps lack-of, adopted in subsequent cases, particularly with regards to the right to property and freedom to pursue a trade in the context of the CAP.²⁵ As noted in chapter I, this led critics of the CJEU to conclude that, notwithstanding

²² Joint Declaration by the European Parliament, the Council and the Commission [1977] OJ C103/1.

²³ Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727 [19].

²⁴ *ibid* [30].

²⁵ See for example: Case C-280/93 *Germany v Council of the EU* [1994] ECR I-4973 [78]; Case C-84/95 *Bosphorus Hava Yollari Turizm Ve Ticaret As v Minister for Transport, Energy and Communications, Ireland*

the CJEU's discourse of rights, it was 'the general Community rule or the Community objective'²⁶ enshrined in secondary legislation which prevailed over claims based on fundamental rights.

III. Review of EU Administrative Acts

The role of fundamental rights was also gaining traction in the field of staff disputes. Prior to the establishment of the European Civil Service Tribunal, it was the (then) CFI and the Court of Justice (CJEU) adjudicating disputes of Community officials. The CFI was created, *inter alia*, to lessen the CJEU's case law and the ECST was created in turn to mitigate the case load of the CFI.²⁷ An inspection of a handful of cases decided by the CJEU before the creation of the ECST reveals a fragmented methodological framework for protecting rights.

Early signs of 'rights' infiltrating staff cases can be seen in *Sabbatini v European Parliament*.²⁸ The case concerned the termination of the applicants' expatriation allowances pursuant to Art.4 of the Civil Service Regulations. The applicants, both female officials, lost their entitlement to an expatriation allowance on the basis of Art.4 of the Regulations which made the allowance conditional on acquiring the status of head of the family when marrying. Under Art.1 of the Regulations, a female official was deemed to be head of the family only if

and Another[1996] ECR I-3953 [21]; Joined Cases C-20/00 and C-64/00 *Booker Aquaculture Limited v The Scottish Ministers* [2003] ECR I-7411 [67]-[68].

²⁶ Jason Copell and Aidan O'Neil, 'The European Court of Justice: Taking Rights Seriously?' (1992) 29 CML Rev 669, 682.

²⁷ A right of appeal to the (now) General Court of decisions made by the ECST flows from Art.256(2) TFEU, and decisions made by the General Court may, in limited circumstances, be reviewed by the CJEU. More generally, see: Kieran Bradley, 'The Application of the Charter of Fundamental Rights in EU Staff Law' (2014) 15 ERA Forum 561; Siofra O'Leary, 'Applying Principles of EU Social and Employment Law in EU Staff Cases' (2011) 36 EL Rev 767.

²⁸ Case 20/71 *Sabbatini v European Parliament* [1972] ECR 345

the husband was ill or disabled.²⁹ The applicants, invoking the legal principle of non-discrimination based on sex, sought to annul the decisions terminating their allowances.

AG Karl Roemer opined that the applicants failed to demonstrate that the prohibition of discrimination between men and women was ‘a legal principle of a higher legal rank’³⁰ than the impugned provision of the Regulations. For the AG, no such general principle existed as the legal systems of the Member States did not contain any principle safeguarding ‘absolute equality’³¹ in relation to pay between men and women. The CJEU was less methodical, but more accommodating. Without addressing whether equality of pay between men and women was a general principle, the CJEU annulled the decisions as the Regulations introduced an ‘arbitrary difference’³² between the treatment of male and female officials.

A more insightful authority is *Prais v Council*.³³ Mrs Prais invoked Staff Regulations to annul a Council decision. Prais had applied to the Council for a position as a legal translator. On 23 April 1975, Prais was notified by the Council that her application had been accepted and that she had been admitted to sit a written exam on 16 May.³⁴ On 25 April, Prais informed the Council that, as she was of Jewish faith, she would be unable to participate as it fell on the first day of a Jewish feast. She asked to sit the exam on an alternative date, but on 5 May the Council informed her that, in the interest of fairness, all candidates should sit the exam on the same date using the same paper, and that no alternative date was viable.³⁵

²⁹ *ibid*, Opinion of AG Karl Roemer, [1].

³⁰ *ibid* [2].

³¹ *ibid* [2].

³² *ibid* [13].

³³ Case 130/75 *Prais v Council* [1976] ECR 1589; Ioannis Dimitrakopoulos, ‘Scrutiny: Organisation of Community Recruitment Competitions, Pregnancy, Childbirth and Equal Treatment of Candidates’ (2008) 14 EPL 165, 175.

³⁴ Case 130/75 *Prais v Council* [1976] ECR 1589, Opinion of AG Warner.

³⁵ *ibid* [3].

Prais sought to annul the Council's Decision of 5 May. She even challenged the outcome of the competition, seeking an annulment of the *result* of who was appointed on the basis that her refusal may have affected the outcome. Prais relied on Art.27 of the Staff Regulations which read 'Officials shall be selected without reference to race, creed or sex'. Prais also relied on Art.9 of the ECHR, Member States' constitutional traditions, Art.21(2) of the Universal Declaration of Human Rights, and Art.25 of the International Covenant on Civil and Political Rights.³⁶ Prais argued that the Council should avoid fixing tests on holy days of well-known religions and make provisions for invigilated exams on substitute dates.³⁷

In a robust opinion AG Warner highlighted a flaw in the applicant's tale of events. In the letter dated 25 April, Prais wrote '[a]s indicated in my application form, I am of the Jewish faith'. In fact, Prais made no such claim in her application. Second, Prais furnished the CJEU with insufficient proof that Member States required public authorities to avoid particular dates which fall on religious festivals. Third, it was erroneous of Prais to infer from the Staff Regulations that a 'positive duty' existed for the institutions to ensure participation in any competition for entry into the service. This was not the intention of the authors, and such a guarantee would require 'elaborate administrative machinery'. Finally, as regards Art.9 ECHR and ECtHR case law, they had no tangible relevance to the dispute.³⁸

In a rapid judgment the CJEU reached the same conclusion, albeit via a different route. It observed that the principle of *equality* required that candidates should be subjected to tests under the same conditions, though this was to be counter-balanced with the interests of candidates not to be examined on certain dates. It concluded that neither religious freedom nor the Staff Regulations could be construed as placing a duty on the appointing authority to

³⁶ Equal opportunity of access to the public service regardless of race, colour, sex, language, religion or any other distinction.

³⁷ Case 130/75 *Prais v Council* [1976] ECR 1589, Opinion of AG Warner.

³⁸ *ibid.*

avoid conducting tests on certain days which conflict with religious festivals, for which that authority had not been made aware. In this particular case the Council had not been informed by the applicant in good time and it was within its discretion to refuse an alternative date.³⁹

As a human rights arbiter the CJEU in *Prais* was evidently in its infancy. While the applicant claimed the Council decision was in breach of her freedom of religion, and that it was the duty of the CJEU to ensure its observance, the CJEU seemed reticent. It made no determination as to whether freedom of religion was a general principle of law. Nor did it establish any test whereby the legality of restricting the right in question could be ascertained. It recognised freedom of religion as a human right only insofar as the Council was obliged to take account of the applicant's religion if the latter had given the former adequate notice of it.

In *X v Commission* the CJEU was clearly more judicious as a human rights arbiter.⁴⁰ Mr X applied to be a temporary typist at the Commission and was requested to undertake a medical examination carried out by a Commission medical officer. After taking a clinical and biological examination, Mr X was asked, but declined, to undergo a test to screen for HIV antibodies (AIDS).⁴¹ Results from the clinical examination pointed towards the existence of poly-adenopathy (affecting the lymph-nodes) and, in the light of this finding, the medical officer conducted a blood test (T4/T8 lymphocyte count), *without Mr X's consent*, from which it was deduced that he was suffering from a serious immune deficiency indicative of the existence of AIDS. He was duly informed of his ineligibility to work as a staff typist.

Mr X sought to annul the Commission's decision not to hire him, arguing that he had been subjected to a clandestine AIDS test and that in so doing the Commission acted in breach of Art.8 of the ECHR. Reversing the decision of the CFI (now General Court), the

³⁹ *ibid* [18]-[19].

⁴⁰ Case C-404/92P *X v Commission* [1994] ECR I-4737; Patrick M. Twomey, 'Joined Cases T-121/89 & T-13/90, *X v Commission*, ECR II-2195, on appeal Case C-404/92 P, *X v Commission*, Judgment of the Court of Justice 5 October 1994' (1995) 32 CML Rev 1013.

⁴¹ *ibid* [2].

CJEU took the view that the Commission could not conduct a test, which a medical officer deems necessary in order to ascertain physical fitness, without the applicant's consent. Equally, however, if the applicant withheld consent the Commission could not be obliged to run the risk of employing him. The CJEU opined that although respect for private life, and in particular medical confidentiality, was a human right safeguarded in the Community, that right could be subjected to restrictions so long as they corresponded to the objectives of public general interest and did not constitute a disproportionate and intolerable interference which infringed the substance of the right protected.⁴² Using this formula, the CJEU ruled that while pre-recruitment medical tests accorded with the interests pursued by the EC institutions, conducting tests without consent did not justify that interest. The CJEU concluded that the right to respect for private life requires that a person's refusal be respected in its entirety.⁴³

From a human rights perspective, the merit of the CJEU's judgment is that the right to privacy required not only the duty not to test for AIDS against the applicant's consent, but also, and contrary to the CFI's ruling, not to conduct tests which might point towards the existence of AIDS. The absence of consent had to be respected in its *totality*. From a methodological perspective, however, the CJEU confined itself to its EU test on limitations of rights established in market-oriented cases like *Hauer* (rather than drawing on the ECHR).

Lastly, a ubiquitous staff case is *Connolly v Commission*.⁴⁴ Mr Connolly was a Commission official specialising in Community monetary affairs who published a blazing critique entitled '*The Rotten Heart of Europe -The Dirty War for Europe's Money*' whilst he was on leave without first seeking permission. Mr Connolly was subsequently suspended

⁴² Case C-404/92P *X v Commission* [1994] ECR I-4737 [18].

⁴³ *ibid* [23].

⁴⁴ Case C-274/99 P *Bernard Connolly v Commission* [2001] ECR I-1611; Hugh O'Donoghue, 'The Connolly Case: An Affirmation of Europe's Commitment to Human Rights?' (2002) 3 *Hibernian LJ* 115.

following a decision taken by the relevant authority for infringing Arts.12 and 17 of the Staff Regulations. Mr Connolly sought, unsuccessfully, to annul that decision before the CFI.

On appeal to the CJEU, Mr Connolly argued that his dismissal on the basis of Arts.12 and 17 of the Regulations was in breach of the principle of freedom of expression enshrined in Art.10 of the ECHR. According to established case law, Art.12 of the Regulations required officials to ‘present a dignified image’ and to uphold a ‘duty of loyalty’.⁴⁵ Art.17 of the Regulations also mandated officials to obtain ‘prior consent’ for publications.⁴⁶ The CJEU, having recourse to ECtHR jurisprudence, accepted that whilst freedom of expression was not absolute, limitations to it had to be strictly interpreted. Drawing on the case law of the ECtHR when interpreting Art.10(2) of the ECHR, the CJEU noted that restrictions must be ‘prescribed by law’ and ‘necessary’. Any limitation also had to be ‘proportionate to the legitimate aim pursued’.⁴⁷ The CJEU concluded that, pursuant to the Regulations, it was legitimate to limit the rights of Community public servants in order to preserve the requisite degree of trust between the institution and its officials. Yet, while prior permission was required for publication, permission could be refused only in exceptional circumstances which were ‘liable to cause serious harm to the Communities’ interests’.⁴⁸

Connolly v Commission is a landmark judgment owing to the CJEU’s affirmation of the importance of fundamental rights. The CJEU had, at this juncture, established a rich body of human rights jurisprudence for it to draw on. In addition, Art.6(2) of the Treaty of the EU, which the CJEU made reference to, had codified the EU’s commitment to the protection of fundamental rights as derived from the Member States’ constitutional traditions and the ECHR. Most significantly, however, the CJEU imported the ECtHR’s step-by-step approach

⁴⁵ *ibid* [17].

⁴⁶ *ibid* [19].

⁴⁷ Case C-274/99 P *Bernard Connolly v Commission* [2001] ECR I-1611 [40]-[41].

⁴⁸ *ibid* [53].

to ascertaining whether limitations placed upon human rights were permissible. Now, Article 52(1) of the Charter of Fundamental Rights codifies an EU test on limitations of rights whilst Article 52(3) of the Charter enacts that rights contained in the Charter which correspond to rights guaranteed by the ECHR are to be given the same scope and meaning.

IV. The Charter of Fundamental Rights of the EU: A Solemn Proclamation, Nice 2000

The evolution of the EU Charter of Fundamental Rights, from a proposal instigated by the European Council in Cologne in 1999 (to make the *acquis* of the EU pertaining to fundamental rights more visible), to its solemn political proclamation in Nice in 2000 by the Commission, Council and Parliament, to its acquisition of primary legal status after the entry into force of the Lisbon Treaty in 2009, is well documented.⁴⁹ The intention in this section will be to consider the application of the Charter, in relation to review of EU measures, by the EU Courts in the period after it was solemnly proclaimed and prior to the Lisbon Treaty.

The Charter's debut came, not in litigation arising before the CJEU, but before the (then) CFI in the case of *Max.Mobil v Commission*.⁵⁰ The applicant, a GSM mobile phone network operator incorporated under Austrian law, sought a partial annulment of a Commission decision rejecting the former's complaint lodged against Austria.

The CFI, noting that the contested decision constituted a rejection of a complaint, linked the proper treatment of a complaint to the right to sound administration which was protected under EC law as a general principle. In addition, the CFI cited Art.41 of the Charter (the right to have affairs handled impartially, fairly and within a reasonable time by

⁴⁹ David Anderson and Cian Murphy, 'The Charter of Fundamental Rights' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds.), *EU Law After Lisbon* (OUP 2012); Gráinne De Búrca, 'The Drafting of the EU Charter of Fundamental Rights' (2001) 26 *EL Rev* 126; Paul Craig and Gráinne De Búrca, *EU Law: Text, Cases, and Materials* (5th edn, OUP 2011) 394.

⁵⁰ Case T-54/99 *Max.Mobil Telekommunikation Service GmbH v Commission* [2002] ECR II-313. See also Case T-193/04 *Tillack v Commission* [2006] ECR II-3995 [127] where the CFI cited Art.41 of the Charter.

the institutions and bodies of the Union)⁵¹ and Art.47 of the Charter (the right to an effective remedy).⁵² As is often the case with alleged rights-based violations of Community acts (*Stauder, Hauer, Internationale Handelsgesellschaft et al*), the action was dismissed: in this instance because no evidence existed to demonstrate manifest misjudgement by the Commission in not initiating proceedings against Austria.

In *D v Council*,⁵³ AG Mischo drew on Art.9 of the Charter (on the right to marry and found a family) but also the explanations pertaining to Art.9 in order to reinforce the distinction between marriage (two people of the opposite sex) and a partnership (two people of the same sex).⁵⁴ On this basis, the Charter was used by the AG to dismiss the applicant's claim that the CFI erred in its interpretation of the Staff Regulations (in finding that D, a Council employee, was not entitled to the same household allowance as an employee in a marriage). As for the CJEU, no reference was made to the Charter.

A fleeting reference to the Charter was also made by AG Jacobs in the case of *Z v Parliament*⁵⁵ where he cited Art.41, though no substantive review was conducted in the light of that provision and, akin to *D v Council*, the CJEU did not follow the AG and resolved the dispute without recourse to the Charter. Similarly, in *Netherlands v Council*, AG Jacobs made a passing reference to Art.1 of the Charter in order to affirm that human dignity was protected in the Community legal order. AG Jacobs also referred to Art.3(2) of the Charter pertaining to free and informed consent.⁵⁶ The CJEU resolved the dispute without

⁵¹ Case T-54/99 *Max.Mobil Telekommunikation Service GmbH v Commission* [2002] ECR II-313 [48].

⁵² *ibid.*

⁵³ Joined Cases C-122/99 P and C-125/99 P *D and Sweden v Council of the EU* [2001] ECR I-4319; Emily Reid and Eugenia Caracciolo Di Torella, 'The Changing Shape of the "European Family" and Fundamental Rights' (2002) 27 EL Rev 80, 88.

⁵⁴ Joined Cases C-122/99 P and C-125/99 P *D and Sweden v Council of the EU* [2001] ECR I-4319, Opinion of AG Mischo, [97].

⁵⁵ Case C-270/99 P *Z v European Parliament* [2001] ECR I-9197.

referencing the Charter. In this situation, however, it was because reliance by the applicant on the fundamental right to human dignity was ‘misguided’.⁵⁷

The CJEU broke its silence in the case of *European Parliament v Council*.⁵⁸ While the Parliament invoked Art.7, Art.21 and Art.24 of the EU Charter in an action for annulment of the so-called Family Reunification Directive,⁵⁹ the Council countered that the Directive should not be reviewed in the light of the Charter as it did ‘not constitute a source of Community law’.⁶⁰ For its part, the CJEU affirmed that the Charter was not a legally-binding instrument, but that the Community legislature did cite its importance in the preamble to the Directive by stating that it observes the principles enshrined in the Charter.⁶¹ After this brief mention, however, the Charter played no further part as the CJEU switched to the ECHR, as a source of inspiration, in order to review the impugned provisions of the Directive.

In *Kadi v Council of the European Union*⁶² a reference to Art.47 of the Charter surfaced towards the end of the judgment (in paragraph 335) to support the finding that, based on the legal traditions of the Member States, the principle of effective judicial protection was a general principle of Community law which was, moreover, protected under the Charter. Despite the insouciant nod to the Charter, at the time of the judgment the general principles of law remained the jewel in the CJEU’s crown, as evidenced from its reasoning. The CJEU asserted that the Community was based on the rule of law (itself a general principle) and that neither the Member States nor the Community institutions were immune

⁵⁶ Case C-377/98 *The Netherlands v Parliament and Council* [2001] ECR I-7079, Opinion of AG Jacobs, [197].

⁵⁷ Case C-377/98 *The Netherlands v Parliament and Council* [2001] ECR I-7079 [79].

⁵⁸ Case C-540/03 *European Parliament v Council* [2006] ECR I-5769; Eleanor Drywood, ‘Giving with One Hand, Taking with the Other: Fundamental Rights, Children and the Family Reunification Decision’ (2007) 32 EL Rev, 396, 400.

⁵⁹ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L251/12.

⁶⁰ Case C-540/03 *European Parliament v Council* [2006] ECR I-5769 [34].

⁶¹ *ibid* [38].

⁶² Joined Cases C-402/05 P & C-415/05 P *Kadi v Council of the EU* [2008] ECR I-6351.

from judicial review.⁶³ Moreover, given that fundamental rights formed an integral part of the general principles, the observance of which the CJEU was bound to ensure, ‘the obligations imposed by an international agreement could not have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights’.⁶⁴

A. Critique

It is axiomatic that the EU Courts were reluctant to attach any tangible value to the Charter. And it is not hard to discern why. The general principles of law, fleshed out over time by the CJEU, have primary legal status. The Charter on the other hand, whilst both wide in its ambit and an express amalgamation of existing rights, was a non-binding instrument. Logic dictates that the EU Courts were awaiting some sort of green light. Yet still, the Charter did make its entrance into the legal landscape, albeit as a point of reference.

V. The Charter Becomes a Legally-Binding Source of Law, Lisbon Treaty 2009

A new dawn for the protection of fundamental rights was heralded by the entry into force of the Lisbon Treaty insofar as the EU Courts had at their disposal a Bill of Rights with the same legal value as the Treaties (Art.6(1) TEU). The pertinent question, however, is whether the Charter has, post-Lisbon, enhanced the CJEU’s case law in terms of legal method when reviewing EU legislation. The format of this section will comprise an overview of the factual and legal context of the selected cases, followed by a critique of the CJEU’s *modus operandi*.

⁶³ *ibid* [281].

⁶⁴ *ibid* [285].

A. *Volker und Markus Schecke GbR v Land Hessen*

In *Volker und Markus Schecke GbR v Land Hessen*,⁶⁵ the CJEU - sitting in Grand Chamber - showcased the potency of the Charter. The applicants, Volker und Markus Schecke GbR (a legal partnership) and Mr Eifert (a natural person), operated agricultural businesses in Germany. In 2008, they applied for and received various European Agricultural subsidies (the EAGF and the EAFRD) pursuant to Council Regulation No.1290/2005,⁶⁶ and implemented by Commission Regulation No.259/2008.⁶⁷ In the application form for the subsidies the applicants signed the following notice: ‘I am aware that Art.44a of Regulation No.1290/2005 requires publication of information on the beneficiaries of the EAGF and the EAFRD and the amounts per beneficiary’.

The German Authorities, the Land Hessen, published the details of the beneficiaries on the Internet via a website.⁶⁸ Having allegedly been chastised in their local community as ‘profiteers’,⁶⁹ the applicants sought to prohibit the dissemination of their personal details in proceedings brought before the German Administrative Court, which then made a reference to the CJEU.

In a nutshell, the resolution of the dispute hinged on: the principle of transparency (Art.1 and Art.10 TEU and in the recitals in both Regulations) of EU expenditure in the

⁶⁵ Joined Cases C-92/09 and 93/09 *Volker und Markus Schecke Gbr v Land Hessen* [2012] All ER (EC) 127; Charlotte Baggot Tranberg, ‘Proportionality and Data Protection in the Case Law of the European Court of Justice’ (2011) 1 IDPL 239, 245.

⁶⁶ Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy [2005] OJ L 209/1.

⁶⁷ Commission Regulation (EC) No 259/2008 of 18 March 2008 laying down detailed rules for the application of Council Regulation (EC) No 1290/2005 as regards the publication of information on the beneficiaries of funds deriving from the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD) [2008] OJ L 076/28.

⁶⁸ The names of beneficiaries, their localities, postal codes and the amounts awarded are made available on the website (see Opinion of AG Sharpston, Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke Gbr v Land Hessen* [2012] All ER (EC) 127 [52]).

⁶⁹ Sonia Morano-Foadi and Stelios Andreadakis, ‘Reflections on the Architecture of the EU After the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights’ (2011) 5 ELJ 595, 608.

context of the Common Agricultural Policy on the one hand and the protection of personal data (fundamental rights) on the other.

Advocate General Sharpston quickly established a rights-based tone by stating: ‘I regard it as inconceivable that EU secondary legislation that contravened fundamental rights in general, or the ECHR or the Charter in particular, could be upheld as valid by the Court’.⁷⁰ The AG then opined that to assess the validity of the contested provisions, the objective of transparency ‘in the specific context of the two Regulations’⁷¹ first had to be ascertained. The AG noted that according to the Commission the objective was to generate awareness and stimulate *public debate* as to the most deserving recipients of subsidies.⁷² The Council, however, submitted that, in addition, the objective driving the publication of the beneficiaries’ details was to increase public scrutiny over CAP expenditure in a bid to *mitigate fraud*: a claim which the Commission distanced itself from.⁷³ The EU institutions were not, therefore, singing from the same hymn sheet in the oral hearing before the CJEU. AG Sharpston made clear that while it was not for the CJEU to prescribe the objective pursued by the EU legislature, it could not simply ‘rubber stamp’⁷⁴ legislation which, although relating to democratic principles, failed to provide specific justifications such that the CJEU could balance competing interests.

What this meant in practice was that since the Union institutions had not put forward a satisfactory explanation as to why the contested provisions required publication of the beneficiaries’ personal details in the specific form chosen, the CJEU would be unable, according to the AG, to ascertain whether the restriction placed upon the applicants’

⁷⁰ Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke Gbr v Land Hessen* [2012] All ER (EC) 127, Opinion of AG Sharpston, [64].

⁷¹ *ibid* [105].

⁷² *ibid* [114].

⁷³ *ibid* [117].

⁷⁴ *ibid* [123].

fundamental rights was proportionate to the ambiguous aim pursued. Indeed, no test for compliance with the principle of proportionality was undertaken by the AG.

The trajectory of the CJEU's judgment differed from the Opinion of the AG in one major way, namely its exclusive reliance on the Charter. At the outset, the CJEU noted that in accordance with Art.6(1) TEU the Charter shall have the same legal value as the Treaties. On that basis, the contested provisions were to be assessed in the light of the Charter, and in particular Art.8 (protection of personal data) which was closely related to Art.7 (right to private life).⁷⁵

The CJEU also drew on Art.52 of the Charter, enshrining the principle of proportionality, according to which any limitation placed upon the exercise of such rights must be (i) provided for by law, (ii) respect the essence of those rights, and subject to the proportionality principle (iii) be necessary and genuinely meet the objectives of general interest recognised by the EU or (iv) the need to protect the rights and freedoms of others.⁷⁶

Applied to the facts at hand, the CJEU rearranged the formula somewhat. It found that the publication of the beneficiaries' personal data, made available on a public website, constituted an *interference* with the right to a private life.⁷⁷ The respondents' submission, that no interference had occurred since the applicants had been informed and given their consent to the publication, was given short shrift by the CJEU. A lucid distinction was drawn by the CJEU between *consenting* to the publication of personal data and being *aware* that the legislation required the publication of their data.⁷⁸ As to whether the interference was justified, it was provided for by law as Art.1 and Art.2 of the Regulation required the

⁷⁵ Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke Gbr v Land Hessen* [2012] All ER (EC) 127 [45-47].

⁷⁶ *ibid* [50].

⁷⁷ *ibid* [58].

⁷⁸ *ibid* [61-64].

publication. The next issue was whether the interference pursued an objective of general interest pursued by the Union. In contrast to AG Sharpston, the CJEU unhesitatingly ruled that the principle of transparency necessitated ‘public control’ over EU expenditure.⁷⁹ So far as the principle of proportionality was concerned, the CJEU accepted the desirability of tax payers being made aware of how public funds were allocated, however, there was no evidence to suggest that the Council and the Commission had contemplated less-intrusive measures e.g. limiting publication of the beneficiaries’ data to the time-frame for which they received funding, or the frequency of funding received.⁸⁰ Thus, the institutions could have pursued the objectives set out in the contested provisions without interfering, to the extent that this specific publication scheme did, with the applicants’ fundamental rights. The impugned provisions were therefore invalid insofar as they concerned *natural* persons.⁸¹

(i) Critique

The CJEU’s switch to the Charter as the legal basis for reviewing secondary legislation constitutes a milestone in its jurisprudence. While the CJEU made reference to the ECHR and ECtHR jurisprudence and the general principle of proportionality, it was the Charter that was the benchmark against which the contested provisions were assessed. Yet, this point need not be overstated. Although trite, the Charter codifies many rights already established in the CJEU’s jurisprudence. Moreover, the connection between Charter rights and Convention rights is often very close e.g. Art.52(3) of the Charter guarantees equivalent protection between it and the ECHR on corresponding rights. In addition, and as noted above, Art.52 of the Charter enshrines the principle of proportionality, which long pre-dates

⁷⁹ *ibid* [67].

⁸⁰ *ibid* [75].

⁸¹ *ibid* [72]-[89]. On this point, see: Michal Bobek, ‘Joined Cases C-92 & 93/09, Volker und Markus Schecke GbR and Hartmut Eifert, Judgment of the Court of Justice (Grand Chamber) of 9 November 2010’ (2011) 48 CML Rev 2005, 2013.

the Charter. In other words, while the Charter furnishes the CJEU with a written document, it does not necessarily alter the CJEU's formal *modus operandi* in human rights disputes. Against that, even if the CJEU's method of operation did not change drastically in *Volker und Markus Schecke*, the Charter did make the CJEU less pusillanimous in its scrutiny of the discretion enjoyed by the institutions, in that it annulled the contested provisions. The two-fold significance of the judgment is that, for the first time, the Charter was used to review *and* invalidate secondary legislation.

B. *Test-Achats ASBL v Conseil des Ministres*

In *Test-Achats ASBL v Conseil des Ministres*,⁸² the Grand Chamber examined the validity of Directive 2004/113⁸³ implementing the principle of equal treatment between men and women in the access to and supply of goods and services. Akin to its approach in *Volker und Markus Schecke*, the CJEU stated that the Directive was to be considered in the light of Arts.21 and 23 of the Charter.

Stripped to its core, the issue was whether it was compatible with the fundamental right of equality to use as a criterion the gender of an insured person when calculating private insurance contracts. Art.5(1) of the Directive sought to establish a unisex rule in the calculation of insurance premiums and benefits. However, by way of derogation from that rule, Art.5(2) of the Directive permitted certain Member States to allow differences in insurance premiums on the basis of actuarial and statistical data which demonstrated that gender was a determining factor in the assessment of risk.

The Directive was transposed into Belgian law by the Law of 10 May 2007, though at the time of its implementation Belgium did not make use of the derogation permitted by

⁸² Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL v Conseil des Ministres* [2011] [2011] ECR II-7177; Jakob Cornides, 'Three Case Studies on "Anti-Discrimination"' (2012) 23 EJIL 517, 524.

⁸³ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37.

Art.5(2). The Law of 10 May 2007 was subsequently amended by the Law of 21 December 2007 (“the Amending Law”), which implemented the derogation. An action for annulment of the Amending Law was brought before the Belgian Constitutional Court. Since the Amending Law was based on the Directive, a reference was made to the CJEU to determine the validity of the latter, namely its compliance with Art.6(2) TEU (Lisbon version).

The CJEU observed that since Art.6(2) TEU was cited in recital 1 to the Directive, and since Arts.21 and 23 of the Charter were cited in recital 4 to the Directive, the derogation was to be examined for compliance with those Charter provisions.⁸⁴ In its submission, the Council argued that the rationale for the derogation was that different situations ought not to be treated in the same way.⁸⁵ The CJEU retorted that:

The purpose of Directive 2004/113 in the insurance services sector is...the application of unisex rules on premiums and benefits...Recital 19 to that Directive describes the option granted to Member States not to apply the rule of unisex premiums and benefits as an option to permit ‘exceptions’. Accordingly, Directive 2004/113 is based on the premise that, for purposes of applying the principle of equal treatment for men and women, enshrined in Articles 21 and 23 of the Charter, the respective situations of men and women with regard to insurance premiums and benefits contracted by them are comparable.⁸⁶

The CJEU elaborated that there existed a risk that to permit derogation from that premise without temporal limitation would fly in the face of the attainment of equality between men and women, which was the very purpose of the Directive (as per Art.1 of the Directive). Art.5(2) was therefore in a breach of Arts.21 and 23 of the Charter.⁸⁷ The longstop of the CJEU’s ruling was that as of 21 December 2012, insurance benefits and premiums were required to be gender neutral i.e. the derogation would cease to have effect.

⁸⁴ Case C-236/09 *Association Belge des Consommateurs Test-Achats ASBL v Conseil des Ministres* [2011] ECR II-7177 [17].

⁸⁵ *ibid* [27].

⁸⁶ *ibid* [30].

⁸⁷ *ibid* [31]-[32].

(i) Critique

On par with cases like *Mangold* and *Kadi*, *Test Achats* generated a lot of attention, both in the academy but also in wider circles due to its far-reaching effect. In *Test-Achats*, AG Kokkot (in her Opinion delivered on 20 September 2010) would have invalidated Art.5(2). The AG's Opinion was not warmly received in many quarters, such as the European Insurance and Reinsurance Federation and the media.⁸⁸ This notwithstanding, the CJEU (on 1 March 2011) gave a relatively terse judgment in terms of its reasoning. Unsurprisingly, the CJEU's judgment was met with displeasure amongst some observers.⁸⁹ The economic critique of the ruling is that financial service providers will inevitably pass on the cost to consumers, in particular to female drivers who will have to pay higher insurance premiums to offset additional cost incurred by insurance providers.

Aside from the economic facet of the case, *Test Achats* follows on from *Volker und Markus Schecke* in that the validity of secondary legislation is to be assessed for compliance with the Charter, irrespective of whether the legislation at issue was adopted before the Charter acquired primary legal status (1 December 2009). Again, however, the role of the Charter ought not to be overstated. Despite the formal reference to its provisions (Arts.21 and 23), the CJEU in *Test Achats* relied on its case law pertaining to the principle of equal treatment; the general principles retain residual force.

⁸⁸ CEA Insurers of Europe, 'CEA Warns of Consumer Detriment if Insurers can no Longer Differentiate on Basis of Sex' (*Press Release*, 30 September 2010) <<http://www.insuranceurope.eu/uploads/Modules/Newsroom/100930-ecj-opinion.pdf>> accessed 25 August 2014; Michele Hanson, 'Car Insurance: Why Must Women Drivers Subsidise the Boy-Racers?' *The Guardian* (1 March 2011) <<http://www.theguardian.com/money/2011/mar/01/women-drivers-insurance-subsidises-boyracers>> accessed 25 August 2014; BBC Business News, 'Insurance and Pension Costs Hit by ECJ Gender Ruling' *BBC* (1 March 2011) <<http://www.bbc.co.uk/news/business-12606610>> accessed 25 August 2014.

⁸⁹ HM Treasury, 'UK Response to the 1 March European Court of Justice Ruling that Insurance Benefits and Premiums after 21 December 2012 should be Gender-Neutral' (July 2012) <http://webarchive.nationalarchives.gov.uk/20130129110402/http://www.hm-treasury.gov.uk/d/condoc_responses_insurance_benefits_and_premiums.pdf> accessed 25 August 2014.

The CJEU was criticised, in addition, for being over-zealous. First, as with the other equality directives adopted under Art.19 TFEU (ex Art.13 EC Treaty), unanimity in the Council was required for the enactment of Directive 2004/113. The Grand Chamber, perhaps fortified by the Charter, therefore declared a legal act adopted unanimously by (then) 25 Member States to be invalid. In that connection, it has been argued that the CJEU replaced ‘a carefully designed legislative scheme...with a bare assertion that December 21, 2012 was the longest period for which premiums differentiated by sex could be tolerated’.⁹⁰ Second, if the judgment leads to higher insurance premiums across the board then some might argue that it is a pyrrhic victory for the right to equality. Against that, the Charter was approved by all of the Member States as well. In addition, the derogation was a flagrant contradiction of the objective of the Directive. If the CJEU did not invalidate that provision then it is hard to know what it would invalidate.

C. The Kadi Saga

In an entirely different context, in the case of *European Commission and others v Kadi* (C-584/10 P & C-595/10 P),⁹¹ the European Commission *et al* appealed against the judgment of the General Court which annulled Regulation 1190/2008⁹² insofar as it pertained to Mr Kadi.

To recapitulate briefly on the *Kadi* saga, in *Kadi v Council of the EU* (T-315/01) Mr Kadi sought, on grounds of fundamental rights, to annul a Council Regulation (881/2002)⁹³

⁹⁰ Art.5(2) stipulated that ‘the Member States concerned shall inform the Commission and ensure that accurate data relevant to the use of sex as a determining actuarial factor are compiled, published and regularly updated. These Member States shall review their decision five years after 21 December 2007, taking into account the Commission report referred to in Article 16, and shall forward the results of this review to the Commission’. The CJEU ‘foreclosed’ that possibility: See Lord Mance, ‘The Interface between National and European Law’ (2013) 38 EL Rev 437.

⁹¹ Joined Cases C-584/10P, C-593/10P & C-595/10P *European Commission and others v Kadi* [2014] All ER (EC) 123.

⁹² Commission Regulation (EC) No 1190/2008 of 28 November 2008 amending for the 101st time Council 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 [2008] OJ L322/25.

which was adopted to implement United Nations Security Council (UNSC) Resolutions.⁹⁴ Mr Kadi had been listed in Annex 1 of the contested Regulation, which necessitated (at the EU level) the freezing of funds and financial assets of individuals with links to Osama Bin Laden and the Al-Qaeda network. The CFI (now the General Court), acquiescing primacy to UN law, held that it did not have jurisdiction to judicially review the legality of the contested Regulation on the basis of EU law (i.e. the general principles) as it would amount to ‘indirect’ review of UNSC Resolutions.⁹⁵ Instead, the CFI held that it was empowered to review the contested Regulation in the light of *jus cogens* (higher norms of public international law).⁹⁶ The CFI ruled that Mr Kadi’s fundamental rights - right to property, right to be heard and right to effective judicial review - had not been infringed.

In *Kadi v Council of the EU* (C-402/05 P & C-415/05 P), the CJEU set aside the judgement of the CFI and annulled Regulation 881/2002 insofar as it concerned Mr Kadi. In contrast to the CFI, the CJEU held that the lawfulness of acts of the EU institutions adopted to give effect to UNSC Resolutions could not be immune from internal standards of review.⁹⁷ The Court of Justice proceeded to review the contested Regulation in the light of the EU general principles, finding Mr Kadi’s rights to have been breached.

As is well known, the effects of the Regulation were maintained insofar as a three-month grace was given to the Council to redress the infringements found by the CJEU. Following disclosure from the Chairman of the Sanctions Committee to the Commission, Mr

⁹³ Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan [2002] OJ L139/9.

⁹⁴ Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649.

⁹⁵ *ibid* [215]-[216].

⁹⁶ *ibid* [226].

⁹⁷ Joined Cases C-402/05 P and C-415/05 P *Kadi v Council of the European Union* [2008] ECR I-6351 [281-285].

Kadi was duly informed of the summary of reasons for his inclusion on the list, invited to comment on the reasons given, and notified that he would be maintained on the list. Notwithstanding Mr Kadi's response requesting evidence for the reasons given, the Commission took the view that it had complied with the CJEU's ruling by providing him with a summary of reasons for his inclusion and by giving him an opportunity to reply. Accordingly, Regulation 1190/2008 (amending Annex I of Regulation 881/2002) was adopted, placing Mr Kadi's details on the list.⁹⁸

Mr Kadi brought an action for annulment of Regulation 1190/2008 before the General Court. In line with the CJEU in *Kadi v Council of the EU* (C-402/05 P & C-415/05P), the General Court stated that it was under an obligation to review the contested Regulation in the light of EU fundamental rights standards. The General Court held, *inter alia*, that in breach of his rights of defence, Mr Kadi was 'not in a position to mount an effective challenge to any of the allegations against him, given that all that was disclosed to him was the summary of the reasons'.⁹⁹ The General Court accordingly annulled Regulation 1190/2008 insofar as it related to Mr Kadi.

On appeal to the CJEU, several grounds were raised by the appellants, namely that Regulation 1190/2008 was immune from the jurisdiction of EU Courts (the Council); that the intensity of judicial review applied by the General Court was erroneous (the Council, the Commission and the UK Government); and that the General Court erred in its examination of Mr Kadi's rights-based claims (the Council, the Commission and the UK Government).¹⁰⁰

⁹⁸ See Joined Cases C-584/10P, C-593/10P and C-595/10P *European Commission and others v Kadi* [2014] 1 CMLR 24, Opinion of AG Bot, [20-26].

⁹⁹ Case T-85/09 *Kadi v Commission of the European Communities* [2010] ECR II-5177 [177]-[179] (rights of defence), [184] (right to effective judicial review and right to property).

¹⁰⁰ Joined Cases C-584/10P, C-593/10P and C-595/10P *European Commission and others v Kadi* [2014] All ER (EC) 123 [59].

In relation to the plea based on fundamental rights, the CJEU cited Art.41(2) of the EU Charter (right to be heard) and Art.47 (right to effective judicial protection) as its starting point. In addition, the CJEU made reference to Art.52(1) of the Charter which permits limitations to the abovementioned rights so long as any such limitation respects the essence of those rights and is necessary and genuinely meets objectives recognised by the EU - in this case, global peace and security and respect for international law.¹⁰¹

The CJEU held (first) that respect for the rights of defence and the right to effective judicial protection required the Commission to disclose to Mr Kadi the (available) evidence against him which was relied on by the Commission as the basis for maintaining him on the list, so that Mr Kadi was in a position to mount a challenge - which the Commission did.¹⁰² The right to effective judicial protection, as protected under Art.47 of the Charter, also required the EU Courts to ensure that the reason for maintaining Mr Kadi on the list was derived from ‘a sufficiently solid factual basis’.¹⁰³ The allegations listed in the summary of reasons therefore had to be verified by the CJEU in order to ascertain whether they were well-founded. While upholding the operative part of the General Court’s judgment, the CJEU held that the former erred in law in finding that the failure by the Commission to disclose to Mr Kadi and the General Court the evidence underlying the summary of reasons was a violation of his right of defence and right to effective judicial protection, since the Commission was not privy to that evidence. In addition, the General Court erred in law in finding that the allegations made in the summary of reasons were insufficiently precise. The CJEU held that although one of five reasons was vague, the remaining four reasons were

¹⁰¹ *ibid* [100]-[103].

¹⁰² *ibid* [113].

¹⁰³ *ibid* [119].

sufficiently detailed.¹⁰⁴ After scrutinising the remaining reasons, however, the CJEU found that, in the light of Mr Kadi's response, the evidence to substantiate the allegations was insufficient. The CJEU dismissed the appeal and upheld the operative part of the General Court's judgment.

(i) Critique

In terms of human rights adjudication a few general observations can be made. The CJEU in *Kadi v Council of the EU* (C-402/05 P & C-415/05P) was patently correct to review the contested measure for compliance with EU standards of protection, as opposed to the left-of-field approach adopted by the (then) CFI in using *jus cogens* as the benchmark. The rights invoked by Mr Kadi are established fundamental rights forming part of the EU general principles; it is less clear that those rights, in particular the right to property, form part of *jus cogens*.¹⁰⁵ In any event, even if they do form part of *jus cogens* it is questionable whether the EU Courts have the requisite expertise to conduct such a review. The CJEU's resolve to apply EU standards of protection, irrespective of the fact that the EU had no discretion in implementing the UNSC Resolutions, also demonstrates judicial self-confidence and commitment to fundamental rights and due process.¹⁰⁶ As regards the CJEU's decision in *European Commission and others v Kadi* (C-584/10 P, C-593/10 P & C-595/10 P), a key difference between its judgment and that of the General Court's in *Kadi v Commission of the European Communities* (Case T-85/09) was that the latter held that, in the absence of supporting evidence, the summary of reasons provided to Mr Kadi by the Commission

¹⁰⁴ *ibid* [138]-[141].

¹⁰⁵ Takis Tridimas, 'EU Law, International Law, and Economic Sanctions against Terrorism: the Judiciary in Distress?' (2008-2009) 32 *Fordham Int'l LJ* 660, 692.

¹⁰⁶ See: Sara Poli and Maria Tzanou, 'The Kadi Rulings: A Survey of the Literature' (2009) 28 *YEL* 533. More generally see: Nikolas Lavranos, 'The Impact of the Kadi Judgment on the International Obligations of the EC Member States and the EC' (2009) 28 *YEL* 616.

violated the duty to give reasons. The CJEU on the other hand, ruled that the duty to give reasons had been met by the Commission, but that the allegations contained therein could not be substantiated by the available evidence.¹⁰⁷ A final point to note is that beyond the CJEU's perfunctory citation of Art.41, Art.47 and Art.52 of the Charter, the dispute was resolved without further recourse to the Charter.

D. *Schwarz v Stadt Bochum*

A forceful judgment in the context of the AFSJ was delivered by the CJEU in *Schwarz v Stadt Bochum*.¹⁰⁸ In that case, the CJEU was asked to assess the validity of Art.1(2) of Regulation 2252/2004¹⁰⁹ in the light of Arts.7 (right to respect of private life) and 8 (protection of personal data) of the Charter of Fundamental Rights.

Mr Schwarz, a German national, applied for a passport, but refused to provide two fingerprints as required by German legislation (para.4(3) of the Law on passports of 19 April 1986 - amended by the Law of 30 July 2009) giving effect to Regulation 2252/2004. Accordingly, the competent German authorities (the Stadt Bochum) did not issue Mr Schwarz with a passport. Art.1(2) of Regulation 2252/2004 (which does not apply to the UK) requires Member States to provide, in addition to a facial image, two fingerprints to be stored in the passport (in interoperable formats). Mr Schwarz brought an action before the German Administrative Court in order for the German authorities to issue a passport without him having to provide fingerprints. The Administrative Court sought interpretive guidance from the CJEU on the validity of the Regulation as regards three issues, namely the legal

¹⁰⁷ See Miranda Rushton, 'Kadi II: ECJ Confirms Annulment of Mr Kadi's EU listing' (*Carter-Ruck Blog*, July 26 2013) <<http://www.carter-ruck.com/Blog/?p=513>> accessed 27 May 2014.

¹⁰⁸ Case C-291/12 *Schwarz v Stadt Bochum* [2014] 2 CMLR 5.

¹⁰⁹ Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States [2004] OJ L385/1.

basis of the Regulation, the procedure for adopting the Regulation, and the Regulation's compliance with the EU Charter of Fundamental Rights.

Focusing on the human rights component, the CJEU was quick to find that fingerprints amounted to personal data, and that the taking and storing fingerprints posed a threat to Arts.7 and 8 of the Charter. The issue, therefore, was whether the threat was justified.¹¹⁰

In accordance with Art.8(2) of the Charter, the processing of personal data can only be permitted if consent has been given or on some other basis established in law. As regards the requirement of consent, under Art.1(2) of the Regulation citizens cannot refuse to supply their fingerprints if they wish to obtain a passport. On the other hand, Arts.7 and 8 are not absolute rights. Citing Art.52(1) of the Charter, the CJEU affirmed that rights contained therein may be restricted so long as those limitations are provided for by law, respect the essence of those rights, and subject to the principle of proportionality, are necessary for the attainment of objectives recognised by the Union.¹¹¹

The limitation was provided for by law, namely Art.1(2). Concerning the objective of the limitation, the CJEU identified twin aims: preventing falsification of passports and fraudulent use of passports, both of which are objectives recognised by the EU. In order to ascertain whether the 'essence' of Arts.7 and 8 remained intact, the litmus test was whether the measures dictated by the Regulation were appropriate and did not exceed necessity.¹¹²

The CJEU rejected Mr Schwarz's contention that the use of fingerprints was not appropriate for mitigating fraud. The nub of Mr Schwarz's contention was that, as a method of identification, the use of fingerprints was not entirely accurate. The CJEU retorted that complete reliability was not determinative: it was sufficient that fingerprints reduced

¹¹⁰ Case C-291/12 *Schwarz v Stadt Bochum* [2014] 2 CMLR 5 [29]-[30].

¹¹¹ *ibid* [34].

¹¹² *ibid* [40].

fraudulent use of passports.¹¹³ On the question of necessity, the CJEU opined that the legislature was under an obligation to consider whether measures less restrictive of the rights in question existed, without compromising the attainment of the objectives at play.¹¹⁴ The line advanced by the CJEU was that the supply of fingerprints did not entail physical or mental discomfort any more than a facial image. The taking of two fingerprints did not restrict Arts.7 and 8 more than the taking of a facial image when regarded separately. In addition, the only realistic alternative was iris scanning. The CJEU opined that iris-scanning would not necessarily restrict Arts.7 and 8 any less, and in any event iris scanning technology was not on par with finger-printing technology as yet.¹¹⁵

Although processing fingerprints was necessary, the next question was whether it could potentially *exceed* necessity. The CJEU highlighted that, in order to avoid misuse, the Regulation required fingerprints to be used only to verify identity (Art.4(3)). In addition, they had to be stored in the passport itself so as to avoid fingerprints being read by unauthorised persons.¹¹⁶ Any central storage of fingerprints by Member States could not affect the validity of the Regulation. On that basis, Regulation 2252/2004 was not in breach of the fundamental rights invoked by Mr Schwarz.

(i) Critique

The force of the judgment lies in the absence of hesitancy by the CJEU. Yet the decision is not unproblematic from a human rights perspective. First, although the CJEU was lenient at the first stage of the enquiry (the *existence* of an interference), insofar as it acknowledged that fingerprints amounted to personal data, the supply and storage of which was liable to pose a

¹¹³ *ibid* [43].

¹¹⁴ *ibid* [46].

¹¹⁵ *ibid* [52].

¹¹⁶ *ibid* [58-61].

threat to Arts.7 and 8, it was less merciful at the second stage (the *justification* for the interference). The CJEU concedes that consent, as required under Art.8(2) of the EU Charter in order to restrict the right to personal data, could not be readily inferred since a refusal to supply fingerprints would result in a passport application being rejected. To circumvent this hurdle, the CJEU moves to consider whether some other basis in law could be used, namely Art.52 of the Charter governing restrictions of the rights contained therein. In order to assess the degree of the interference, the CJEU acknowledges that fingerprints are required *in addition* to a facial image, yet curiously concludes that that fact alone did not give rise to greater interference with those rights, if each were to be viewed separately. The CJEU's reasoning is clearly flawed. The point is not that when viewed in isolation the taking of fingerprints does not constitute a greater incursion into Art.8 than the taking of a facial image, but rather that *collectively* they constitute an erosion of the essence of Art.8. Taken to its logical conclusion, if interferences are viewed in isolation rather than cumulatively then it opens the door for a raft of permissible incursions of a similar nature which do not affect the essence of the right in question. In any event, there is a case to be made that the taking of fingerprints is more intimate than supplying a facial image, since one's face is (save for religious purposes) always visible. In human rights disputes, the CJEU ought to examine these issues in greater detail.

E. Digital Rights Ireland Ltd v Minister for Communications

A landmark in the CJEU's post-Lisbon human rights jurisprudence is *Digital Rights Ireland Ltd v Minister for Communications*.¹¹⁷ Arid yet significant in equal measure, the dispute

¹¹⁷ Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd v Minister for Communications* [2014] All ER (EC) 775; Orla Lynskey, 'The Data Retention Directive is Incompatible With the Rights to Privacy and Data Protection and is Invalid in its Entirety: Digital Rights Ireland' (2014) 51 CML Rev 1789.

hinged on the validity of the so-called Data Retention Directive (2006/24/EC)¹¹⁸ when examined in the light of Arts.7 and 8 of the EU Charter of Fundamental Rights.

If the preamble to the Data Retention Directive is anything to go by, then a spectre of international terrorism is haunting the European Union. Directive 2006/24/EC is therefore part of the EU's bid to exorcise that threat. In the wake of terrorist attacks in Madrid in March 2004 and London in July 2005, the preamble states that there is a 'need to adopt common measures on the retention of telecommunications data as soon as possible'. Accordingly, the Directive obliges Member States to enact laws requiring communication service providers to retain data for the purposes of making such data available, where necessary, to competent domestic authorities (Art.3) in order to facilitate 'the prevention, investigation, detection and prosecution of serious crime' (Art.1 and recitals 4,5,7 to 11, 21 and 22). Data may be retained for up to 24 months (Art.6).

Even before the dispute reached the CJEU, a deep sense of foreboding about the Directive was felt in many quarters. The European Data Protection Supervisor, Peter Hustinx, deplored the Directive as being 'without doubt the most privacy invasive instrument ever adopted by the EU in terms of scale and the number of people it affects'.¹¹⁹

A raft of problems associated with the Directive became apparent leading up to the *Digital Rights Ireland Ltd* litigation. First, as might be expected, the Directive did not attain harmonised retention periods, with some Member States retaining data for 6 months while others kept data for up to 24 months.¹²⁰ In addition, Art.12(1) of the Directive hazily enables

¹¹⁸ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L105/54.

¹¹⁹ Peter Hustinx, 'The Moment of Truth for the Data Retention Directive' (Conference: Taking on the Data Retention Directive, Brussels, 3 December 2010) <https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Publications/Speeches/2010/10-12-03_Data_retention_speech_PH_EN.pdf> accessed 17 July 2015.

¹²⁰ Chris Jones, Content and Implementation of the Data Retention Directive (*EU Law Analysis*, 8 April 2014) <<http://eulawanalysis.blogspot.co.uk/2014/04/implementation-of-data-retention.html>> accessed 25 August 2014.

Member States to extend the retention of data for ‘a limited period’ if they face ‘particular difficulties’. Second, the Directive does not define ‘competent authorities’. As a result, the discretion lies with Member States as to which institutions or agencies can have access to retained data, leading to divergences across Europe (though every Member State with the exception of the UK permits access by the police).¹²¹ Third, the Directive was not implemented by numerous Member States, leading to infringement proceedings by the Commission.¹²² Fourth, the Directive does not define ‘serious crime’, resulting in fluctuating thresholds as between Member States, and with implementing measures in some Member States also failing to define the term.¹²³ Fifth, many Member States permit access to data beyond the requirements stipulated by the Directive. Sixth, mediation of access varies across Member States, with some States requiring judicial authorisation, while in others a senior authority (but not a judge) is required, and in some a simple written request will suffice. Finally, Art.3 of the Directive derogates from Arts.5, 6, and 9 of the e-Privacy Directive and the Data Protection Directive.¹²⁴

Focusing on the CJEU’s judgment, the first issue was whether the Directive fell within the scope of Arts.7 and 8 of the EU Charter of Fundamental Rights. The CJEU found that, taken as a whole, the retention of data as well as access to that data by domestic authorities, as required pursuant to the Directive, facilitated ‘very precise conclusions to be drawn concerning the private lives of the persons whose data has been retained’.¹²⁵ Art.8 of the Charter was also engaged as the retention of data pursuant to the Directive entailed the

¹²¹ *ibid.*

¹²² *ibid.*

¹²³ *ibid.*

¹²⁴ *ibid.*

¹²⁵ Case C-293/12 *Digital Rights Ireland Ltd v Minister for Communications* [2014] All ER (EC) 775 [27]-[29].

‘processing of personal data’.¹²⁶ The second, closely-related, issue was to ascertain whether there had been an *interference* with Arts.7 and 8. The CJEU found that, in order to interfere with Art.7, the retention of data need not be of a sensitive nature nor have inconvenienced the person concerned: the retention of data *itself* was sufficient to establish an interference with that right.¹²⁷ Access to that data by domestic authorities was a ‘further’ interference with that right. Similarly, the Directive amounted to an interference with Art.8 of the Charter as it ‘provides for’ the processing of personal data.¹²⁸

The next hurdle was the justification for the interference. The CJEU followed the curious formula established under Art.52(1) of the Charter of assessing whether the *essence* of the rights at issue has been adversely affected *before* considering the proportionality of the restriction. (It is submitted that in order to establish whether the essence of the right has been left intact the proportionality test should be conducted first). Consequently, in an unavoidably perfunctory manner, the CJEU opined that the essence of Art.7 was not adversely affected as the Directive did ‘not permit the acquisition of knowledge of the *content* of the electronic communications as such’.¹²⁹ (The Directive does not apply to the content of data but rather to *traffic data* – data which is processed to convey a communication. For instance, the Directive does not apply to search engine providers as search engine queries are content as opposed to traffic data.) The essence of Art.8 was also not unduly affected because the Directive provided that Member States are to ensure that ‘appropriate technical and organisational measures are adopted against accidental or unlawful destruction, accidental loss or alteration of the data’.¹³⁰

¹²⁶ *ibid* [29].

¹²⁷ *ibid* [35].

¹²⁸ *ibid* [36].

¹²⁹ *ibid* [39].

¹³⁰ *ibid* [40].

As to whether the interference pertained to an objective of general interest pursued by the Union, the CJEU cited *Kadi and Al Barakaat International Foundation v Council and Commission* to affirm that the maintenance of international peace and security was one such objective.¹³¹ On the question of proportionality, the CJEU stressed that the vital nature of the protection of personal data in the EU legal order reduced the discretion enjoyed by the EU legislature, entailing that scrutiny of acts of the EU institutions in this context would be ‘strict’.¹³² The CJEU held that the Directive was *appropriate* (to shed light on, and assist national authorities with, serious crime). On the issue of *necessity*, however, the CJEU held, *inter alia*, that the Directive ‘covers, in a generalised manner, all persons and all means of electronic communication as well as all traffic data without any differentiation, limitation or exception being made in the light of the objective of fighting against serious crime’.¹³³ In addition, the Directive:

Fails to lay down any objective criterion by which to determine the limits of the access of the competent national authorities to the data and their subsequent use for the purposes of prevention, detection or criminal prosecutions concerning offences that, in view of the extent and seriousness of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter, may be considered to be sufficiently serious to justify such an interference.¹³⁴

In light of the intrusive nature of the Directive, its broad scope, and the absence of safeguards, the legislature acted in breach of the principle of proportionality as regards Arts.7, 8 and 51(2) of the EU Charter of Fundamental Rights; the Directive was thus invalid.

¹³¹ *ibid* [42].

¹³² *ibid* [48].

¹³³ *ibid* [57].

¹³⁴ *ibid* [60].

(i) Critique

The decision in *Digital Rights Ireland Ltd* is significant for the high level of review exercised by the CJEU. It is the first case in which a directive has been declared invalid in the light of the EU Charter. In that connection, it is clear that akin to cases such as *Volker und Markus Schecke and Eifert*, the pursuit of an objective by the legislature expressed in a generalised manner will not suffice as a justification for a restriction of rights contained in the Charter (in *Volker und Markus Schecke and Eifert*, transparency of EU expenditure in the context of the CAP and in *Digital Rights Ireland Ltd*, the fight against serious crime). What is less clear, however, is in what situation and with which rights the CJEU will accord less discretion to the legislature. In relation to the right to property and the right to pursue a trade in the context of the CAP, the CJEU seldom curtails the wide discretion enjoyed by the legislature. Thus, it may be that the CJEU exercises a value judgment based on (i) the area of law concerned, (ii) the right at stake, (iii) the seriousness of the interference and (iv) the Union objective pursued. Strasbourg jurisprudence may also serve as a guideline in relation to (ii) and (iii).

Another striking facet of the judgment is that the CJEU proceeds on the basis that the essence of a fundamental right can be left in-tact whilst simultaneously finding that a restriction placed upon it is disproportionate. Although this approach by the CJEU stems from the wording of Art.52(1) of the Charter, it seems like an artificial separation. In terms of judicial methodology, it is somewhat premature for the CJEU to pronounce on whether the essence of the right in question has been unaffected before examining the proportionality of the restriction placed upon it.

Finally, aside from the vindication of the rights at issue, that is, from a Orwellian-surveillance point of view, it is worth noting that the CJEU examined, by its own admission, the proportionality of the Directive's *material* objective, namely mitigating serious crime

(public security), as opposed to its stated aim - market harmonisation of data retention by communication service providers (which undercuts the CJEU's finding in *Ireland v Council* that the function of the directive was the efficacy of the EU internal market via the adoption of harmonised rules).¹³⁵ Yet, given the weight attached by the CJEU to the objective of preventing serious crime, it could have highlighted and remedied some of the well-known flaws of the Directive, such as the silence on the issue of what serious crime is and who competent domestic authorities are; the CJEU could have furnished some guidance to help harmonise the approach adopted by the Member States. Had the CJEU done so, accusations of judicial activism would probably reverberate, though it could be rebutted that invalidating the Directive is even more activist.

¹³⁵ Case C-301/06 *Ireland v Parliament and Council* [2009] ECR I-593 [58-72].

VI. Conclusion

Tracing the evolution of the case law, it emerges that the CJEU's methodological approach ought not to be characterised as a logical and linear progression from dark to light. Rather, its hallmark is that of continuity.

In the first wave of jurisprudence, the CJEU established a doctrinal framework, albeit unwritten, in order to determine the legality of EU measures *viz* their compliance with fundamental rights. A striking component of that framework is the autonomy of EU fundamental rights. Whilst specific rights derive from the constitutional traditions of the Member States, they are then secured as EU fundamental rights insofar as they form part of the general principles of law. Ever since the ruling in *Internationale Handelsgesellschaft*, the CJEU has consistently held that fundamental rights are to be ensured within the framework of the structure and objectives of the EU. Thus, EU fundamental rights are to be interpreted in light of EU (economic) objectives. The second wave of jurisprudence, after the adoption of the EU Charter, was characterised by reticence on behalf of the CJEU in terms of using the EU Charter as the first point-of-reference instead of the general principles, with only fleeting references being made to the former. The third wave of jurisprudence, post Lisbon, sees the CJEU using the EU Charter as the primary benchmark for reviewing EU legislation. In particular, the CJEU has drawn on Article 52 and its rules on limitation of rights. However, the binding legal nature of the EU Charter has not brought about a sea of change regarding the CJEU's *modus operandi*. Many of the fundamental rights contained in the Charter were already protected as part of the general principles and Article 52 essentially codifies the unwritten doctrinal framework established by the CJEU in the first wave of jurisprudence. The merit of the EU Charter is that it makes EU rights more visible and enhances legal certainty. In terms of predicting the future trajectory of the CJEU's jurisprudence, i.e. the fourth wave, cases like *Volker* and *Digital Rights Ireland Ltd* point towards a more vigorous

application of the proportionality test which may lead to greater instances of EU legislation being annulled. Equally, the integration of the EU Charter by the EU institutions ought to ensure that EU legislation is not enacted in a way that is in violation of fundamental rights.

CHAPTER IV: CONSTITUTIONAL REVIEW OF MEMBER STATE ACTION: EXECUTING EU POLICY OBJECTIVES

I. Introduction

There is no specific provision of the TFEU granting jurisdiction to the CJEU to lord it over the Member States as a human rights court.¹ However in the context of the preliminary reference procedure, the CJEU will provide an interpretation of Union law in order to assist a national court to determine the compatibility of national implementing measures with EU fundamental rights. In this regard, the CJEU exercises a ‘constitutional review’ of Member State activity.² Initially, it was the general principles that served as the exclusive basis for the CJEU’s review of national implementing legislation. Post Lisbon, it is the EU Charter that serves as the starting-point for the CJEU’s review of domestic implementing measures.³ The focus of this chapter will be on (first) the CJEU’s constitutional review of national measures which are enacted to transpose directives and (second) domestic action for the enforcement of regulations. In addition, the horizontal application of EU fundamental rights *vis-à-vis* national legislation will be assessed.⁴ In line with the ethos of the thesis, the objective will be to explicate the CJEU’s methodology. As regards the implementation of directives, the (pre-Lisbon) *Booker Aquaculture* case will be examined, focusing in particular on the scope of EU fundamental rights, now enshrined in Article 51 of the EU Charter, and the level of protection granted to fundamental rights, now enacted in Article 53 of the EU

¹ Aiden O’Neill, *EU Law for UK Lawyers* (2nd edn, Hart Publishing 2011) 2030.

² Takis Tridimas, ‘Constitutional Review of Member State Action: the Virtues and Vices of an Incomplete Jurisdiction’ (2011) 9 *ICON* 737, 738.

³ Measures which ‘derogate’ from EU law may also be characterised as implementing measures insofar as they implement a right to derogate from EU rules and must therefore be assessed for rights-based compliance (see Paul Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (OUP 2010).

⁴ EU fundamental rights in this context encompass the general principles and the EU Charter of Fundamental Rights.

Charter. The case will then be re-considered in the light of post-Lisbon cases pertaining to Articles 51 and 53 of the EU Charter in a bid to ascertain whether the CJEU's methodology has altered. In relation to the enforcement of regulations, the (post-Lisbon) *N.S.* case will be examined, focusing on the CJEU's application of Article 51 of the EU Charter as well as the balancing exercise conducted by the CJEU *viz* the protection of fundamental rights on the one hand and the functioning of the Common European Asylum System on the other. As regards the horizontal application of the general principles, the landmark (pre-Lisbon) *Mangold* case will be examined in conjunction with other post-Lisbon horizontal disputes in order to consider whether the CJEU has circumvented the 'no-horizontal direct effect of directives' rule, and whether rights enshrined in the EU Charter may be invoked in horizontal scenarios.

II. Article 51 of the EU Charter: the Reach of Fundamental Rights

It was alluded to in the introduction that the emphasis of this chapter is on substantive adjudication as opposed to isolating, either doctrinally or theoretically, the specific issue of the field of application of fundamental rights. (Though, of course, the latter forms an integral part of the former.) At this juncture, however, it is apposite to recapitulate the findings in chapter II before delving into the selected case studies, namely that Article 51 of the EU Charter has not narrowed the field of application of fundamental rights as part of the general principles. Article 51 of the Charter provides that 'the provisions of this Charter are addressed...to the Member States *only when they are implementing Union law*'. It was shown in chapter II that this well-documented phrase covers not only the strict *Wachauf*-type implementation of EU law scenario, but also the *ERT*-type derogation from EU law scenario.

The Charter therefore codifies the pre-existing general principles case law on the *situations* in which EU fundamental rights apply. Chapter II also highlighted instances of action falling *outside* the scope of EU law, such as a purely hypothetical prospect of

exercising a right to free movement or the absence of an economic link to trigger free movement law and therefore fundamental rights. The question that remains, however, is what is required to actively trigger the application of Article 51 of the Charter. Two post-Lisbon cases which shed some light are *Fransson*⁵ and *Siragusa*.⁶ In *Fransson*, the CJEU held that national legislation which was not enacted to transpose the directive in question nevertheless fell within the scope of EU law ‘since its application was designed to penalise an infringement of that directive and [was] therefore intended to implement the obligation imposed on the Member States by the Treaty to impose effective penalties for conduct prejudicial to the financial interests of the European Union’.⁷ In *Siragusa*, the CJEU held that in order for Article 51 of the Charter to apply to national legislation, it needs to be determined ‘whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues an objective other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it’.⁸ As observed by Denman, the CJEU’s formulation in *Siragusa* is more akin to a list of factors which might activate Article 51 of the Charter rather than a ‘conceptually tidy test’.⁹ However, given the diverse nature of EU litigation, it is no easy task for the CJEU to posit a watertight test. As regards the decision in *Fransson*, two interpenetrating factors are at play. On the one hand, the CJEU set a ‘low threshold’¹⁰ for a national measure to enter the field of EU law. On the other hand, the

⁵ Case C-617/10 *Åklagaren v Åkerberg Fransson* [2013] 2 CMLR 46; Flippo Fontanelli, ‘Hic Sunt Nationes: the Elusive Limits of the EU Charter and the General Constitutional Watchdog’ (2013) 9 EuConst 315, 317.

⁶ Case C-206/13 *Siragusa v Regione Sicilia* [2014] 3 CMLR 13; Niamh Nic Shuibhne, ‘The “Constitutional Weight” of Adjectives’ (2014) 39 EL Rev 153, 154.

⁷ Case C-617/10 *Åklagaren v Åkerberg Fransson* 2013] 2 CMLR 46 [27].

⁸ Case C-206/13 *Siragusa v Regione Sicilia* [2014] 3 CMLR 13 [25].

⁹ Daniel Denman, ‘The EU Charter of Fundamental Rights: How Sharp Are its Teeth?’ (2014) 19 JR 160, 163.

¹⁰ *ibid*, 162.

CJEU yielded some ground to the Member States. In particular, the CJEU held that ‘in a situation where action of the Member States is *not entirely* determined by European Union law’¹¹ national authorities are free to apply domestically-set standards of fundamental rights protection so long as the level of protection set by the Charter ‘and the primacy, unity and effectiveness of European Union law’¹² are not jeopardized. The tenuous link between the national measures and EU law was thus off-set by preserving a degree of domestic autonomy to apply higher standards.

III. Implementing Directives

*Booker Aquaculture*¹³ (hereafter ‘*Booker*’) was decided by the CJEU before the Lisbon Treaty came into effect and thus before the EU Charter acquired binding legal force. While the dispute is seemingly unassuming, and hardly the paragon of a human rights quagmire, it is instructive as it addresses the issue of whether Member States must comply with fundamental rights when adopting domestic measures to implement directives. The case is also significant as it raises the broader question of whether national measures, which go beyond minimum requirements laid down in EU secondary legislation, are reviewable by the CJEU for compliance with EU fundamental rights or, whether they are subject to review by domestic courts according to national standards. The question of whether an infringement of the right to property gives rise to the payment of compensation under EU law is also addressed by the CJEU. The legal context of the case relates to the implementation of minimum control measures for the eradication of fish diseases in the territory of the Union.

¹¹ Case C-617/10 *Åklagaren v Åkerberg Fransson* 2013] 2 CMLR 46 [29].

¹² *ibid* [29].

¹³ Joined Cases C-20/00 and C-64/00 *Booker Aquaculture Limited (trading as Marine Harvest McConnell) v The Scottish Ministers* [2003] ECR I-7411; Aidan O’Neill, ‘The Protection of Fundamental Rights in Scotland as a General Principle of Community Law - the Case of Booker Aquaculture’ (2000) 1 EHRLR 18.

A. Legal Framework

Under powers conferred by Art.43 EC (now Art.43 TFEU) pertaining to the Common Agricultural Policy, the legislature adopted Directive 93/54¹⁴ introducing minimum EU measures for the control of fish diseases. Stripped to its core, Directive 93/54 contains a distinction between the control of List I and List II diseases occurring in an approved zone or an approved farm in the EU. List I diseases, which include infectious salmon anaemia (ISA), mandate the killing and destruction of all fish showing clinical signs of disease and the killing of all other fish which are to be destroyed, unless they have attained commercial size, in which case they can be placed on the market for human consumption after having first been slaughtered and eviscerated.¹⁵ List II diseases, including viral haemorrhagic septicaemia (VHS), require that all fish be slaughtered, and clinically infected or contaminated fish destroyed. Pursuant to Art.9(3) of the Directive, however, the national official service may authorise the fattening of fish to marketable size prior to being slaughtered. In addition, Art.20(2) of the Directive contains a minimum harmonisation clause which stipulates that Member States ‘may, subject to the general rules of the Treaty, maintain or apply in their territory stricter provisions than those contained in the Directive and shall notify the Commission of any such measure’. Directive 93/54 was implemented in the United Kingdom (UK) by the Diseases of Fish (Control) Regulations 1994. When the UK adopted the national legislation, it elected to apply the same measures to List II diseases as those laid down by the EU for List I. In other words, the competent national authorities could not authorise the fattening of fish for sale before being slaughtered pursuant to Art.9(3) of the Directive.

¹⁴ Council Directive 93/54/EEC of 24 June 1993 amending Directive 91/67/EEC concerning the animal health conditions governing the placing on the market of aquaculture animals and products [1993] OJ L 175/34.

¹⁵ Joined Cases C-20/00 and C-64/00 *Booker Aquaculture Ltd v The Scottish Ministers* [2003] ECR I-7411, Opinion of AG Mischo, [14].

B. Facts of the Dispute

Booker Aquaculture Ltd (“Booker”), a fish farm in Scotland, was affected by an outbreak of VHS in 1994, while Hydro Seafood Ltd (“Hydro”), also a fish farm situated in Scotland, was affected by an outbreak of ISA in 1998. Both firms were served with a notice pursuant to the Diseases of Fish (Control) Regulations 1994, requiring all fish to be killed and destroyed except those which were of marketable size and showed no clinical sign of infection, which could be slaughtered, eviscerated and sold for human consumption. Booker’s fish stocks dating from 1993 and 1994 had not reached marketable size and were therefore to be destroyed, while fish stocks dating from 1991 could be sold for human consumption.¹⁶ Hydro also had to destroy vast stocks which had not attained marketable size, and sell prematurely fish which had reached commercial size.¹⁷ Both undertakings sought compensation from the Scottish Ministers but were refused on the basis that the domestic rules did not make provision for such payment. Booker brought an action for judicial review before the Court in Session (Outer House) Scotland, where the Lord Ordinary pronounced a declarator in the undertaking’s favour.¹⁸ The Secretary of State appealed against that decision to the Court in Session (Inner House), which stayed proceedings seeking guidance from the CJEU. In the reference from *Booker*, the national court asked whether the general principles placed an obligation on the Member State to provide compensation, while the reference from *Hydro* sought to ascertain whether the Directive itself was invalid owing to the absence of compensation.

¹⁶ *ibid*, Opinion of AG Mischo, [26].

¹⁷ *ibid*, Opinion of AG Mischo, [27].

¹⁸ Lord Ordinary (Lord Cameron of Lochbroom) *Booker Aquaculture (Trading As Marine Harvest McConnell) v Secretary of State for Scotland*, Court of Session (Outer House) [1999] 1 CMLR 35, [62]-[63].

C. Opinion of AG Mischo

The salient aspects of the AG's Opinion are as follows (i) the applicability of the general principles to the dispute at hand and (ii) whether there had been a restriction on the right to property and whether the restriction gave rise to the payment of compensation.

(i) The Applicability of the General Principles

The preliminary issue to address was whether the general principles were applicable in the first place. The AG noted that whilst the previous case law in this area concerned the requirement to respect fundamental rights when Member States adopted national measures to apply regulations, *Booker* appeared to be the first case in which the issue of compliance with a directive had arisen. The AG swiftly concluded that the choice and form of method accorded to the Member States as to how to implement a directive did not entail the choice as to whether or not to adhere to its fundamental rights obligations under EU law.¹⁹ The *Wachauf* line of case law was therefore applicable to directives.

Addressing the minimum harmonisation clause contained in Art.20(2), the AG reiterated that subject to the general rules of the Treaty, Member States may maintain or apply stricter measures than those enshrined in the Directive. This alone, opined the AG, precluded a Member State from asserting that once it had faithfully transposed the Directive into domestic law, without adding anything, it was in common with the EU legislature, but that as soon as it supplemented the measures it was required to adopt by other measures in order to achieve the aims of the Directive, it could discard fundamental rights.²⁰ The

¹⁹ Joined Cases C-20/00 and C-64/00 *Booker Aquaculture Ltd v The Scottish Ministers* [2003] ECR I-7411, Opinion of AG Mischo, [59].

²⁰ *ibid*, Opinion of AG Mischo, [55].

lawfulness of those measures adopted to transpose the Directive, national though they are, must be assessed in the light of EU law.²¹

(ii) The Right to Property and the Provision of Compensation

The AG proceeded to examine whether the right to property had been infringed and, more specifically, whether the absence of compensation in the national implementing measures and the Directive constituted a disproportionate interference with that right. The AG concluded that the loss suffered by both undertakings essentially resulted, not from the obligations imposed on them by the Scottish authorities, but from the outbreak of disease, and that the right to property under EU law did not give rise to the payment of compensation. In particular, given that directives are by definition addressed to the Member States, the absence of an EU law requirement to provide compensation (having regard to the right to property) meant that it was for the Member States, exercising their discretion, to decide whether to provide compensation.²²

D. Judgment of the CJEU

(i) The Validity of Directive 93/54

The CJEU affirmed that the fundamental right to property is protected under EU law but that it is subject to restrictions. Those limitations must, however, correspond to the objectives of general interest pursued by the EU and not constitute an intolerable and disproportionate interference to the extent that the very substance of the right has been impaired.²³ In that connection, the objectives pursued by the Directive were the completion of the internal

²¹ *ibid*, Opinion of AG Mischo, [56].

²² *ibid*, Opinion of AG Mischo, [142],[148].

²³ Joined Cases C-20/00 and C-64/00 *Booker Aquaculture Ltd v The Scottish Ministers* [2003] ECR I-7411, Judgment of the CJEU, [59].

market in aquaculture animals and the eradication of fish diseases.²⁴ In particular, the application of control measures to List I and List II were not designed to deprive the undertakings of their property, but rather to eliminate the presence of fish diseases, and also to enable fish-farms to resume trading activities as soon as practicable.²⁵ With regards to losses suffered by the undertakings, fish demonstrating clinical signs of disease had no commercial value. Fish which had reached marketable size (which were slaughtered but not destroyed) conferred a loss on the undertakings only insofar as the firms were unable to choose the most lucrative time for their sale. Yet due to the likelihood of those fish developing clinical signs of disease, it was impossible to ascertain a more profitable time to place them on the market.²⁶ In a startlingly perfunctory manner, the CJEU then declared that while the EU legislature may, in the context of its broad discretionary powers under the CAP, make provision for the payment of compensation, the existence of a general principle granting such payment ‘could not be inferred from that fact’.²⁷ As such, the Directive was not invalid in not making the provision of compensation available for the losses incurred by the undertakings.

(ii) The Application of the Directive by the Member States

Affirming that Member States must comply with fundamental rights when implementing EU rules into national law, the CJEU observed that the UK elected not to make use of the power conferred under Art.9(3) of the Directive. However in so doing, the UK was furthering the objectives of general interest pursued by the EU, even in the absence of compensation, which did not constitute a disproportionate and intolerable breach of the right to property.

²⁴ *ibid*, Judgment of the CJEU, [72].

²⁵ *ibid*, [79]-[81].

²⁶ *ibid*, [84].

²⁷ *ibid*, [85].

E. Critique

Booker is a landmark case insofar as it establishes that Member States must comply with fundamental rights when adopting national measures to implement directives. Yet there are aspects of the AG's Opinion and the CJEU's judgment which are problematic, in particular, (i) the issue of compensation and (ii) the adoption of stricter measures by the UK authorities.

(i) Payment of Compensation

One intriguing aspect of the CJEU's judgment was its non-engagement with existing case law on the thorny issue of compensation, a matter which clearly concerned the referring court. The tension in the CJEU's case law on the issue of compensation can be distilled as follows. In *Flip CV*, a case concerning compensation for owners of pigs arising out of the slaughter of said animals in order to control classical swine fever, the CJEU proceeded on the basis that, in the absence of an EU measure requiring the granting of compensation i.e. in a directive or a decision, the issue of compensation fell within the competence of the Member States.²⁸ In *Ex parte Bostock*, a case concerning compensation arising out of the definitive discontinuance of milk production upon expiry of a tenancy by a lessee, the AG opined that simply because a legal problem (the determination of compensation) arose out of the implementation of EU rules into national law, it did not mean that the solution to that problem had to comply with fundamental rights.²⁹ In other words, the matter of compensation fell to the Member States to determine. However the CJEU in *Ex parte Bostock* ruled that the EU fundamental right to property did not require the Member States to

²⁸ Case C-315/93 *Flip CV and Verdegem NV v Belgium* [1995] ECR I-913, [30]. In *Flip CV*, the issue was not whether the right to property gave rise to compensation as the national measures in question provided for compensation. The issue was the quantum of compensation payable following the slaughter of pigs pursuant to EU minimum control measures. The applicants argued that EU law required total and immediate compensation.

²⁹ Case C-2/92 *R v Ministry of Agriculture, Fisheries and Food, Ex parte Bostock* [1994] ECR I-955, Opinion of AG Gulmann, [33]. In *Bostock*, neither the relevant EU Regulations nor the national implementing measures (at the relevant time) made provision for compensation. The question was whether the general principles placed an obligation on the Member States to protect the economic interests of tenants when their tenancies expired as regards milk quotas allocated to them.

introduce a scheme for compensation.³⁰ As noted by the Court in Session (Inner House) in the preceding *Booker Aquaculture* litigation, the CJEU in *Ex parte Bostock* was, contrary to the AG, presupposing that the issue of compensation did fall within the scope of EU law, otherwise the CJEU would not have made that determination.³¹ Indeed, the CJEU in *Ex parte Bostock* seemingly drew a distinction between the issue of whether the Member States are required to introduce a scheme for compensation to an outgoing tenant (which did fall within the scope of EU law but was not required) and the issue of whether the landlord is under an obligation to pay compensation to the lessee (which did not fall within the scope of EU law as the matter of unjust enrichment was governed by the law of the Member State in question). Admittedly, the above cases have differing factual and legal contexts (i.e. *Flip CV* did not even raise the issue of the fundamental right to property). Nevertheless, the common denominator is the issue of compensation arising out of the implementation of EU rules into domestic law, and it is disappointing that the CJEU abstained from addressing this case law.

Despite not engaging with its case law, the CJEU and the AG in *Booker* appear to have unwittingly amalgamated the approaches adopted in *Ex parte Bostock* and *Flip CV*. First, the CJEU found that the dispute fell within the scope of EU law, as did the issue of compensation; the national authorities were adopting measures to transpose EU rules, which is why the AG and the CJEU conducted a review to see if the absence of compensation was compatible with the EU fundamental right to property (*Bostock*). Second, the absence in the Directive (making provision for compensation) did not, however, give rise to the payment of compensation just because the undertaking's property was restricted pursuant to the aims of that Directive. While EU law did not impose an obligation on the Member States to pay compensation, the Member States were free to exercise their discretion and make that provision (*Flip CV*).

³⁰ Case C-2/92 *R v Ministry of Agriculture, Fisheries and Food, Ex parte Bostock* [1994] ECR I-955, [19]-[20].

³¹ Lord (President) Roger, *Booker Aquaculture Ltd v Sec of State for Scotland* [2000] SC 9, 21.

(ii) The Adoption of Stricter National Measures

Another curious component of the case was the CJEU's lack of scrutiny of the application of the List I control measures to the outbreak of a List II disease. When the UK authorities enacted the national rules to transpose the Directive, they elected not to implement the discretion enshrined in Art.9(3) which permits the official service to authorise the fattening of fish to commercial size. The Lord Ordinary in the Court of Session (Outer House) ruled that the decision not to implement that discretion constituted a breach of the undertaking's right to property which gave rise to the payment of compensation. While Art.20(2) permits the Member States to apply or adopt stricter measures than those laid down by the Directive, the Lord Ordinary was clearly of the view that the choice of absence of that discretion (to fatten the fish) was made without having due regard to the right to property, though he did not address whether the decision not to implement that discretion amounted to a stricter application of the Directive or was merely a similar measure to that enshrined in the Directive. In contrast, the CJEU held that while the UK did not implement that discretion, the national measures were 'similar' to the EU minimum control measures and were justified as they were furthering the objectives of the EU.³² The AG in *Booker* obliquely addressed the issue by opining that a Member State cannot assert that it is in compliance with fundamental rights if it faithfully transposes a directive but that as soon as it adopts 'other' measures which it deems necessary to further the objectives of the EU that it can disregard fundamental rights. Yet, what the AG appears to be saying is a general remark, namely that other measures which are ancillary or distinct, also form part of the implementation of the minimum control measures stipulated by the Directive and are therefore reviewable by the CJEU for compliance with fundamental rights.³³

³² Joined Cases C-20/00 and C-64/00 *Booker Aquaculture Ltd v The Scottish Ministers* [2003] ECR I-7411 [92].

³³ On this point, see: Kieron Beal, 'Sauce for the Goose, Sauce for the Cow, Pig and Fish?' (2002) 13 ICCLR 192, 198.

In *Booker*, this was not particularly problematic as the national measures were closely aligned to the minimum EU control measures. More complex would be a situation where a Member State adopts stricter measures which, while furthering the objectives of the EU, constitute an intolerable and disproportionate interference with the fundamental rights of an applicant. The question then becomes as follows: Are the general principles and fundamental rights in particular applicable to more stringent national measures adopted on the basis of EU legislation laying down minimum rules, even if there has been no breach of internal market law or obstruction of the coherence of EU action?³⁴ In *Borsana*, the CJEU held that stricter national measures which do not hinder the exercise of the fundamental freedoms cannot be reviewed for their compatibility with the principle of proportionality.³⁵ Similarly, in *Deponiezweckverband* the CJEU ruled that the principle of proportionality was applicable to domestic measures insofar as the minimum requirements of the relevant Directive were enforced i.e. the principle was not applicable to measures which went beyond the minimum requirements laid down by the Directive.³⁶ Interestingly, the AG in *Borsana* was AG Mischo (also the AG in *Booker*), and in the former case he took the view that the adoption of more stringent measures did not give the Member States free reign to determine EU policy, and that the principle of proportionality was applicable to national measures in the upwardly-flexible area.³⁷ This may suggest that by his reference to ‘other’ measures having to comply with fundamental rights (in *Booker*) he was in fact referring to more stringent measures, which would also be subject to review by the CJEU for compliance with fundamental rights.

³⁴ In general: Francesco De Cecco, ‘Room to Move? Minimum Harmonisation and Fundamental Rights’ (2006) 43 CML Rev 9-30; Jan H Jans, ‘Minimum Harmonisation and the Role of the Principle of Proportionality’ (SSRN, 13 March 2008) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1105341> accessed 28 July 2015; Michael Dougan, ‘Minimum Harmonisation and the Internal Market’ (2000) 37 CML Rev 853.

³⁵ Case C-2/97 *Società Italiana Petroli SpA (IP) v Borsana Srl* [2001] 1 CMLR 27 [38]-[40].

³⁶ Case C-6/03 *Deponiezweckverband Eiterköpfe v Land Rheinland-Pfalz* [2005] 2 CMLR 52, [62]-[63].

³⁷ Case C-2/97 *Società Italiana Petroli SpA (IP) v Borsana Srl* [2001] 1 CMLR 27, Opinion of AG Mischo, [35], [47].

However, neither *Booker* nor *Borsana* squarely address the above-posed question. First, the stricter national measures in *Borsana* offered more protection (for the workers' health and safety in the dispute), whereas the stricter measures in *Booker* gave less protection to the undertaking's right to property. Second, one of the issues in *Borsana* was whether the principle of proportionality was applicable to the stricter national rules, whereas the exploratory issue regarding *Booker* is whether fundamental rights are applicable to the stricter national rules.³⁸ On the other hand, fundamental rights and proportionality both form part of the general principles, and a finding that the principle of proportionality is applicable to stricter Member State rules ought to lead to a similar conclusion for the application of fundamental rights (though fundamental rights and proportionality do of course operate in distinct ways). Third, a significant difference between *Borsana* and *Booker* is that in the former case, the stricter Member State rules imposed a duty (i.e. a positive act) to offer more protection (from exposure to the presence of carcinogens in the workplace), whereas the Member State rules in the latter did not implement the discretion to authorise the fattening of fish (i.e. an omission). Arguably, the former constitutes the clear exercise of national regulatory autonomy, whereas the latter may be characterised as an incorrect implementation of the minimum rules laid down in a directive. The common factor which does unite the two cases, however, is the finding that the stricter national measures were in line with the policy objectives of the EU.

³⁸ Fundamental rights did not form part of the litigation in *Borsana*. The dispute, between two private parties (Italiana Petrol ("IP") and Borsana), hinged on the interpretation of national implementing measures which were more stringent than Directive 90/394 of 28 June 1990 on the protection of workers from the risks related to exposure to carcinogens at work (Sixth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) OJ L 196/1). More recently, see: Case C-426/11 *Alemo-Herron v Parkwood Leisure Ltd* [2014] 1 CMLR 21 [36].

F. Concluding Remarks

Returning to *Booker*, the first point to note is that a potential breach of the right to property does not automatically give rise to the payment of compensation in situations where Member States are acting as ‘agents’ of the EU. In *Booker*, while the matter of compensation arising out of the implementation of EU rules seemingly fell within the scope of EU law, it was not required. With regards to the relationship between fundamental rights and minimum control measures, it has been argued by Tridimas that the measures adopted by the UK authorities were stricter and as such formed part of the UK’s regulatory autonomy, and that accordingly the review by the CJEU should not be viewed as correct.³⁹

However, it is submitted that national legislation in the upwardly-flexible area (in *Booker* and in general) should be subject to EU rights-based compliance for various reasons. First, in *Booker*, the minimum harmonisation clause stipulated that subject to the general rules of the Treaty, Member States may maintain or apply stricter measures. In light of the fact that the EU Charter (now) has the same legal value as the Treaties, and since the general principles constitute a primary source of Union law, stricter national measures adopted by the Member States ought to meet EU fundamental rights standards. Second, while the principle of proportionality was held to be inapplicable to the upwardly-flexible area in *Borsana*, its application in the context of minimum harmonisation measures clearly has a different function to that of fundamental rights. In particular, the principle of proportionality is applied to determine whether domestic measures are appropriate and necessary in relation to the objectives of the EU (in the case of *Booker*, the eradication of fish diseases). Fundamental rights on the other hand operate primarily to protect the individual from abuse of power by public authorities. In cases like *Booker*, the stricter the national measures are, the more the EU’s objectives will be furthered, but also the greater the restriction on fundamental rights

³⁹ Takis Tridimas, *The General Principles of EU law* (2nd edn, OUP 2006) 323.

will be. If the functioning of the internal market and the protection of fundamental rights constitute twin EU objectives of equal value, then scrutiny of restrictions on fundamental rights where Member States adopt stricter rules as part of their regulatory autonomy to further the economic aims of the EU seems only logical.

Whilst *Booker* was decided pre Lisbon, it is worth pondering how the dispute might have been resolved post Lisbon. Focusing on the scope of EU law, the expansionist approach in *Fransson* points towards a clear finding that the issue of compensation would fall within the ambit of Art.51 of the Charter, albeit as a matter which was not ‘entirely governed by EU law’. Consequently, the national authorities would be free to provide compensation (thus providing a higher level of protection to the right to property) notwithstanding the absence for the provision of compensation in the Directive. In keeping with *Fransson* and *Melloni*, this higher level of protection would in no way compromise the level of protection accorded to right to property under the Charter or the primacy, unity or effectiveness of Union law. As regards the stricter national measures, the CJEU in *Booker* held that they were ‘similar’ to the EU minimum control measures. On this basis, the CJEU would have to check whether the standard set by the Directive was compliant with the right to property protected under the EU Charter. If compliant, then the level of protection provided at the national level would also be sufficient. It seems, therefore, that the Charter would not alter the judgment in *Booker*.

IV. Enforcing Regulations

The *N.S.* litigation exemplifies the ascending role of human rights in the post-Lisbon EU legal order. Situated in the context of EU asylum law, *N.S.* is the leading case on return of asylum seekers to Greece under Regulation 343/2003,⁴⁰ also known as the “Dublin II” Regulation, replacing the Dublin Convention.⁴¹ A prescient aspect of *N.S.* is the propinquity between the Greek asylum crisis and the debt crisis in Greece, both of which show no signs of abating.⁴²

A. Legal Context

After the ratification of the Treaty of Amsterdam in 1999, rule-making powers pertaining to asylum, visas and immigration were transferred from the (then) Justice and Home Affairs (JHA) Title VI Third Pillar to the (then) Community EC Title IV First Pillar as part of the creation of an Area of Freedom, Security and Justice (AFSJ), conferring upon the [EU] competences in this sphere of law.⁴³ The Amsterdam Treaty also introduced Art.63 EC (Art.78 TFEU) serving as the legal basis for the adoption of Regulation 343/2003 in conjunction with numerous other Directives, specifically Directives 2001/55, 2003/9, 2004/83 and 2005/85, as part of the establishment of a Common European Asylum System (CEAS).

⁴⁰ Council Regulation (EC) No 343/2003 of 18 February 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 [2003] OJ L 50/25.

⁴¹ The Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities [1997] OJ C254/1 (“the Dublin Convention”).

⁴² EU and IMF backed austerity measures designed to mitigate the Greek debt crisis are having an insidious effect on existing detention and reception conditions of asylum seekers in Greece. See: Greece: Amnesty International UK, ‘Racism, Squalor and Chaos - the Reality for Migrants as Austerity Measures Bite’ (*Amnesty International UK Press Release*, 18 December 2012) <<http://www.amnesty.org.uk/press-releases/greece-racism-squalor-and-chaos-reality-migrants-austerity-measures-bite>>accessed 9 July 2015.

⁴³ Paul Craig and Gráinne de Búrca, *EU Law: Text Cases and Materials* (5th edn, OUP 2011) 18.

The Dublin Regulation itself, to which all Member States as well as Norway, Iceland and Switzerland are bound, creates a mechanism whereby responsibility for examining an asylum application lodged in a Member State is determined according to a hierarchy of criteria set out in Chapter III therein. At a glance, Chapter III of the Regulation sets out in ascending order the responsible State as being that where: a family member of an unaccompanied minor is lawfully residing (Art.6); a family member has been affirmed as a refugee (Art.7); a visa or residence permit has been issued (Art.9); entry into the EU first took place (Art.10).

If no State can be designated as responsible according to one of the Chapter III criteria, then under Art.13 of the Regulation the default rule is that the Member State in which the application is first lodged becomes responsible. Where the State in which the application is made believes that another State is responsible, it shall, under Art.17 of the Regulation, call upon that State to assume responsibility for the application. If that State fails to respond within two months, then under Art.18(7) it is deemed to have tacitly accepted responsibility.

Most importantly, under Art.3(2) of the Regulation, also known as the *sovereignty clause*, each Member State is enabled, by way of derogation, to examine an asylum application even though it is not designated as the responsible State under the Regulation; the purported rationale being that States may wish to examine an application on humanitarian grounds or, less altruistically, in order to expediently dispose of an unmeritorious application.

In theory, the objective of the Dublin system is to ensure that each application is examined by one State efficiently and equitably in a bid to eradicate so-called ‘forum-shopping’ and ‘asylum seekers in orbit’.⁴⁴ In practice, it transpires that the allocation criteria

⁴⁴ Joanna Lenart, ‘Fortress Europe: Compliance of the Dublin II Regulation with the ECHR’ (2012) 28 UJILEL 4,5.

in Chapter III are seldom used on grounds of being ‘unworkable’, entailing that responsibility invariably reverts back to the Member State in which the application was first registered.⁴⁵

B. Facts of the Dispute and EU Law Dimension

A vivid insight into the depressing facts of the case, as alleged by the claimant in his witness statement, was delineated by the High Court of Justice (England & Wales), QBD (Administrative Court), and can be summarised as follows.

On 23 November 2008, N.S., an Afghan national, fled Afghanistan after Afghan authorities became aware that he had converted to Christianity.⁴⁶ N.S. arrived in Greece on a motorboat via Turkey having travelled overnight in treacherous conditions.⁴⁷ Along with others, N.S. was arrested by Greek police and taken to a detention centre. N.S. was not offered the assistance of an interpreter, nor was he offered legal advice or an opportunity to make an asylum application. Indeed N.S. did not apply for asylum in Greece. Having been detained in a large hall with 70-80 detainees for four days, N.S. was released from the detention centre, given ferry tickets to Athens, and ordered to leave Greece within the month.⁴⁸ N.S. fled Greece via the Bulgarian border, but was intercepted by Turkish police and spent two months in detention in Turkey in squalid and violent conditions.⁴⁹ N.S. managed to escape from Turkey and board a lorry to the UK where he lodged an application for asylum on 12 January 2009.

On 1 April 2009, the Secretary of State for the Home Department (“the Secretary of State”) notified N.S. that a request had been sent to Greece, as being the responsible State

⁴⁵ Cathryn Costello, ‘Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored’ (2012) 12 HRL Rev 287, 314.

⁴⁶ *R. (on the application of S) v Secretary of State for the Home Department*, [2010] EWHC 705 (Admin) [3].

⁴⁷ *ibid* [4].

⁴⁸ *ibid* [4]-[5].

⁴⁹ *ibid* [6].

under Art.17 of the Dublin Regulation, with a view to taking the claimant back and determining his asylum application there. The Secretary of State adopted this view on the combined basis of Art.10(1) and Art.3(1). The Hellenic Republic, having failed to respond in the requisite time, was deemed to have accepted responsibility for the claimant.⁵⁰

As regards EU law adjudication, the central-focal point of the dispute pertains to the so-called sovereignty clause housed in Art.3(2) of the Regulation. As noted above, the clause grants a Member State the discretion, by way of derogation, to accept responsibility for an asylum application even though it is not the responsible State under the Chapter III criteria.

Before the High Court, the claimant argued that the Secretary of State should exercise that discretion and accept responsibility for N.S.'s application and not send him back to Greece as this would violate his human rights. In particular, N.S. argued that the failure to exercise that discretion would breach his rights under Art.3 ECHR and EU law on the basis that Greece would subject him to ill-treatment and not process his application properly.⁵¹ In contrast, the Secretary of State argued that while the exercise of the discretion under Art.3(2) had to comply with the aims of the Regulation, it did not impose a duty not to return N.S. to Greece on the basis that Greece might not abide by its obligations under EU law.⁵² The Administrative Court ruled in favour of the Secretary of State, but granted N.S. leave to appeal to the Court of Appeal (England & Wales) (Civil Division).

Before the Court of Appeal, the Secretary of State further argued that the exercise of the discretion under Art.3(2) did not fall within the scope of EU law and that accordingly the Charter of Fundamental Rights was inapplicable to it.⁵³ As an alternative, the Secretary of

⁵⁰ Pursuant to Art.18(7); Case C-411/10 *N.S. v Secretary of State for the Home Department* [2012] All ER (EC) 1011 [36].

⁵¹ *R. (on the application of S) v Secretary of State for the Home Department* [2010] EWHC 705 (Admin) [11].

⁵² *ibid* [141].

⁵³ *ibid* [8].

State asserted that any duty to take account of EU human rights did not entail consideration that return to Greece would expose N.S. to a substantial risk of ill-treatment. The Secretary of State further contended that the Regulation enabled the UK to rely on a ‘conclusive presumption’ that the Hellenic Republic would honour its obligations under EU law.⁵⁴

The Court of Appeal stayed proceedings and referred a series of questions to the CJEU to ascertain, *inter alia*, whether: a decision under Art.3(2) fell within the scope of EU law for the purposes of Art.6 TEU and/or Art.51 of the Charter; the duty to comply with human rights under EU law is discharged where the transferring State sends an asylum seeker to the responsible State under the Chapter III criteria; compliance with EU human rights precludes reliance on a conclusive presumption that the responsible State will comply with EU human rights; a Member State is obliged to exercise the power under Art.3(2) where transfer to the responsible State would expose an asylum seeker to a breach of his human rights under EU law; Protocol (No.30) of the EU Charter altered any of the obligations of the UK.⁵⁵

C. Submissions before the Court of Justice

Before the Luxembourg Court a dozen Member States intervened, namely Germany, Finland, France, the Hellenic Republic, Belgium, Ireland, Italy, Austria, the Netherlands, Poland, the UK, and the Czech Republic together with the Swiss Confederation (a party to the Dublin system) and the European Commission. Submissions were also made by the United Nations High Commissioner for Refugees (UNHCR), the AIRE (Advice on Individual Rights in Europe) Centre, Amnesty International Ltd and the UK Equality and Human Rights Commission.⁵⁶

⁵⁴ Case C-411/10 *N.S. v Secretary of State for the Home Department* [2012] All ER (EC) 1011 [47].

⁵⁵ *ibid* [50].

In relation to the pivotal issue of whether a decision taken by a State pursuant to Art.3(2) fell within the scope of EU law, N.S., Amnesty International Ltd, the AIRE Centre, the UNHCR, the French, Dutch, Austrian and Finnish Governments and the European Commission all adopted the view that it did.⁵⁷ In contrast, Ireland, Italy, Belgium and the UK argued that the textual reference to a ‘sovereignty clause’ in conjunction with its ‘raison d’être’ (to exercise it on humanitarian grounds) brought Art.3(2) outside the scope of EU law.⁵⁸ The UK Government also drew a distinction between a sovereignty clause and an *ERT*-type derogation, arguing that only the latter is caught by EU law.⁵⁹ Adopting a middle-ground position, the Czech Government asserted that only a decision to assume responsibility would fall within the scope of EU law; non-exercise of that discretion would not.⁶⁰

D. Judgment of the Court of Justice

Article 3(2) of the Dublin Regulation fell within the scope of EU law and triggered the application of the EU Charter. The CJEU found that the discretion contained in the sovereignty clause formed an integral part of the Common European Asylum System in that a Member State which elects to examine an asylum application ‘itself becomes the Member State responsible within the meaning of the Regulation’.⁶¹ As such, that power had to be exercised in accordance with other provisions of the Regulation. In that connection, a decision by a Member State to examine an asylum application, which is not its responsibility

⁵⁶ Case C-411/10 *NS v Secretary of State for the Home Department* [2012] All ER (EC) 1011, Opinion of AG Trstenjak, [56]. See also: Cathryn Costello, ‘Dublin-case NS/ME: Finally, an End to Blind Trust across the EU?’ (2012) 2 A & MR 83, 86.

⁵⁷ *ibid*, Opinion of AG Trstenjak, [57].

⁵⁸ *ibid*, Opinion of AG Trstenjak, [58]; Judgment of Court [61].

⁵⁹ *ibid*, Opinion of AG Trstenjak, [62].

⁶⁰ *ibid*, Opinion of AG Trstenjak, [59].

⁶¹ Case C-411/10 *N.S. v Secretary of State for the Home Department* [2012] All ER (EC) 1011, Judgment of the Court, [67].

according to criteria laid down in the Regulation, ‘implements EU law for the purposes of Art 6 TEU and/or Art 51 of the EU Charter’.⁶²

The principle of mutual confidence between the Member States underpins the Common European Asylum System. While it is not inconceivable that the responsible Member State to which an asylum seeker is transferred may treat an asylum seeker in a manner incompatible with his/her human rights due to operational problems, it did not follow that any slight breach would affect the obligations of the other contracting States to comply with the Regulation.⁶³ The CEAS was premised on the principle of mutual confidence and ‘a presumption of compliance by other Member States with EU law and, in particular, fundamental rights existed’.⁶⁴

Member States cannot operate a conclusive presumption that other Member States of the EU respect fundamental rights. A Member State cannot transfer an asylum seeker to the responsible State within the meaning of the Regulation:

Where it could not be unaware that systematic deficiencies in the asylum procedure and reception conditions of asylum seekers in that Member State amounted to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Art 4 of the EU Charter.⁶⁵

Citing the Strasbourg case of *M.S.S. v Belgium* (delivered by the ECtHR after the Court of Appeal referred *N.S.* to the Court of Justice), the CJEU emphasised that the Member States had at their disposal the necessary instruments to assess whether transfer to the responsible State under the Chapter III criteria would expose the transferee to ill-treatment.⁶⁶

⁶² *ibid* [69].

⁶³ *ibid* [81]-[82].

⁶⁴ *ibid* [83].

⁶⁵ *ibid* [94].

⁶⁶ *ibid* [91].

The discretion under Art.3(2) of the Regulation becomes an obligation. Where the transferring State is aware of systematic deficiencies in the responsible State, as was the case in Greece, then it must continue to establish whether another (third) Member State can be designated as the responsible State according to criteria set out in Chapter III of the Regulation.⁶⁷ However the transferring State must not ‘worsen’ the rights-based situation of the asylum seeker i.e. by taking a long period of time to determine the responsible State and, if necessary, the Member State in which the asylum seeker is present must ‘itself’ examine the asylum application according to the procedures laid down in Art.3(2).⁶⁸

Protocol (No.30) does not absolve the UK or Poland from compliance with the Charter. In line with the AG’s Opinion, the CJEU affirmed that Art.1(1) of Protocol (No.30) clarifies Art.51 of the Charter with regards to its scope and ‘does not intend to exempt the Republic of Poland or the UK from the obligation to comply with the provisions of the Charter’.⁶⁹

E. Analysis

Numerous aspects of this important judgment warrant closer inspection and elaboration. The first pertains to the Greek asylum crisis and the Dublin Regulation in general. The second relates to the scope of application of EU law and the EU Charter. The third concerns the effective application of EU law and the protection of fundamental rights in the EU legal order.

⁶⁷ *ibid* [96].

⁶⁸ *ibid* [98].

⁶⁹ *ibid* [120].

(i) The Greek Asylum Crisis and the Dublin System

The eminent historian Perry Anderson once deplored the illegal occupation of the Republic of Cyprus by Turkish troops as ‘an anomaly in the new Europe’.⁷⁰ Evidently, the ill-treatment of asylum seekers in Cyprus’ Hellenic sibling is a European anomaly as well.

In 2007, the European Parliament advised Member States not to transfer people to another State under the Dublin Regulation if it was established that the responsible State did not process Iraqi asylum claims properly and, if necessary, to utilise Art.3(2).⁷¹ To place things in context, recognition rates of Iraqi asylum claims in Greece in 2007 was 0 per cent, whereas in Germany and Sweden it was 85 per cent.⁷² In 2008, the European Commission instituted infringement proceedings against Greece for its failure to adopt national rules in order to ensure the examination of applications by asylum seekers returned back to the Hellenic Republic under Chapter III of the Dublin II Regulation.⁷³ At the UN level, concerns materialised as early as 2004 when a UNHCR report revealed that asylum seekers who were returned to Greece faced a real risk of being expelled back to domestic persecution in violation of the non-*refoulement* principle.⁷⁴ In 2008 the UNHCR advised EU Member States to freeze transfers to Greece and make use of the sovereignty clause housed in Art.3(2) of the Dublin Regulation.⁷⁵

⁷⁰ Perry Anderson, ‘The Divisions of Cyprus’ (2008) 30 LRB 7, 7.

⁷¹ European Parliament, ‘European Parliament Resolution of 12 July 2007 on the Humanitarian Situation of Iraqi Refugees’ (*European Union*, 12 July 2012) <<http://www.refworld.org/docid/4697795d2.html>> accessed 11 August 2013.

⁷² Joanna Lenart, ‘Fortress Europe: Compliance of the Dublin II Regulation with the ECHR’ 28 (2012) UJILEL 4, 6.

⁷³ *R. (on the application of S) v Secretary of State for the Home Department* [2010] EWHC 705 (Admin) [73].

⁷⁴ UN High Commissioner for Refugees (UNHCR), ‘Note on Access to the Asylum Procedure of Asylum-Seekers Returned to Greece, *Inter Alia*, Under Arrangements to Transfer Responsibility With Respect to Determining an Asylum Claim or Pursuant to Application of the Safe Third Country Concept’ (*ref world*, November 2004) <<http://www.refworld.org/docid/46d52b3d2.html>> accessed 11 August 2013.

At the ECHR level, in the *M.S.S. v Belgium* (“*M.S.S.*”) case, the ECtHR, citing UNHCR reports, observed that in the year of 2008 a staggering 88 per cent of foreign nationals entered the EU via Greece, yet of that percentage only 0.04 per cent successfully claimed asylum in Greece.⁷⁶ Aside from these sobering statistics, the ECtHR’s decision in *M.S.S.* merits reiteration due to its role in the CJEU’s decision in *N.S.* The issue for the ECtHR in *M.S.S.* was whether the transfer of an Afghan asylum seeker (“*M*”) from Belgium to Greece pursuant to the Dublin Regulation was in breach of *M*’s ECHR rights. The ECtHR, while departing from but not overruling the previous case of *KRS v UK* (where it held that (i) there was a presumption of compliance by Greece with the Dublin system and (ii) no risk of *refoulement* or of the transferee’s human rights being breached existed)⁷⁷ ruled that Greece was in breach of Arts.3 and 13 ECHR, and that Belgium was also in breach of Arts.3 and Art.13 ECHR for exposing *M* to the risks associated with the deficiencies in the Greek asylum system.⁷⁸

It has been suggested that the Grand Chamber in *N.S.* relied on the ECtHR’s decision in *M.S.S.* to the extent that it was determinative.⁷⁹ However, while it is true that the AG and the CJEU cited *M.S.S.*, and that it was indeed influential, the CJEU had already made clear (at paragraph 86) that Member States could not operate a conclusive presumption of human rights compliance by the responsible State before it considered the ECtHR’s decision in

⁷⁵ UN High Commissioner for Refugees, ‘UNHCR Position on the Return of Asylum-Seekers to Greece under the “Dublin Regulation”’ (*ref world*, 15 April 2008) <<http://www.refworld.org/docid/4805bde42.html>> accessed 11 August 2013.

⁷⁶ *M.S.S. v Belgium and Greece* (2011) 53 EHRR 2 [126].

⁷⁷ *KRS v United Kingdom* (2009) 48 EHRR 8 [144].

⁷⁸ *M.S.S. v Belgium and Greece* (2011) 53 EHRR 2: [233]-[234] (Greece’s violation of Art.3); [321]-[322] (Greece’s violation of Art.13 in conjunction with Art.3); [360]-[361] (Belgium’s violation of Art.3); [396]-[397] (Belgium’s violation of Art.13 in conjunction with Art.3).

⁷⁹ Sophie Lieven, ‘Case Report on C-411/10, *N.S.* and C-493/10, *M.E. and Others*’ (2012) 14 EJML 223.

M.S.S. (at paragraph 88).⁸⁰ It seems therefore that the CJEU was eager to set out its own stall in terms of balancing the functioning of the Dublin system and protecting *EU* human rights.

In practical terms, the determination by the two European courts that Greece is incapable of ensuring transferees' human rights entails that transfers to the Hellenic Republic have been frozen, at least until it conforms with Art.4 of the EU Charter (*N.S.*) and Art.3 ECHR (*M.S.S.*).⁸¹ However a recent report by Amnesty International Ltd illustrates that there is a mephitic atmosphere in Greece, with systematic violations of asylum seekers' human rights being exacerbated by the Greek debt crisis and Amnesty's Europe Director lamenting asylum conditions in Greece as being 'totally unworthy of the Nobel Peace Prize-winning EU and so far below international human rights standards as to make a mockery of them'.⁸²

Against that, and at the risk of seeking to exonerate Greece from its humanitarian obligations, it appears that the problem lies not only with Greece but with the Dublin system as a whole. In 2008 the Commission proposed a recast of the Dublin II Regulation and also the EURODAC Regulation, followed by calls in 2011 to recast the Reception Conditions Directive, the Asylum Procedures Directive and the Qualification Directive, all of which form constituent parts of the CEAS.⁸³

Focusing on the Dublin II Regulation, a litany of drawbacks can be highlighted. One pitfall of the regime is that it places a heavy burden on Member States located on the outer edges of the EU, such as Greece, Croatia and Lithuania. This geographical inequity is exacerbated by Greece's current financial quagmire which makes policing her borders less

⁸⁰ See Maarten den Heijer, 'Joined Cases C-411 & 493/10, *N.S. v Secretary of State for the Home Department and M.E. and Others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, Judgment of the Court (Grand Chamber) of 21 December 2011' (2012) 49 CML Rev 1735, 1744-1745.

⁸¹ *ibid*, 1736.

⁸² Amnesty International UK, 'Asylum-seekers and Migrants in Greece Hounded by Police Operations and Right-wing Extremists' (*Amnesty International UK Press Release*, 19 December 2012) >http://www.amnesty.org.uk/news_details.asp?NewsID=20525> accessed 20 February 2013.

⁸³ Joanna Lenart, 'Fortress Europe: Compliance of the Dublin II Regulation with the ECHR' (2012) 28 UJIEL 4, 7.

feasible, leading inevitably to a greater influx of asylum seekers into the EU via Greece. Add to the mix regional instability in neighbouring States such as Iraq, Libya and Afghanistan, and one gets the distinct feeling that the Hellenic Republic is being kept as some sort of EU Asylum mooch-cow, much in the same way as the ant keeps the green aphid. Similarly, concerns have been raised regarding accession of States such as Croatia and Poland, namely that they are being induced to act as a ‘border guard’ in order to shield ‘fortress Europe’.⁸⁴

Aside from dubious geographical fairness, another gripe with the Regulation is that it deprives asylum seekers of the right to self-determination. Having entered the EU from one State, an asylum seeker may wish to claim asylum elsewhere only to be sent back to the ‘responsible’ State. In sociological terms, the asylum seeker has no agency. Indeed, prior to the CJEU’s decision in *N.S.*, certainty as to whether a State was under a duty to exercise its discretion under the sovereignty clause meant asylum was more of a ‘lottery’ than a choice.⁸⁵

Overall, the Regulation seems to be premised on twin fallacies, namely that asylum claims will be shared equally between States (so-called ‘burden sharing’) and that asylum seekers will be treated uniformly irrespective of which State receives them. In reality, burden sharing has been replaced with ‘burden shifting’ to States located at the (eastern and southern) EU external frontiers.⁸⁶ Yet burden shifting gives rise to divergent standards of treatment as States who shoulder the most burden often end up having the least workable asylum systems.⁸⁷ Against that, and as noted above, there is evidence to suggest that even prior to *M.S.S.* and *N.S.*, national courts were reticent about sending returnees back to Greece.

⁸⁴ *ibid*, 6.

⁸⁵ *Ibid*, 12.

⁸⁶ Maarten den Heijer, ‘Joined Cases C-411 & 493/10, *N.S. v Secretary of State for the Home Department and M.E. and Others v Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, Judgment of the Court (Grand Chamber) of 21 December 2011’ (2012) 49 CML Rev 1735, 1751.

⁸⁷ *ibid*, 1752.

(ii) The Application of the EU Charter

In *N.S.*, the Grand Chamber essentially ruled that *any* decision taken on the basis of the sovereignty clause falls within the scope of EU law. If a State elects to accept responsibility for an asylum application, even though it is not designated as the responsible State under the Regulation, it must comply with the EU Charter as it becomes responsible within the meaning of the Regulation. If, however, a State decides not to take responsibility for the application, it cannot automatically transfer the asylum seeker to the responsible State where it cannot be unaware of systematic deficiencies in the latter's asylum procedures which are liable to expose the asylum seeker to a real risk of a breach of Art.4 of the EU Charter. While a slight breach would be insufficient to affect the obligations of the transferring State (mutual recognition) it cannot operate a conclusive presumption that the responsible State respects human rights, and if necessary the State in which the application was lodged *must* itself examine the application.

The glaring drawback with the above approach is that the obligation to exercise the discretion means that a State which is not ordinarily responsible has to make good any systematic deficiencies in the responsible State.⁸⁸ However the CJEU did not clarify what constitutes a 'systematic deficiency', though it did cite sources from which States could glean such insights. Similarly the 'substantial grounds' threshold, as distinct from the AG's moderated 'serious risk' benchmark, seems like a high hurdle to clear and yet the CJEU furnished no guidance. Nor did it elucidate how the rebuttable presumption that other States respect human rights operates. It is unclear whether the onus is on the asylum seeker being transferred to rebut the presumption, as suggested by the AG, or whether it is for States and

⁸⁸ Indeed this was one of the contributing factors which led Mr Justice Cranston to dismiss *N.S.*'s claim in the High Court of Justice. See: *R. (on the application of S) v Secretary of State for the Home Department*, [2010] EWHC 705 (Admin) [141], [152].

their courts to evince awareness of deficiencies which do not violate Art.4 of the EU Charter.⁸⁹

On a different note, the CJEU's opportune clarification that Art.1(1) of Protocol (No.30) does not exonerate Poland or the UK from compliance with the Charter is to be welcomed. According to the CJEU, and in line with much academic commentary,⁹⁰ Art(1) of the Protocol merely clarifies the scope of application of the Charter as delineated in Art.51 therein. In relation to Art.1(2) of the Protocol, pertaining to social rights contained in Title IV of the Charter, neither the AG nor the CJEU made any determination since *N.S.* did not concern such rights. *N.S.* thus sheds little light on whether the social rights contained in Title IV will have any impact on aspects of British and Polish employment law, for which the Protocol was adopted in the first place.⁹¹

The CJEU may also have missed the boat on a discrete yet pertinent matter, namely the Secretary of State's informal policy on the sovereignty clause. As highlighted by the High Court, the majority of Member States restrict certain categories of returnees such as unaccompanied minors or chronically-ill asylum seekers, whereas the Secretary of State exercises his discretion on an ad-hoc basis in the absence of any formal guidelines.⁹² It is not beyond the bounds of credulity to foresee a situation whereby failure to take account of specific categories of returnees will also amount to a real risk of breaching provisions of the Charter e.g. Art.24 on the rights of the child.⁹³

⁸⁹ The CJEU left it to the Member States to set in motion the rules on the burden and standard of proof whereas the AG suggested [at paragraph 135] that the onus was on the asylum seeker to rebut the presumption.

⁹⁰ Steve Peers, 'Court of Justice: The NS and ME Opinions - The Death of "Mutual Trust"?' (*State Watch*) <<http://www.statewatch.org/analyses/no-148-dublin-mutual-trust.pdf>> accessed 14 September 2013.

⁹¹ Stephen Weatherill, *Cases and Materials on EU Law* (10th edn, OUP 2012) 63-63.

⁹² *R. (on the application of S) v Secretary of State for the Home Department* [2010] EWHC 705 (Admin) [143].

⁹³ See Case C-648/11 *MA v Secretary of State for the Home Department* [2013] 3 CMLR 49; See now Art 2(g). and Art.6 of the Dublin III Regulation: Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible

(iii) The Effective Application of the Dublin System and the Protection of EU Human Rights

At the heart of the CJEU's decision in *N.S.* is the tender balance between the effective application of the Dublin mechanism and the protection of human rights. Evidently, the default position for the CJEU is that in order for the mechanism to operate efficiently, a presumption of rights-based compliance by other EU Member States is necessary. However as noted above, this presumption is not conclusive and can be rebutted. Moreover, not just any infringement warrants a rebuttal; only serious systematic flaws would be liable to do so.

F. Concluding Remarks

It remains to be seen whether the approach adopted in *N.S.* can be transplanted to other domains of the AFSJ, such as in the context of the European Arrest Warrant (EAW), where the principle of mutual recognition and human rights intersect.

An instructive case in this regard is *Melloni*.⁹⁴ Leaving aside factual details, the pivotal issue for the CJEU was whether Art.53 of the Charter enabled Spain to apply a higher standard of protection than that accorded by Arts.47 and 48(2) of the Charter (fair trial and rights of defence respectively), thus rendering extradition of Mr Melloni conditional upon review of his conviction handed down in absentia in the issuing State (Italy), notwithstanding Art.4a of the EAW Framework decision (which does, under certain conditions, permit trials in absentia). The CJEU held that Art.4a was compatible with Art.47 and 48(2) of the Charter, and that in any event Art.53 of the Charter precludes Member States from disapplying EU rules which may breach *national* human rights standards, but do not violate the Charter.⁹⁵ In

for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person OJ L180/31.

⁹⁴ Case C-399/11 *Criminal proceedings against Melloni* [2013] All ER (EC) 475.

⁹⁵ *ibid* [58].

particular, the CJEU ruled that Art.53 of the Charter merely affirms that in situations where Member States implement EU rules into national law (the ‘agency situation’), authorities retain the right to apply national standards of human rights protection subject to the condition 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 thereby not compromised’.⁹⁶

It appears that in terms of balancing human rights on the one hand and the effective application of the EU system of extradition (based on the principle of mutual recognition)⁹⁷ on the other, the CJEU came down on the side of the latter. On closer inspection, the list of circumstances permitting the execution of the EAW in order to enforce a court judgment rendered in absentia effectively ‘insulated’ the EU measure from being in breach of Mr Melloni’s rights of defence.⁹⁸ The most that can be said, therefore, is that the relationship between the principle of mutual recognition and human rights is context specific i.e. based on the relevant EU legislative measure at issue, and hence the approach adopted in *N.S.* may not have a wave effect on other parts of the AFSJ; indeed the decision in *N.S.* did not even create a ripple since the Grand Chamber in *Melloni* did not make any reference to it.

Another case in the context of the EAW is *Radu*. At its core, the issue for the CJEU was whether Romania, the executing State, was under an obligation to refuse to execute the EAW where to do so might expose Mr Radu to a breach of his human rights (Arts. 47 and 48 of the EU Charter) on the basis that the issuing State, Germany, did not afford him an opportunity to be heard *prior* to the warrant being issued. The AG concluded that while human rights grounds were not included in the list of grounds (Art.3 and 4 of Framework Decision

⁹⁶ *ibid* [60].

⁹⁷ The historical origin of the principle of mutual recognition is in the context of the internal market but it has, over time, been extended into the sphere of EU criminal law: see Steve Peers, ‘Mutual Recognition and Criminal Law in the EU: Has the Council got it Wrong?’ (2004) 41 CML Rev 5.

⁹⁸ Aside from the absence of a proportionality test, this method of tautological insulation is not beyond reproach. As noted by Leczykiewicz, ‘If this method was applied more broadly, an EU act could never be found invalid for breaching fundamental rights’. See Dorota Leczykiewicz: ‘Melloni and the Future of Constitutional Conflict in the EU’ (*U.K. Const. L. Blog*, 22 May 2013) <<http://ukconstitutionallaw.org>>accessed 14 September 2013.

2002/584) for refusing to execute the EAW, to exclude human rights considerations altogether would be too ‘narrow’.⁹⁹ After taking into account the test adopted in *N.S.*, as well as relevant ECtHR case law, the AG opined that the onus was on Mr Radu to demonstrate to the executing State that his reasons for not being transferred were ‘substantially well founded’.¹⁰⁰ In contrast, the CJEU adopted the view that Art.47 and 48 of the Charter could not apply just because the issuing State had not afforded the requested person the right to be heard since one objective of the EAW was the ‘element of surprise’.¹⁰¹ Thus the CJEU artfully avoided making any determination on whether rights enshrined in the Charter could mediate the application of the EAW system. So while *N.S.* was instrumental in the AG’s exploratory Opinion, the CJEU’s ruling was purely pragmatic and made no reference to it.

To conclude this brief foray into the murky waters of EU criminal law, it seems that while there are evident parallels between the EU Asylum system and the EAW system, insofar as both hinge on the principle of mutual recognition, the CJEU’s omission to cite *N.S.* in either *Melloni* or *Radu* means that the role of the Charter in mediating the principle in other parts of JHA law remains to be seen. What is clear, however, is that in the context of EU Asylum law, the Dublin II Regulation can function only on the basis of mutual rather than blind trust. (In January 2014, the long awaited Dublin III Regulation came into force and Art.3(2) of the updated Regulation now incorporates the salient pronouncements made by the CJEU in *N.S.*)¹⁰²

⁹⁹ Case C-396/11 *Criminal Proceedings against Radu* [2013] All ER (EC) 410, Opinion of AG Sharpston, [69].

¹⁰⁰ *ibid* [81].

¹⁰¹ *ibid*, Judgment of the Court, [40].

¹⁰² Louis Karaolis, ‘A Post-modern Greek Tragedy: Austerity and Asylum in Times of Crisis’ (*Opendemocracy*, 3 April 2014) <<https://www.opendemocracy.net/openglobalrights-blog/louis-karaolis/postmodern-greek-tragedy-austerity-and-asylum-in-times-of-crisi>> accessed 17 July 2015; Steve Peers, ‘The Dublin III Regulation: What will be Different?’ (2014) 28 *JIANL* 46.

V. Horizontal Disputes and Fundamental Rights: Mangold, Dominguez and AMS

A striking development in the context of the CJEU's agency jurisprudence is the so-called 'horizontal application' of the general principle of non-discrimination (now 'holistically' enshrined in Arts.21 and 23 of the EU Charter of Fundamental Rights)¹⁰³ in the field of EU employment law. In this section, the implications of the landmark pre-Lisbon case of *Mangold*¹⁰⁴ will be considered, with passing reference to the subsequent case of *Küçükdeveci*,¹⁰⁵ followed by an appraisal of the post-Lisbon case of *Dominguez*.¹⁰⁶ The horizontal applicability of the EU Charter will also be assessed in light of the post-Lisbon *AMS* case.¹⁰⁷

A. *Mangold v Helm*

The material facts of the *Mangold* dispute: Mr Mangold entered into a fixed-term contract of employment with Mr Helm (from July 2003 to February 2004). The fixed-term provision of his contract was based on para 14(3) of The German Law on Part-Time Working and Fixed-Term of Contracts of December 2000 ("TzBfG") as amended by the so-called "Hartz law" in 2002, which temporarily substituted the age limit from 58 to 52 years old for the conclusion of fixed-term contracts of employment without objective justification (operating from 1 January 2003 until 31 December 2006). Mr Mangold brought proceedings against Mr

¹⁰³ The term 'holistic' is borrowed from: Susan Millns and Dia Anagnostou, 'Gender Equality, Legal Mobilization, and Feminism in a Multilevel European System' (2013) 28 *Can.J.L. & Society* 115, 121. See also: Gillian More, 'The Principle of Equal Treatment: From Market Unifier to Fundamental Right?' in Paul Craig and Gráinne de Búrca (eds.) *The Evolution of EU Law* (OUP 1999) 517.

¹⁰⁴ Case C-144/04 *Mangold v Helm* [2006] 5 ECR I-9981; Christa Tobler, 'Putting Mangold into Perspective: in Response to Editorial Comments, Horizontal Direct Effect – A Law of Diminishing Coherence?' (2007) 44 *CML Rev* 1177; Elise Muir, 'Enhancing the Effects of Community Law on National Employment Policies: the Mangold Case' (2006) 31 *EL Rev* 879.

¹⁰⁵ Case C-555/07 *Küçükdeveci v Swedex GmbH and Co KG* [2010] ECR I-365.

¹⁰⁶ Case C-282/10 *Dominguez v Centre Informatique du Centre Ouest Atlantique* [2012] 2 *CMLR* 14.

¹⁰⁷ Case C-176/12 *Association de Médiation Sociale v Union Locale des Syndicats CGT and others* [2014] All ER (EC) 501.

Helm disputing the compatibility of the fixed-term clause of his contract with Directive 2000/78¹⁰⁸ establishing a general framework for equal treatment in employment and occupation. The implementation deadline for Directive 2000/78 was originally 2 December 2003, though Germany secured a three-year transposition extension under Art.18(2) therein.

(i) Judgment of the CJEU

The fundamental tenets of the CJEU's ruling are well-known. First, the CJEU held that national legislation which 'took the age of the worker concerned as the only criterion for the application of a fixed-term contract of employment' was disproportionate to the legitimate aim pursued, namely the incorporation of older unemployed workers into the labour force.¹⁰⁹ Second, the fact that the contract was promulgated before the transposition deadline had expired was immaterial. In accordance with the *Inter-Environment Wallonie* doctrine, Member States are to refrain from adopting measures liable to seriously impede the objectives set by a Directive.¹¹⁰ Third, the sole objective of Directive 2000/78 was to establish a general framework for mitigating discrimination on the grounds of, *inter alia*, age in the area of employment. In that connection, Directive 2000/78 did not 'itself' establish the principle of non-discrimination in the field of employment.¹¹¹ Rather, the source of the prohibition of discrimination, as stated in the preamble to the Directive, derived from various international treaties and the constitutional traditions common to the Member States.¹¹² As such, non-discrimination on grounds of age was to be regarded as a general principle of EU

¹⁰⁸ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.

¹⁰⁹ Case C-144/04 *Mangold v Helm* [2006] 5 ECR I-9981 [65].

¹¹⁰ *ibid* [67]. As noted in the editorial comments of the CML Rev, this was a novel invocation as the doctrine has never been applied by the CJEU in proceedings between private parties. See Editorial Comments, 'Horizontal Direct Effect – A Law of Diminishing Coherence?' (2006) 43 CML Rev 43 1, 7.

¹¹¹ Case C-144/04 *Mangold v Helm* [2006] 5 ECR I-9981 [74].

¹¹² *ibid* [74].

law and, where national rules fell within the scope of EU law, the application of that general principle could not be contingent on the expiry of the Directive's implementation deadline.¹¹³ The onus was thus on the national court to ensure the full effectiveness of rights conferred under EU law by setting aside any provision of domestic law conflicting with those rights.¹¹⁴

(ii) Analysis

It is now trite to observe that by framing the dispute on the basis of the general principle of non-discrimination on grounds of age as opposed to the legal effect of Directive 2000/78, the CJEU is said to have: (i) side-stepped the 'no horizontal direct-effect of directives' rule, (ii) discovered a new general principle and (iii) given effect to an unimplemented directive. In spite of this jurisprudential ingenuity, or rather because of it, the decision has generated much attention. What ensues is an engagement with some of the thought-provoking reactions to the *Mangold* dispute regarding the following issues: legal certainty, judicial methodology, the field of application of EU law, and the horizontal application of the general principles.

(iii) Legal Certainty

Craig notes that the decision in *Mangold* gives rise to several problems, one of which is legal certainty. In particular, given that the implementation period for Directive 2000/78 had not elapsed, Mr Helm was merely acting in accordance with existing domestic law (as the fixed term provision of the contract was based directly on para 14(3) of the TzBfG).¹¹⁵ Yet he effectively found himself in a situation whereby compliance with national law in a private dispute constituted a breach of EU law.

¹¹³ *ibid* [75]-[76].

¹¹⁴ *ibid* [77].

¹¹⁵ Paul Craig, 'The Legal Effect of Directives: Policy, Rules and Exceptions' (2009) 34 *EL Rev* 349, 373.

In contemplating the consequences of applying the general principles horizontally, Craig, while not formally objecting to such a development, highlights that a necessary condition for an individual to impose obligations on another individual via an EU general principle would be for the latter to satisfy the criteria of direct effect i.e. that it be clear, precise and unconditional.¹¹⁶ Craig forewarns that due to the inherent nature of the general principles, there will be many situations where they cannot meet the requirements of direct effect.¹¹⁷ As a consequence, there exists a danger that the CJEU will have to draw on more specific provisions of a directive to off-set this problem. Craig is referring here to the way in which the CJEU in *Mangold* applied provisions of Directive 2000/78 to the principle of non-discrimination.¹¹⁸ From the stand-point of legal certainty, it will be impossible for litigants to ascertain beforehand which provisions of a directive will be applied to, or read into, the relevant general principle.¹¹⁹ Dougan has argued that the general principle in *Mangold* was ‘legally complete’ so as to have direct effect without further reference to secondary legislation in that ‘every equal treatment dispute follows the same essential pattern of legal analysis’.¹²⁰ On the other hand, Dougan also foresees that some general principles will be ‘too nebulous’ to satisfy the criteria of direct effect.¹²¹

(iv) Judicial Methodology

Another criticism levelled at the CJEU concerned its methodological approach. The CJEU declared that non-discrimination on grounds of age constituted a general principle of EU law.

¹¹⁶ *ibid*, 375.

¹¹⁷ *ibid*, 375.

¹¹⁸ Case C-144/04 *Mangold v Helm* [55]-[65],[76].

¹¹⁹ Paul Craig, ‘The Legal Effect of Directives: Policy, Rules and Exceptions’ (2009) 34 *EL Rev* 349, 375.

¹²⁰ Michael Dougan, ‘In Defence of *Mangold*?’ in Anthony Arnul and others (eds.), *A Constitutional Order of States: Essays in Honour of Alan Dashwood* (Hart Publishing 2011) 219, 240.

¹²¹ *ibid*, 241.

Yet it appears that only the Finnish and Portuguese Constitutions (Art.6 and Art. 51(1) respectively) enshrined non-discrimination on grounds of age at the time of the ruling. Against that, Art.21 of the Charter states that ‘any discrimination based on...age...shall be prohibited’. *Mangold* was decided before the entry into force of the Lisbon Treaty. However, had the CJEU cited the aforementioned provision of the Charter then it might have been able to exonerate itself from some of the subsequent academic scorn.

The approach adopted by the CJEU in *Mangold* was followed in the *Kücükdeveci* litigation, albeit with a twist. Akin to *Mangold*, the dispute was between two private-parties involving Directive 2000/78, though this time the transposition deadline had elapsed. The case hinged on whether Directive 2000/78 precluded national legislation stipulating that periods of employment completed by an employee before the age of 25 years old were not to be taken into consideration by an employer when calculating the period of notice required for dismissal.¹²² The CJEU affirmed that Directive 2000/78 did not itself establish the principle of non-discrimination in the field of EU employment law and that non-discrimination on grounds of age must be regarded as a general principle of EU law. At this point, however, the CJEU injected an additional component, namely that ‘Directive 2000/78 gave specific expression to that principle’.¹²³ This then enabled the CJEU to examine whether the general principle, as given expression in the Directive, precluded the operation of the national legislation, which the CJEU held that it did. It was seemingly immaterial that recourse to the doctrine of consistent interpretation with Directive 2000/78 was not feasible (the national law was unambiguously clear and precise) as the general principle was the guiding force. It was therefore for the national court to disapply any provision of domestic law contrary to the general principle.

¹²² Case C-555/07 *Kücükdeveci v Swedex GmbH and Co KG* [2010] ECR I-365 [18]; Mirjam De Mol, ‘Kücükdeveci: Mangold Revisited - Horizontal Direct Effect of a General Principle of EU Law’ (2010) 6 *EuConst* 293-308.

¹²³ *ibid* [21].

(v) The Ambit of EU Law

Another methodological gripe is the determination of when exactly a matter falls within the scope of EU law in order to trigger the application of the general principles. In *Mangold*, the dispute fell within the scope of EU law because of the ‘fortuitous’ fact that the national rules in question implemented another EU measure, namely Directive 1999/70.¹²⁴ This then triggered the newly discovered general principle to apply on the basis of Directive 2000/78 even though it (the Directive) could not apply horizontally and its transposition deadline had not expired. In *Küçükdeveci*, the impugned national legislation (Para 662 of the German Civil Code) did not constitute specific transposing legislation in respect of Directive 2000/78, but the legislation nevertheless fell within the ambit of EU law because of its relationship to the material scope of the Directive. As noted by Dougan, this contrasts with the earlier case of *Bartsch*.¹²⁵ In this case, the CJEU ruled that national rules (an age-gap clause) which did not constitute measures implementing Directive 2000/78 could not bring the dispute within the field of EU law in order for the general principles to apply where the Directive’s deadline for implementation had not expired.¹²⁶ A key difference between *Bartsch* and *Küçükdeveci* is that the deadline had not passed for the implementation of Directive 2000/78 in the former case, but a similarity is that in both cases the disputed national legislation did not constitute transposing measures.

The most which can be said, therefore, is that so long as (i) a directive’s transposition deadline has elapsed, then national measures which do not constitute implementing measures may still be reviewed for compliance with the general principles, if (ii) they fall within the material scope of the directive. The decision in *Mangold* is equally expansive: but for

¹²⁴ Michael Dougan ‘The General Principles of EU Law and Private Relationships’ in Stephen Weatherill and Dorota Leczykiewicz (eds.), *The Involvement of EU Law in Private Law Relationships* (Hart Publishing 2013) 78.

¹²⁵ Case C-427/06 *Bartsch v Bosch und Siemens Hausgeräte (BSH)*[2008] ECR I-7245.

¹²⁶ *ibid* [16]-[17].

Directive 1999/70, the national rules in question would not have been assessed in light of a general principle based, for all intents and purposes, on provisions of Directive 2000/78.

(vi) The Horizontal Application of the General Principles

In the wake of *Mangold* and *Kücükdeveci*, it has been posited that the cases represent the horizontal direct effect of the general principles. It is beyond the remit of this case-note to examine the doctrinal theory on the horizontal direct effect of the general principles.¹²⁷ However a few general remarks can be made. First, as noted above, in order for the general principles to apply horizontally, the dispute must fall within the scope of EU law i.e. a Member State must be implementing EU rules into national law or a national rule must touch upon the scope of application of a directive. If so, then upon expiry of the directive's transposition deadline the general principles can be relied on in civil proceedings. Second, the extent to which the decisions in *Mangold* and *Kücükdeveci* constitute inroads into the contractual autonomy of private parties is debatable. In a magisterial analysis (or *defence*) of *Mangold*, Dougan draws a lucid distinction between the imposition of EU private law obligations on private parties which are apt for enforcement in national courts on the one hand, and EU public law duties which are imposed on Member States but which can also be invoked 'collaterally' in civil proceedings on the other.¹²⁸ In *Mangold*, the disputed provisions of the contract were based directly on German legislation i.e. there was 'a clear public law basis' upon which the general principles could bite.¹²⁹ Public law acts that are in breach of the general principles can be set aside (directly) in litigation against public authorities and also (indirectly) as between private parties where the latter contest the legality

¹²⁷ See for instance: Thomas Papadopoulos, 'Criticising the Horizontal Direct Effect of the EU General Principle of Equality' (2011) 4 EHRLR 437.

¹²⁸ Michael Dougan, 'In Defence of Mangold?' in Anthony Arnul and others (eds.), *A Constitutional Order of States: Essays in Honour of Alan Dashwood* (Hart Publishing 2011) 219, 224.

¹²⁹ *ibid*, 224.

of the public law act.¹³⁰ Yet still, the most curious aspect of this development is the existence of a ‘dissonance’ between the field of application of a directive which ‘triggers’ the general principles to apply, and the scope of application of the general principles which, unlike directives, apply horizontally.¹³¹

(vii) Critique

In light of the above, the following observations can be made. First, it may be the case that non-discrimination on grounds of age did not constitute a ‘new’ general principle of EU law *per se*, but rather constituted a manifestation of the (already) established general principle of equality. Be that as it may, it is not clear whether the horizontal application of the general principle of non-discrimination extends to other general principles recognised by the CJEU and to other fundamental rights which also form part of the general principles. Taking this one step further, it is equally unclear (as we shall see) if such horizontal applicability extends to rights enshrined in the EU Charter or whether the latter can act merely as a prop to support the application of a given general principle in a horizontal situation. There is a risk of a dual-regime emerging whereby the general principles can apply horizontally, whereas the EU Charter (which according to Art.51 is addressed to the Member States) cannot on a purely textual reading. This is further complicated by the fact that rights enshrined in the EU Charter can operate as a source of inspiration for the elaboration of the general principles.

It appears, therefore, that the development of the general principles and fundamental rights is at the crossroads. On the one hand, the fact that the general principles can apply horizontally may constitute a natural evolution i.e. as the EU itself develops, the role of the general principles also augments from that of administrative safeguards, to public law rights,

¹³⁰ *ibid*, 225.

¹³¹ Eleanor Spaventa, ‘The Horizontal Application of Fundamental Rights as General Principles of Union Law’ in Anthony Arnul and others (eds.), *A Constitutional Order of States: Essays in Honour of Alan Dashwood* (Hart Publishing 2011) 119, 210.

to having legal effects in private disputes, albeit in a limited form. On the other hand, there is a risk that the general principles may become some sort of joker in the pack that is deployed to circumvent established legal rules or to extend the scope of EU law. In the post-Lisbon *Dominguez* case, the CJEU was given a fresh chance to address these unresolved issues.

B. Dominguez v Centre Informatique du Centre Ouest Atlantique

The litigation in *Dominguez* centred on the Working Time Directive 2003/88,¹³² Put briefly, the issue was whether Directive 2003/88 precluded French national rules which made the entitlement to paid annual leave conditional on actual work during the relevant reference period. The national rules stipulated that no right to annual leave was available in a particular year if the absence was due to illness.¹³³ In order to obtain paid annual leave, a minimum of one month's actual work was required, except periods on maternity leave or leave owing to work-related accidents which are treated as actual work. Ms Dominguez was unable to work having sustained an injury en-route to work and was on certified sick leave during the relevant reference period. Ms Dominguez was absent from work from November 2005 to January 2007. She brought an action seeking 22.5 days' paid leave regarding that period. The national court sought interpretative guidance from the CJEU on whether (i) the French national rules were in breach of Directive 2003/88, and if so (ii) whether it (the referring court) was under a duty to disregard those rules in a dispute between two private individuals.

(i) Opinion of AG Trstenjak

In contrast to CJEU's relatively fleeting and evasive judgment, the AG grasped the nettle regarding the horizontal application of the general principles. The AG found that, in

¹³² Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L 299/9.

¹³³ Case C-282/10 *Dominguez v Centre Informatique du Centre Ouest Atlantique and another* [2012] 2 CMLR 14, Opinion of AG Trstenjak, [14].

subjecting the right to paid annual leave to any pre-conditions whatsoever (in this case, actual work), the national rules constituted a breach of the Directive.¹³⁴ The AG then addressed the second question in great detail. In particular, while the national rules were in breach of the Directive, the AG recalled the limited applicability of directives, namely that even a clear, precise and unconditional provision cannot ‘of itself’ apply in a horizontal situation so as to impose obligations on a private party.¹³⁵ Therefore, Ms Dominguez could not rely on provisions of the Directive (against her employer) in order to oblige the national court to disapply the national rules.

The next available alternative was for the referring court to interpret the national rules, as far as possible, in harmony with the Directive. However the AG observed that, in the order for reference, the national court hinted at the unfeasibility of an interpretation which was not *contra legem*.¹³⁶ The next possible option was the direct application of the right to paid annual leave enshrined in Art.31(2) of the EU Charter. Again, however, the AG noted the limitation of doing so in a horizontal situation. Art. 51(1) of the EU Charter states that it applies to the EU and to the Member States only when the latter are implementing EU law. Hence, Art.31(2) could be relied on only insofar as it applied against the EU or the Member States, and private individuals could not be directly bound by it.¹³⁷

Another possible alternative was the direct application of the general principle to paid annual leave. Crucially, the AG stressed that in so doing it must first be established whether the right to paid annual leave could be regarded as a general principle and, second, it had to

¹³⁴ Case C-282/10 *Dominguez v Centre Informatique du Centre Ouest Atlantique and another* [2012] 2 CMLR 14, Opinion of AG Trstenjak, [53]. Furthermore, Directive 2003/88 makes no distinction, as regards the right to paid annual leave, between absence from work owing to sickness and those who have in fact worked during the year.

¹³⁵ Case C-282/10 *Dominguez v Centre Informatique du Centre Ouest Atlantique and another* [2012] 2 CMLR 14, Opinion of AG, [62].

¹³⁶ *ibid* [68].

¹³⁷ *ibid* [83].

be determined whether it could apply horizontally. After surveying various provisions of EU law and the constitutional traditions of the Member States, the AG reasoned that it could be considered a general principle of EU law. In relation to whether it could be directly applied horizontally, that is, without further reference to any other provision of EU law, the AG opined that this was ‘obviously impossible’.¹³⁸ The AG also highlighted that insofar as the general principle on the right to paid annual leave might be applied horizontally, this would give rise to a conflict in that while the Charter and the general principles have equal legal status, the latter could not be applied horizontally.

The final option was to transplant the CJEU’s approach in *Küçükdeveci* to this case, namely the application of the general principle to paid annual leave, as given expression in Directive 2003/88. With this approach, however, the AG had numerous reservations. Given that provisions of a directive (secondary law) would inform a general principle (primary law), there was a risk that the former would become an ‘inexhaustible source of inspiration’ for the latter, resulting in an ‘amalgamation of sources of law with different status’ which, moreover, would lead to an ‘ossification of that legislative content’.¹³⁹ In any event, the Directive could ‘scarcely’ be said to give specific expression to the general principle (to apply horizontally), since the former permits the Member States to adopt more favourable rules, allows for several derogations, and also grants the Member States a wide margin of discretion.¹⁴⁰ The referring court was thus not obliged to disregard the legislation at issue in a dispute between private individuals. Ms Dominguez could instead bring a civil liability action against the Member State for damages.

¹³⁸ *ibid* [138].

¹³⁹ *ibid* [157].

¹⁴⁰ *ibid* [161].

(ii) Judgment of the CJEU

The linear trajectory of the CJEU's ruling was as follows. The right to paid annual leave was an 'important principle of EU social law'¹⁴¹ and Member States could not make that right subject to any pre-conditions. Second, the court was under a duty to interpret national law as far as possible so as to cover absence from employment due to an accident as being equivalent to actual work. If this was not possible, then the national court had to ascertain whether Ms Dominguez's employer was a public authority, in which case the directly-effective provision of the Directive applied. If not, then Ms Dominguez could bring an action for *Francovich* damages.

(iii) Analysis

The AG's Opinion clarifies that while fundamental rights form part of the general principles, not every fundamental right qualifies as a general principle. Although the right to paid annual leave is enshrined in Art.31(2) of the Charter, the AG still conducted a review of EU law provisions and Member State constitutional traditions in order to ascertain whether it could be regarded as a general principle. Thus, the fact that a right is protected under the Charter does not in itself make it a general principle, though it may serve as a source of inspiration for the elaboration of one. Yet there is something quite curious about the Charter and the general principles having the same legal status while simultaneously denying that rights enshrined in the former do not automatically meet the requirements¹⁴² of being a general principle. Arguably, the AG's decision not to apply the general principles

¹⁴¹ Case C-282/10 *Dominguez v Centre Informatique du Centre Ouest Atlantique and another* [2012] 2 CMLR 14, Judgment of the CJEU, [16].

¹⁴² The AG stated that to meet the requirements of being a general principle of EU law, the right to paid annual leave 'would have to be of such fundamental importance...that it has found expression in many rules of primary and secondary EU law'. See Opinion of AG Trstenjak, [99].

horizontally represents an attempt to maintain unity between the Charter and the general principles insofar as they relate to the same right.

Another interesting aspect of the AG's learned Opinion was the attempted direct application of the general principle of the right to paid annual leave. While the AG found that this was not possible in this particular case, she did not rule out the possibility of such an application. Aside from the issue of the risk of this approach creating a dual regime between the Charter and the general principles (in which only the latter can apply horizontally), the salient point to note is the AG's finding that the general principle could not satisfy the criteria of being substantially unconditional and sufficiently clear without reference to legislative provisions. In that connection, it was for the legislature to determine the rules governing the organisation of working time and not for the CJEU to develop any general principles which might run 'counter to the legislature's aims'.¹⁴³ (It is submitted that without using a directive as a point of reference, it is unlikely that this so-called 'pure' application of the general principles will ever satisfy the requirements of being sufficiently clear and substantially unconditional.)

In contrast to the AG's Opinion, the CJEU's ruling was somewhat pusillanimous. The CJEU did not state whether the right to paid annual leave was a general principle of EU law, whether it could apply directly in a dispute between two private individuals, or whether it was a general principle giving specific expression to Directive 2003/88. Instead, the CJEU insouciantly remarked that it was a particularly important principle of EU social law.¹⁴⁴ As a result, the CJEU was not required to elaborate on the relationship between the general principles and the Charter. The CJEU did not even mention the Charter. Moreover the CJEU did not rule on whether Ms Dominguez's employer was a private party. (The AG took the

¹⁴³ Case C-282/10 *Dominguez v Centre Informatique du Centre Ouest Atlantique and another* [2012] 2 CMLR 14, Opinion of AG Trstenjak, [141].

¹⁴⁴ On this point see also: Laurent Pech, 'Between Judicial Minimalism and Avoidance: the Court of Justice's Sidestepping of Fundamental Constitutional Issues in *Romer* and *Dominguez*' (2012) 49 CML Rev 1841.

view that her employer did not possess public powers and was a private party - hence the examination of whether any alternative remedies existed to make up for the lack of horizontal direct effect of the Directive.) The CJEU ruled that if the national court did find her employer to be a private party, then the Directive's directly-effective provision could not apply horizontally, and since the 'important principle' was not classified as a general principle (which might apply horizontally), the only option was for Ms Dominguez to pursue *Francovich* damages.

Finally, the approach adopted in *Dominguez* mirrors that of *Bartsch* and *Küçükdeveci* in that while the French rules did not constitute specific transposing measures, they nevertheless fell within the field of EU law as they touched upon the material scope of the Directive. This positively extends the remit of situations falling within the field of EU law.

(iv) Concluding Remarks

Two final comments are warranted at this point. The first is that, at present, the horizontal application of the general principles is limited to what has been referred to above as 'collateral' situations in which the legality of Member State action is challenged in a dispute between two private parties. Moreover, direct or 'pure' application of the general principles has thus far not been accepted by the CJEU.

Second, it is not inconsequential to note that the above cases have arisen in the context of EU anti-discrimination law i.e. an area in which the Union has legislative competence. Articles 19 and 157 TFEU enable the EU to adopt measures mitigating discrimination on grounds of sex, ethnic origin, religion, age, disability and sexual orientation. The horizontal application of the general principle of non-discrimination thus operates in conjunction with legislative instruments in this area e.g. *Küçükdeveci* hinged on the Framework Employment Directive 2000/78 as the expression of the said general

principle. From this vantage point, the horizontal application of the general principles may in fact be circumscribed to the general principle of non-discrimination rather than extending wholesale to other general principles (and fundamental rights) or to other contexts of EU law where the Union does not have an express rights-based competence.

C. Association de Médiation Sociale v Union Locale des Syndicats CGT

The live issue in *Association de Médiation Sociale (AMS)* was whether the EU Charter could be invoked in a dispute between private parties in order to exclude the operation of a national implementing measure. *AMS*, an association which facilitates the reintegration of unemployed persons, challenged the appointment (by CGT) of Mr Laboudi as a trade union representative within *AMS*. *AMS* argued that its employees totalled less than 50 in number and that accordingly it was not bound under national law to acquiesce to the election of a trade union representative. The national law in question implemented Directive 2002/14 establishing ‘a general framework setting out minimum requirements for the right to information and consultation of employees in undertakings’. In accordance with Art.3(1) of the Directive, the latter is applicable to undertakings employing ‘at least 50 employees’. Crucially, the national law in question excluded ‘employees with assisted contracts’. The two-fold question for the CJEU was whether Directive 2002/14 and/or Art.27 of the EU Charter¹⁴⁵ could be invoked *in a dispute between private parties* in order to assess the legality of the national implementing measure and, if so, whether they precluded the national measure from excluding employees with associated contracts from the sum total of an undertaking’s employees.

¹⁴⁵ Article 27 of the Charter is worded as follows: ‘Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices’.

(i) Judgment of the CJEU

First, the CJEU stated that Art.3(1) of the Directive was to be interpreted as precluding the national law in question from excluding employees with associated contracts.¹⁴⁶ Second, in line with existing case law, while Art.3(1) of the Directive met the requirements of direct effect, a provision of a directive could not ‘of itself’ apply in a dispute between private parties.¹⁴⁷ The so-called doctrine of indirect effect was not feasible either without a *contra legem* interpretation of the national law.¹⁴⁸ The next issue, therefore, was whether the EU Charter could operate either exclusively or, akin to *Küçükdeveci*, in conjunction with the Directive, and apply horizontally in order to preclude the application of the national implementing measure.¹⁴⁹ According to the CJEU, however, Art.27 of the Charter ‘must be given more specific expression in [EU] or national law’ in order to be ‘fully effective’.¹⁵⁰ The CJEU distinguished *AMS* from *Küçükdeveci* on the basis that non-discrimination on grounds of age, enshrined in Art.21 of the Charter, ‘is sufficient in itself’ to confer rights.¹⁵¹ Moreover, Art.27 of the Charter could not operate in conjunction with the Directive in order to make the former fully effective. The CJEU concluded that since Art.27 of the Charter ‘does not suffice to confer on individuals a right which they may invoke as such, it could not be otherwise if it is considered in conjunction with that Directive’.¹⁵²

¹⁴⁶ Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT and another* [2014] [2014] All ER (EC) 501 [29]; Matteo Fornasier, ‘The Impact of EU Fundamental Rights on Private Relationships: Direct or Indirect Effect?’ (2015) 23 ERPL 29.

¹⁴⁷ *ibid* [36].

¹⁴⁸ Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT and another* [2014] All ER (EC) 501 [40].

¹⁴⁹ *ibid* [41].

¹⁵⁰ *ibid* [45].

¹⁵¹ *ibid* [47].

¹⁵² *ibid* [49].

(ii) Critique

The terse judgment clarifies that, notwithstanding Art.51 of the Charter, which is addressed to the Member States only when they are implementing EU law, provisions of the Charter can, if certain circumstances are met, apply to individuals. The CJEU does not elaborate on why this is so.¹⁵³ It insouciantly proceeds on the basis that since the national law in question was adopted to implement the Directive, the Charter applied. It seems, therefore, that the Charter may apply horizontally ‘in all situations governed by EU law’.¹⁵⁴ Thus it is not only the general principles which can impose rights and obligations between private parties, but (now) also the Charter.

A curious aspect of the case is the CJEU’s reconstruction of prior case law. The CJEU distinguished *AMS* from *Küçükdeveci* by asserting that in contrast to Art.21 of the Charter, enshrining non-discrimination on grounds of age, Art.27 of the Charter necessitated further expression as it was not sufficient ‘in itself’ to be operable horizontally. The CJEU then departed from cases like *Mangold* and *Küçükdeveci* by holding that the right enshrined in Art.27 could not be ‘supercharged’ by the Directive in question.¹⁵⁵ Yet, whilst the CJEU in *Küçükdeveci* did indeed make a (fleeting) reference to Art.21 of the Charter (at paragraph 22), it was the general principle of non-discrimination on grounds of age, as given expression in Directive 2000/78, which formed the basis of the CJEU’s assessment of the compatibility of the national legislation in question with Union law. Stated differently, the CJEU in *Küçükdeveci* did not suggest that Art.21 of the Charter was legally complete such that it could

¹⁵³ Nicole Lazzarini, ‘(Some of) the Fundamental Rights granted by the Charter may be a Source of Obligations for Private Parties: *AMS*’ (2014) 51 CML Rev 907.

¹⁵⁴ Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT and another* [2014] All ER (EC) 501 [42]; Case C-617/10 *Åklagaren v Åkerberg Fransson* [2013] 2 CMLR 46 [19].

¹⁵⁵ Steve Peers, ‘When does the EU Charter of Rights apply to private parties?’ (15 January 2015) <<http://eulawanalysis.blogspot.co.uk/2014/01/when-does-eu-charter-of-rights-apply-to.html>> accessed 9 July 2015. The only guidance furnished by the CJEU is that a Charter provision and/or the explanatory note pertaining to that provision must point towards a directly applicable rule in secondary legislation. In this case, Art.27 of the Charter did not.

‘in itself’ confer rights and impose duties in a horizontal situation; rather, it was the general principle of non-discrimination on grounds of age operating in conjunction with Directive 2000/78 which led the CJEU to conclude that the national legislation could be disapplied.

The judgment in *AMS* is remarkable for what is left unsaid. First, the CJEU makes no reference to the horizontal application of the general principles, or indeed to the relationship between the EU Charter and the general principles. It may be recalled that in *Dominguez* AG Trstenjak ruled-out the direct application of the EU Charter and (in that particular case) the general principles in a horizontal situation. It seems that the AG was attempting to maintain harmony between the Charter and the general principles in terms of the situations in which they applied. Moreover, the AG opined that to combine the general principle in question with secondary legislation in order to apply horizontally would lead to ‘an amalgamation of sources of law with different status’ and would moreover result in an ‘ossification of that legislative content’.¹⁵⁶ In contrast, the CJEU in *AMS* opened the door (implicitly) for the horizontal application of the Charter and the general principles.¹⁵⁷ On the other hand, in-line with AG Trstenjak’s reasoning, it did rule-out the application of a Charter provision in conjunction with secondary legislation in order to apply in a dispute between private parties. Second, in contrast to AG Cruz Villalón (in *AMS*), the CJEU in *AMS* did not address, with regards to Art.27 of the Charter, the distinction between rights and principles contained in Art.52(5) of the Charter.¹⁵⁸ Third, the CJEU did not clarify what is required in order for a Charter provision to be sufficient ‘in itself’, and therefore ‘fully effective’ in a horizontal scenario. Akin to the ruling in *Dominguez*, *AMS* has a whiff of judicial avoidance.

¹⁵⁶ Case C-282/10 *Dominguez v Centre Informatique du Centre Ouest Atlantique and another* [2012] 2 CMLR 14, Opinion of AG Trstenjak, [157].

¹⁵⁷ See also: Alison Young, ‘Horizontality and the EU Charter’ (*U.K. Const. L. Blog*, 29 January 2014) <<http://ukconstitutionallaw.org/2014/01/29/alison-young-horizontality-and-the-eu-charter/>> accessed 18 July 2015.

¹⁵⁸ The AG opined that Art.27 was a principle but which could be invoked against another private party [53], [80].

VI. Conclusion

This chapter has focused on the CJEU's constitutional scrutiny of Member State activity in the oft-labelled agency scenario, that is, when Member States execute Union policy objectives. In this context, national activity comprises national authorities applying pre-existing national law or enacting national law in order to transpose EU law obligations. More specifically, the emphasis of this chapter has been on the CJEU's review of the compatibility of national measures with EU fundamental rights. In contrast to the CJEU's exclusive review of EU legislation for compliance with fundamental rights (i.e. Article 263 TFEU), the CJEU's review of Member State activity first requires the CJEU to determine whether the national activity in question falls within the scope of EU law, or in post-Lisbon language, whether it implements Union law for the purposes of Article 51 of the EU Charter. The scope of Union law is thus a Copernican theme in this area, and the CJEU's approach is expansionist.

In *Booker Aquaculture*, the national measures in question fell within the ambit of EU law as they were adopted in order to implement an EU Directive; hence they were to be assessed for their compliance with fundamental rights as protected under the general principles. In *N.S.*, a discretionary clause contained in an EU Regulation formed an integral part of the CEAS. Accordingly, when a Member State exercised its discretion pursuant to the clause, it was implementing EU law within the meaning of Article 51 of the EU Charter. Logically, the exercise of that discretion had to be in compliance with rights enshrined in the EU Charter. In *Mangold*, the dispute fell within the field of EU law due to the fortuitous implementation of a previous EU Directive. This then triggered the application of the general principles in tandem with the invoked EU Directive, notwithstanding the fact that the dispute was between private parties and the EU Directive's transposition deadline had yet to expire. In *Küçükdeveci*, the national rules in question were not enacted to implement an EU

Directive; however they did touch upon an area governed by that Directive. Consequently, upon the expiry of the Directive's transposition deadline, the general principle of non-discrimination on grounds of age, enshrined in Article 21 of the EU Charter, was applicable in a horizontal situation. Finally, in *AMS* the CJEU even paved the way for the horizontal application of certain provisions of the EU Charter, despite the fact that the latter is addressed (first and foremost) to the EU institutions and (second) to the Member States only when they are implementing EU law. It seems that the CJEU is (rightly) trying to maintain unity between the scope of the *horizontally applicable* general principles and the EU Charter.

CHAPTER V: THE INTERSECTION BETWEEN THE TREATY FREEDOMS AND FUNDAMENTAL RIGHTS

I. Introduction

In this chapter we venture into the ‘economic heartland’¹ of EU law and examine the intersection between the Treaty freedoms and fundamental rights. The existence of this convergence is the product of multiple factors. First, as the EU’s economic activities continue to proliferate and move into ever-expanding fields, the likelihood of a right-based infringement occurring correspondingly increases.² The increased visibility and binding status of the EU Charter also opens the door for litigation on human rights grounds in almost every corner of economic activity. Second, as recent citizenship case law illustrates, a cross-border element is not always necessary to trigger the application of Union law,³ and as cases such as *Carpenter* demonstrate,⁴ the impact of a national practice on the internal market may at first blush appear to be tenuous, yet still fall within the ambit of EU law. The net consequence is that few national rules or practices are immune from the province of EU (economic and human rights) law. Third, fundamental rights and Treaty freedoms are brought into close proximity by virtue of the view that both can be conceived of as fundamental rights. Fourth and flowing from the third, it may be argued that this field of law does not represent a conflict between fundamental market rights and fundamental human rights as such, but rather represents fundamental rights forming part of the fabric of the internal market.

¹ Stephen Weatherill, ‘Free Movement of Goods’ (2006) 55 ICLQ 457, 462.

² Takis Tridimas, ‘Primacy, Fundamental Rights and the Search for Legitimacy’ in Miguel Poiares Maduro and Loïc Azoulay (eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 98, 105.

³ Case C-34/09 *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)* [2011] All ER (EC) 491.

⁴ Case C-60/00 *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279.

The paradigmatic cases in this area include, *inter alia*, *ERT*,⁵ *Familiapress*,⁶ *Carpenter*,⁷ *Schmidberger*,⁸ *Omega Spielhallen*,⁹ *Sayn-Wittgenstein*,¹⁰ and *Viking Line*.¹¹ Accordingly, these cases will be the subject matter of this chapter, with reference also to *Commission v France*,¹² *Cinéthèque*,¹³ and *Dynamic Medien*.¹⁴ These cases can and have been examined from different angles, such as through the lens of internal market law, from a human rights standpoint, and from a labour law vantage point.¹⁵ Preserving the ethos of the thesis, the aim will be to traverse the case law in a bid to deduce the CJEU's methodology in situations where a national practice constitutes a restriction on one of the Treaty freedoms. Such restrictions must either comply with, or be justified on the basis of, fundamental rights.

⁵ Case C-260/89 *Elliniki Radiophonia Tileorassi AE v Dimotiki Étairia Pliroforissis* [1991] ECR I-2925.

⁶ Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689.

⁷ Case C-60/00 *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279.

⁸ Case C-112/00 *Schmidberger, Internationale Transporte und Planzüge v Austria* [2003] ECR I-5659.

⁹ Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

¹⁰ Case C-208/09 *Sayn-Wittgenstein v Landeshauptmann Von Wien* [2011] 2 CMLR 28.

¹¹ Case C-438/05 *International Transport Workers' Federation v Viking Line ABP* [2007] ECR I-10779.

¹² Case 265/95 *Commission v France* [1997] ECR I-6959.

¹³ Joined Cases 60/84 and 61/84 *Cinéthèque SA and Others v. Fédération nationale des cinémas français* [1986] ECR 2065.

¹⁴ Case C-244/06 *Dynamic Medien Vertriebs GmbH v Avides Media AG* [2008] ECR I-505.

¹⁵ E.g. Alicia Hinarejos, 'Laval and Viking: the Right to Collective Action Versus EU Fundamental Freedoms' (2008) 8 HRL Rev 714; Niamh Shuibhne, 'Settling dust? Reflections on the Judgments in Viking and Laval' (2010) 21 EBLR 681; Loic Azoulai, 'The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realization' (2008) 45 CML Rev 1335.

II. The Nexus between Fundamental Rights and Treaty Freedoms

Before considering the aforementioned case law, the question of whether the Treaty freedoms can be viewed as fundamental rights ought to be addressed. The orthodox position is that the (express) Treaty freedoms are distinct from fundamental rights, which form part of the (unwritten) general principles of law. There are, however, various factors that militate against this view. There is a body of opinion, both judicial and academic, which sees the Treaty freedoms as fundamental rights or at the very least views them as hierarchically equal.

The CJEU has, on occasion, referred to the Treaty freedoms as fundamental rights. In *Forcheri v Belgium*, the CJEU stated that the right to free movement was not to be narrowly construed and that the free movement of workers was a fundamental right.¹⁶ In the context of the free movement of goods, in *Dounias*, the CJEU made clear that a national rule which had an effect on the importation of goods constituted a refusal by a national authority of ‘the benefit of a fundamental right conferred by the Treaty’.¹⁷ More recently, in *Omega Spielhallen AG Stix-Hackl* opined that the conflict between the protection of human dignity and the provision of services under Art.49 EC (now Art.56 TFEU) could be regarded as a conflict between two fundamental rights. The AG asserted that the ‘fundamental freedoms themselves can also perfectly well be materially categorised as fundamental rights’¹⁸ insofar as they preclude discrimination and can thus be viewed as a manifestation of the general principle of equality before the law.¹⁹ And in the post-Lisbon *Dominguez* case, AG Trstenjak opined that the general principles of law encompass not only principles based on the rule of law such as proportionality and sound administration, but also ‘structural principles of the EU

¹⁶ Case 152/82 *Forcheri v Belgium* [1983] ECR 2323 [11].

¹⁷ Case C-228/98 *Dounias v Minister for Economic Affairs* [2000] ECR I-577 [64].

¹⁸ Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, Opinion of AG Stix-Hackl, [50].

¹⁹ *ibid*, Opinion of AG Stix-Hackl, [50].

such as the fundamental freedoms'.²⁰ Taken together, the Opinions of the Advocates General in *Omega Spielhallen* and *Dominguez* suggest that the fundamental Treaty freedoms and the general principles i.e. fundamental rights are inextricably linked.

Speaking extra-judicially, Skouris has also put forward the view that there is no hierarchy between the four freedoms and fundamental rights. Referring to the cases of *Schmidberger* and *Omega Spielhallen*, which will be considered in detail later, Skouris argues that while in both cases the conflict was seemingly between Treaty freedoms and fundamental rights, and that in both disputes it was the proportionality of restricting the market freedoms that was assessed rather than the fundamental rights at issue, a different reading was in fact possible. Reflecting on *Schmidberger*, Skouris asserts that the undertaking's right of free movement could also be conceptualised as a manifestation of a fundamental right, namely 'freedom of economic activity'.²¹ The fact that the transport undertaking relied on Art 28 EC (now Art.34 TFEU) on the free movement of goods merely denotes that, in order for there to be a cause of action, the dispute must fall within the scope of EU law. Accordingly, the fact that it was the proportionality of restricting the Treaty freedom which was assessed, merely reflects that it is only having (first) established that EU law applied i.e. by virtue of an infringement of EU trade law, that the (subsequent) question of whether the restriction could be justified as a matter of EU law, could be ascertained. The order of this assessment did not, therefore, reflect any particular hierarchy.²²

Another factor enhancing the propinquity between the Treaty freedoms and fundamental rights is that Art.16 of the Charter of Fundamental Rights enshrines the freedom to conduct business. This right can be seen as underpinning the free movement of goods.

²⁰ Case C-282/10 *Dominguez v Centre Informatique du Centre Ouest Atlantique and another* [2012] 2 CMLR 14, Opinion of AG Trstenjak, [95].

²¹ Vassilios Skouris, 'Fundamental Rights and Fundamental Freedoms: the Challenge of Striking a Delicate Balance' (2006) 17 EBL Rev 225.

²² *ibid*, 236.

Equally, the right to property protected under Art.17 of the Charter and in the CJEU's case law can be linked to the right to import and export goods between Member States.²³ More broadly, the Ordo-liberal school of thought, a German variant of social market economics, posits that individual economic freedoms are inextricably linked to political freedoms and fundamental rights.²⁴ Stripped to its core, the Ordo-liberal school's philosophy rests on the supposition that the 'constitution should protect economic freedoms which are integral to the protection of human dignity'.²⁵

A few common features between the market freedoms and fundamental rights can also be discerned. First, neither is absolute and can be restricted so long as (i) the restriction pursues a legitimate objective and (ii) the pursuit of that objective is proportionate. Second, both are codified as being principles on which the Union is founded (Art.2 and Art.6 TEU for fundamental human rights and Arts.34-37 TFEU for the free movement of goods, Art.24 TFEU regarding the free movement of workers, and Arts 49-54 TFEU pertaining to freedom of establishment and Arts.56-62 TFEU on the free movement of services).

At the risk of perpetuating a false dichotomy, the converse view is that the fundamental freedoms are not, and should not be, categorised as fundamental rights. The conventional view is that while the four freedoms constitute the bedrock of the internal market they do not, in contrast to fundamental rights, fall into the category of general principles of law. As part of the general principles, fundamental rights are judge-made norms

²³ Peter Oliver and Wulf-Henning Roth, 'The Internal Market and Four Freedoms' (2004) 41 CMLR Rev 407, 409.

²⁴ David Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (OUP 1998); Liza Lovdahl Gormsen, 'The Conflict between Economic Freedom and Consumer Welfare in the Modernisation of Article 82 EC' (2007) 3 Euro. CJ 329, 333; Christian Ahlborn and Carsten Grave, 'Walter Eucken and Ordo-liberalism: An Introduction from a Consumer Welfare Perspective' (2006) 2 CPI 197, 217; Miguel Maduro, 'Alternative Models of the Economic Constitution' in Miguel Maduro (ed.), *We the Court* (Hart Publishing 2002) 126-130.

²⁵ Sybe de Vires, 'The Protection of Fundamental Rights within Europe's Internal Market after Lisbon' in Xavier Groussot and Gunnar Thor Petursson (eds.), *Balancing Fundamental Rights with the EU Treaty Freedoms: The CJEU as 'tightrope' walker* (Europa Instituut 2012) 30.

in that their discovery and elaboration has been driven by the Court of Justice, albeit by drawing on the constitutional traditions of the Member States, international treaties to which the Member States are contracting parties and, more recently, the Charter of Fundamental Rights. The four freedoms on the other hand, like the principle of loyal co-operation in Art.4(3) TEU (ex Art.10 EC) are established in the Treaty. Aside from this taxonomical distinction, the respective roles of the economic freedoms and fundamental rights are also different. The function of the general principles is to fill gaps in the legal order, act as an aid to interpretation, and serve as grounds for judicial review. In addition, the protection of fundamental rights in the Union serves as a safeguard from abuse of power by its institutions.

Taking this one step further, it may even be argued that supremacy, direct effect, and the protection of fundamental rights, as judge-made constructs, are general principles which collectively represent the ‘constitutionalisation of EU law’.²⁶ In contrast, the market freedoms, while fundamental in nature, are ‘statutory norms’ and ‘central concepts of EU law’, but are not judge-made general principles.²⁷ Moreover, the Treaty freedoms confer rights which pertain to the internal market and thus apply overwhelmingly to purely economic situations.²⁸ This notwithstanding, it is suggested that direct effect and supremacy ought to be viewed not as general principles but as constitutional principles of Union law. It is further submitted that the Treaty freedoms constitute structural principles, whilst fundamental rights, like equality, transparency and proportionality, are general principles.

Another reason to view the economic freedoms and fundamental rights as distinct is that they operate in conjunction. The Treaty provisions can act as a trigger for the general

²⁶ Brun-Otto Bryde, ‘The ECJ’s Fundamental Rights Jurisprudence – A Milestone in Transnational Constitutionalism’ in Miguel Poiares Maduro and Loïc Azoulai (eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 119.

²⁷ Xavier Groussot and Hans Henrik Lidgard, ‘Are there General Principles of Community Law Affecting Private Law?’ in Ulf Bernitz, Joacim Nergelius, Cecilia Cardner and Xavier Groussot (eds.), *General principles of EC Law in a Process of Development* (Kluwer Law International, 2008) 159.

²⁸ Vassilios Skouris, ‘Fundamental Rights and Fundamental Freedoms: the Challenge of Striking a Delicate Balance’ (2006) 17 EBL Rev 225.

principles and fundamental rights to apply. Prime examples of this are the cases of *Viking Line* and *Laval*, which showcase the horizontal application of the Treaty provisions on establishment and services in tandem with the fundamental right to take industrial action. In this regard, the general principles and in particular fundamental rights have a second order characteristic in that although they are a primary source of EU law, they can only apply once it has been established that a dispute falls within the scope of EU law, either by virtue of a piece of secondary legislation or a directly-effective Treaty provision.

As a counter-balance to the invocation of the Ordo-liberal school citation above, the ideologically converse Marxist-economic view is that the protection of fundamental rights serves as a necessary brake on rampant market integration.²⁹ There is a dialectical dynamic to EU fundamental rights in that their (second order) existence is established as a by-product of economic activity. They are not free-standing rights. In Marxian terms, the protection of fundamental rights can therefore be viewed as a potential barrier to trade which, in the process of capital accumulation, must be transcended.³⁰ It should be recalled that the incorporation of fundamental rights into the province of (then) Community law occurred against the backdrop of Member State constitutional courts challenging the primacy of Community law on the basis that the latter could potentially infringe upon hallowed human rights enshrined in Member State constitutions. If the Court of Justice had failed to develop a system of rights-based protection to fill gaps in the novel legal order, then the supremacy of Community law might have yielded to domestic law and ‘the uniformity of Community law

²⁹ Alan Hunt, ‘Marxism, Law, Legal Theory and Jurisprudence’ in Peter Fitzpatrick (ed.), *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (Duke University Press 1991); Hugh Collins, *Law and Marxism* (OUP 1982).

³⁰ David Harvey, *The Enigma of Capital and the Crises of Capitalism* (Prolife Books Ltd London) 47.

would have also suffered leading inevitably to the destruction of the unity of the Common Market'.³¹

In light of the above, it appears that the CJEU increasingly regards the market freedoms as akin to the general principles and fundamental rights, though there are grounds for viewing them as distinct. The first is from a taxonomical point of view, that is, one being expressly established in the Treaties and the other in the CJEU's jurisprudence. The second is the respective roles of the two, which are emphatically divergent. A more nuanced view, however, is that fundamental rights form part of the fabric of the internal market. The interpenetration of multiple forces and the resulting synthesis comprise the remainder of this chapter.

III. Early Inroads: Trade Barriers and Fundamental Rights

A. Elliniki Radiophonia Tileorassi (ERT) v Dimotiki Etairia Pliroforissis (DEP)

In *ERT*, it was established that where a Member State relies on express Treaty provisions (in this case Art.56 and Art.66 EC, now Art.52 TFEU and Art.62 TFEU) to derogate from Union rules, it must comply with fundamental rights, and in this particular case Art.10 of the ECHR (on the right to freedom of expression). While the findings that derive from *ERT* are well known, the facts of the dispute are seldom reiterated. A recollection is therefore warranted.

Art.15 of the Greek Constitution of 1975 conferred on the State direct control over broadcasting of radio and television. The paternalistic objective was to vet standards of broadcasting regarding news and artistic material to ensure that they satisfied the cultural fabric of the country.³² *ERT* was a public undertaking comprised of television and radio

³¹ Takis Tridimas, 'Primacy, 'Fundamental Rights and the Search for Legitimacy' in Miguel Poiares Maduro and Loïc Azoulay (eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 100.

³² Case C-260/89 *Elliniki Radiophonia Tileorassi AE v Dimotiki Etairia Pliroforissis* [1994] ECR I-2925, Opinion of Herr Carl Otto Lenz, [1]-[2].

broadcasting which was set up under the auspices of the State pursuant to Act 1730/1987. In 1988, DEP set up a television station in Thessaloniki and began transmitting television shows. ERT sought an injunction to prohibit DEP from broadcasting, and seizure of its transmission equipment. DEP contended that Act 1730/1987 granting ERT exclusive broadcasting rights was contrary to Art.59 EC (now Art.56 TFEU) and also an infringement of the fundamental right to freedom of expression enshrined in Art.10 of the ECHR.³³

Following a reference from the national court, the Court of Justice held that the Treaty rules on the provision of services precluded national rules which had discriminatory effects, subject to those rules being justified under the derogations set out in Art.66 EC (now Art.62 TFEU) on grounds of public policy, public security and public health - which were to be strictly interpreted.³⁴ Moreover, where a Member State relies on Art.66 EC to justify discriminatory restrictions on the provision of services, those restrictions must, as a matter of Community law, be interpreted in the light of the general principles and in particular with fundamental rights.³⁵

(i) Critique

The judgment in *ERT* is seminal for three principal reasons. First, it established that when a Member State derogates from EU law it is *still* acting within the field of EU law. Second, given that it is still operating within the realm of EU law when it seeks to justify rules which restrict the exercise of the Treaty freedoms, it must also act in accordance with fundamental rights, the protection of which the CJEU pledges to ensure. This in itself has been regarded as contentious on the basis that once it has been established that a restriction on a Treaty

³³ *ibid*, Opinion of Herr Carl Otto Lenz, [30].

³⁴ Case C-260/89 *Elliniki Radiophonia Tileorassi AE v Dimotiki Étairia Pliroforissis* [1991] ECR I-2925 [24].

³⁵ *ibid*, [43].

freedom is justifiable, for instance on grounds of public policy, then it ought not to be subjected to another test of compliance with EU standards of fundamental rights.³⁶ Third, while the earlier case of *Wachauf* determined that Member States were bound by fundamental rights when implementing EU rules into national law, the decision in *ERT* extends the remit of EU fundamental rights: *from* operating as a constraint on EU policy enactments *to* the economic heartland of the single market.³⁷

B. *Vereinigte Familiapress Zeitungsverlags v Heinrich Bauer Verlag*

The approach adopted in *ERT* was subsequently extended to the CJEU's judge-made mandatory requirements in the case of *Familiapress*. Following the introduction of an Austrian Legislative Act in 1992 (Act 1992/147) which sought to de-regulate, *inter alia*, the sphere of competition, magazine publishers engaged in fierce competitive practices by enticing consumers with exponentially larger gifts, and in particular offering the chance to partake in prize draw competitions.³⁸ In 1993, fearing the demise of smaller publishers, the Austrian legislature amended the Unfair Competition Act to preclude 'the offering, advertising and distribution of free gifts to purchasers of periodicals'.³⁹ The defendant, an undertaking established in Germany, published a magazine entitled 'Laura' which was distributed in Austria. Contained in that magazine were various prize competitions offering significant financial rewards for lucky winners. The plaintiff, also an undertaking that

³⁶ Francis Jacobs, 'Human Rights in the European Union: The Role of the Court of Justice' (2001) 26 EL Rev 331, 337-9.

³⁷ Damian Chalmers, 'Looking back at ERT and its Contribution to an EU Fundamental Rights Agenda' in Miguel Poiars Maduro and Loïc Azoulai (eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 140-141.

³⁸ Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689 [14].

³⁹ Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689, Opinion of AG Tesaro, [2].

published magazines (though established in Austria) instituted proceedings to prohibit the defendant from selling magazines that provided readers with an opportunity to win prizes.

The question for the CJEU was whether the Austrian legislation was caught by Art.30 EC (now Art.34 TFEU) as a measure having equivalent effect to a quantitative restriction.

Having established that the Austrian legislation was a non-discriminatory restriction on Art.30 EC, the CJEU moved to examine the justification. The Austrian authorities sought to justify the national rule on the basis of the overriding mandatory requirements, namely preserving the plurality of the press. The CJEU accepted that the maintenance of press diversity was an overriding mandatory requirement which could legitimately restrict Art.30 EC. Such diversity, the CJEU opined, helped ensure the right to freedom of expression enshrined in Art.10 of the ECHR (presumably the freedom of smaller publishers in Austria to stay in existence, though the CJEU was not explicit on this point).⁴⁰ Second, the CJEU stressed that where a Member State relies on the mandatory requirements to justify a restriction on the free movement of goods, that restriction has to be interpreted in light of the general principles, including fundamental rights.⁴¹ Interestingly, the CJEU cited *ERT* as authority for this proposition despite the fact that in *ERT* the Greek authorities relied on the Treaty derogations to justify a restriction on the freedom to provide services. The logical inference is that compliance with fundamental rights applies equally to the Treaty and judge-made derogations i.e. to discriminatory and non-discriminatory measures. The CJEU took the view that the justification put forward by the Austrian authorities could have an adverse effect on freedom of expression under Art.10 of the ECHR (presumably for German publishers seeking to distribute their magazines in Austria, though again the CJEU was not

⁴⁰ Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und Vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689 [18].

⁴¹ *ibid* [24].

clear on this point).⁴² The CJEU left the conundrum of whether freedom for the pike (large German publishers) would mean death for the minnows for the national court to resolve.

(i) Critique

Freedom of expression came into play on both sides of the dispute, namely plurality of the press, which was linked to Art.10 of the ECHR, and the right to freedom of expression for publishers who sought to rely on their rights under Art.30 EC to distribute periodicals in Austria. The decision in *Familiapress* also represents a point of departure from the earlier case of *Cinéthèque*.⁴³ In the latter case, French rules prohibited the simultaneous exploitation of films broadcast in cinemas with recordings intended for sale or rental purposes (for private use by the public) prior to the expiration period (of one year) prescribed by decree.⁴⁴ The CJEU proceeded on the basis that an indistinctly applicable measure which restricted Art.30 EC (now Art.34 TFEU) could be justified on the basis of the mandatory requirements of public interest (a cultural objective to protect the film industry), but in so doing that measure fell outside the scope of EU law and remained within the domain of domestic law.⁴⁵ As a consequence, the measure could not be assessed for its compliance with the general principles and in particular freedom of expression as laid down in Art.10 of the ECHR by the CJEU. This reversal of engines regarding the scope of EU law from *Cinéthèque* to *Familiapress* was undeniably driven by the intermediate decision in *ERT*.

⁴² *ibid* [26].

⁴³ Joined Cases 60/84 and 61/84 *Cinéthèque SA and Others v. Fédération nationale des cinémas français* [1986] ECR 2065.

⁴⁴ *ibid* [2].

⁴⁵ *ibid* [26].

C. Carpenter v Secretary of State for the Home Department

A seminal case catalyzing the ascending role of fundamental rights in EU free movement law is *Carpenter*. At issue was whether a third-country national (Mrs Carpenter) could derive a right of residence in the country of origin (UK) of her spouse (Mr Carpenter) on the basis of his rights under Art.49 EC (Art.56 TFEU) on the freedom to provide services.

Mrs Carpenter was a Philippine national who, having been granted leave to enter the UK for six months as a visitor in 1994, overstayed that leave. Mrs Carpenter did not seek an extension to remain in the UK and in 1996 she married Mr Carpenter.⁴⁶ After wedlock Mrs Carpenter applied to the Secretary of State seeking leave to remain in the UK as the spouse of a national of the UK. In 1997, the Secretary of State refused that application and issued Mrs Carpenter a deportation order. Mrs Carpenter appealed against that decision arguing, *inter alia*, that the order would restrict her husband's ability to provide and receive services. Mr Carpenter operated a business established in the UK selling advertisements in medical journals. Given that a significant amount of his business was conducted with advertisers established in other Member States of the EU, Mr Carpenter frequently travelled to those Member States for business purposes. Mrs Carpenter adroitly argued that Mr Carpenter was better able to provide his services in other Member States because she looked after his (two) children from a previous marriage.⁴⁷

With prophetic utterance, the CJEU pronounced that 'the separation of Mr and Mrs Carpenter would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom'.⁴⁸ With regards to the justification put

⁴⁶ Case C-60/00 *Carpenter v Secretary of State for the Home Department* [2002] ECR I-2925 [13]; Norbert Reich and Solvita Harbacevica, 'Citizenship and Family on Trial: A Fairly Optimistic Overview of Recent Court Practice with Regard to Free Movement of Persons' (2003) 40 CML Rev 615.

⁴⁷ *ibid* [14]-[17].

⁴⁸ *ibid* [39].

forward by the Secretary of State, the CJEU affirmed the *ERT* and *Familiapress* rulings, namely that ‘a Member State may invoke reasons of public interest to justify a national rule which is likely to obstruct the exercise of the freedom to provide services only if that measure is compatible with fundamental rights’.⁴⁹ In no uncertain terms, the CJEU held that the decision to deport Mrs Carpenter constituted an interference with Mr Carpenter’s right to respect for family life enshrined in Art.8 of the ECHR. The maintenance of public order (the application of domestic immigration rules and procedures) could not trump the right to family life of a service provider.

(i) Critique

The decision in *Carpenter* represents a willingness by the CJEU to cede a degree of coherence in order to ensure a humane outcome. The review conducted by the CJEU was seemingly a human rights one as opposed to a textbook internal-market enquiry. Though not distinct, it appears that the focus of the CJEU was the effect of the restriction on the fundamental right at stake rather than whether it actually impeded Mr Carpenter’s ability to provide services. The judgment can be viewed from an internal-market perspective on the following basis: in order for Mr Carpenter to benefit from his (economic) right to rely on his Treaty freedom to provide services, any obstacles, including restrictions on his fundamental (human) rights, had to be eliminated.

This should not detract from the clear and composed intention of the CJEU, which was to safeguard the fundamental rights of a service provider. Yet still waters run deep. And the outcome of the dispute is not inconsequential. It has been argued that the CJEU essentially advanced on the basis that any indistinctly applicable measure adopted by a Member State of origin is capable of constituting an impediment to the inter-state provision of services which must be justified by reference to the imperative requirements and,

⁴⁹ *ibid* [40].

moreover, must comply with EU standards of fundamental rights protection.⁵⁰ It has been suggested that if the CJEU's reasoning is to be applied consistently, then it follows that even 'jail sentences for spouses of service providers will be scrutinised by the CJEU for their justification and proportionality: the effects on family life (taking care of children etc) are no different from a deportation order if a spouse has to go to jail'.⁵¹

In its desire to bring about a humane decision, the CJEU does not assert that access to the market of the other Member States is restricted or that the decision to deport Mrs Carpenter was made in light of the fact that her spouse was a service provider. Rather, the focus of the CJEU was that by deporting Mrs Carpenter, Mr Carpenter's ability to provide services would be restricted.⁵² In this connection, it has been argued that the decision is 'patriarchal' in nature in that the focus is on Mr Carpenter's rights (to rely on the Treaty Freedoms and his right to family life).⁵³ However, since Mrs Carpenter was a non-EU national, she could not avail herself of a right of residence as a matter of EU law as she could not exercise any right under Art.43 EC. It was only logical for the CJEU to focus on the rights of Mr Carpenter.

While the decision is laudable from a human-rights stand-point, insofar as the CJEU assessed the proportionality of restricting the right to respect for family life of a service provider, the test applied by the CJEU was somewhat left-of-field. Although noting that Art.8 of the ECHR is not absolute and can be restricted so long as the restriction is necessary and proportionate, the CJEU insouciantly concluded that the decision to deport Mrs Carpenter was disproportionate as the marriage was genuine and because she looked after his

⁵⁰ Editorial Comments, 'Freedoms Unlimited? Reflections on *Mary Carpenter v Secretary of State*' (2003) 40 CML Rev 537, 539.

⁵¹ *ibid*, 541.

⁵² *ibid*, 541.

⁵³ Norbert Reich and Solvita Harbacevica, 'Citizenship and Family on Trial: A Fairly Optimistic Overview of Recent Court Practice with Regard to Free Movement of Persons' (2003) 40 CML Rev 615, 622.

two children from a previous marriage. The CJEU did not dwell on the fact that Mrs Carpenter knowingly breached UK immigration law, nor did it object to the actuality that Mrs Carpenter was circumventing domestic rules via EU law on the basis that her spouse was a service provider. All in all, the protection of fundamental rights was not merely an incidental objective for the CJEU to ensure, but rather the guiding force.

IV. Fundamental Rights ‘Clashing’ with Fundamental Freedoms?

A. Schmidberger Internationale Transporte und Planzüge v Austria

And so we come to the now infamous *Schmidberger* litigation. *Schmidberger* was an undertaking based in Germany specialising in transporting timber and steel from Germany to Italy via Austria’s Brenner motorway. As a result of a demonstration organised by an environmental group called Transiforum Austria Tirol, a stretch of the Brenner motorway was blocked from 11am on 12 June till 3pm on 13 June. The reported aim of the demonstration was to raise awareness about pollution brought about by excessive commuting on the Brenner corridor. The Austrian authorities had been made aware of the intended demonstration and acquiesced to it. Alternative travel routes were accordingly put in place by the authorities and details of the pending closure widely circulated.⁵⁴ *Schmidberger* brought an action against the Austrian State on the grounds of its alleged failure to ensure the inter-state movement of goods.

The central issue for the CJEU was (i) whether the temporary closure of the Brenner motorway, permitted by the Austrian authorities in order to facilitate the demonstration by private parties, could be regarded as a restriction of Art.28 EC (Art.34 TFEU) and, if so (ii)

⁵⁴ Case C-112/00 *Schmidberger, Internationale Transporte und Planzüge v Austria* [2003] ECR I-5659, Opinion of AG Jacobs, [1]-[13]; Gerry Facenna, ‘Eugen Schmidberger Internationale Transporte Planzuge v Austria: Freedom of Expression and Assembly vs Free Movement of Goods’ (2004) 1 EHRLR 73.

whether such a restriction could be justified on the basis of safeguarding the protestors' fundamental rights to freedom of assembly and speech under Art.10 and Art.11 of the ECHR.

Although the dispute appeared to be horizontal i.e. between private parties (a transport undertaking and a group of protesters), the CJEU affirmed that Art.28 EC read in conjunction with Art.10 EC (duty of loyal co-operation) could bite so as to catch inaction on behalf of the Member State authorities.⁵⁵ While the obstacle to the cross-border movement of goods was created by the protesters, it was the failure of the authorities to prevent the demonstration from taking place that was liable to infringe EU free movement law. As authority for this proposition, the CJEU cited the case of *Commission v France*.⁵⁶ a dispute which could aptly be described as having more brickbats than bouquets in the air. In this case, the CJEU assessed the passivity of French authorities for their failure to quell successive acts of violence perpetrated by private parties and French farmers including, *inter alia*, the interception of vehicles transporting goods and the destruction of those goods i.e. sabotage targeted directly against agricultural products from other Member States (notably Spain).⁵⁷ The CJEU ruled that Art.28 EC applied not only to actions of a Member State that result in a restriction of the free movement of goods, but also when a Member State 'abstained' from taking steps to deal with obstacles to trade caused by private individuals.⁵⁸ The decision in *Commission v France* also confirmed that a Member State is required to take positive steps to ensure the free flow of goods (owing to restrictions caused by private action) where those goods merely pass through one Member State *en route* to another i.e. to goods in transit.⁵⁹

⁵⁵ Case C-112/00 *Schmidberger, Internationale Transporte und Planzüge v Austria* [2003] ECR I-5659 [59].

⁵⁶ Case C-265/95 *Commission v France* [1997] ECR I-6959.

⁵⁷ *ibid* [17]-[38].

⁵⁸ *ibid* [30].

⁵⁹ *ibid* [53].

Transposing the reasoning in *Commission v France to Schmidberger*, the CJEU asserted that the Austrian authorities were required to adopt measures to ensure goods passing through Austria were not impeded due to the actions of private parties (and the onus to do so was even greater on a major transit route). Failure to ban the blockade thus constituted a measure having equivalent effect to a quantitative restriction (MEQR).⁶⁰

With regards to the justification, the AG noted that this was the first case in which the protection of (national) fundamental rights had been invoked by a Member State to justify a restriction of Art.28 EC.⁶¹ This notwithstanding, the AG opined that the justification for the restriction ought to be subjected to the same test of proportionality as that applied to measures which are invoked under the Treaty derogations and the mandatory requirements.⁶² The AG also opined that the objective of the demonstration was immaterial. The material issue was that the authorities decided to allow the demonstration on the basis of ensuring the demonstrators' constitutional rights to freedom of speech and assembly.⁶³ The CJEU also took the view that the objective of the demonstration was irrelevant and that it was the objective of the authorities that was determinative.⁶⁴ The CJEU then affirmed the place of fundamental rights in its case law as part of the general principles, and also maintained that measures incompatible with such rights were prohibited in EU law. And since the EU institutions and the Member States were bound to respect fundamental rights, the protection

⁶⁰ Case C-112/00 *Schmidberger, Internationale Transporte und Planzüge v Austria* [2003] ECR I-5659 [63]-[64].

⁶¹ Case C-112/00 *Schmidberger, Internationale Transporte und Planzüge v Austria* [2003] ECR I-5659, Opinion of AG Jacobs, [89].

⁶² *ibid*, Opinion of AG Jacobs, [95].

⁶³ *ibid*, Opinion of AG Jacobs, [54].

⁶⁴ Case C-112/00 *Schmidberger, Internationale Transporte und Planzüge v Austria* [2003] ECR I-5659 [66]-[67].

of those rights was a legitimate interest which, in principle, could justify a restriction on the Treaty freedoms.⁶⁵

Noting that neither the free movement of goods nor the rights enshrined in Art.10 and Art.11 of the ECHR were absolute, the CJEU proceeded to assess whether, in spite of the wide margin of appreciation afforded to the competent authorities, a fair balance had been struck between the competing interests and in particular whether the restriction on intra-EU trade was proportionate. Distinguishing the facts at issue from those at play in *Commission v France*, the CJEU observed that the demonstration took place after consent had been given, that only one route had been obstructed, and that it occurred only once (albeit for almost 30 hours). Moreover, the demonstrators were exercising their fundamental rights and, unlike in *Commission v France*, the intention was not to restrict specific goods from a particular source. The demonstration had also been much publicised beforehand.⁶⁶ Taking account of the wide margin of appreciation accorded to the Member States, the authorities were entitled to conclude that a blanket ban would have constituted an excessive restriction of the demonstrators' rights. The CJEU concurred with the AG who opined that a more onerous restriction on the demonstrators' rights might have had the effect of creating an even greater barrier to trade as a result of public disorder.⁶⁷ In light of the above, the authorities' decision to permit the demonstration was not incompatible with Art.28 EC combined with Art.10 EC.

(i) Critique

It is easy to applaud the CJEU's decision. The judgment is a clear example of human rights infiltrating the province of EU trade law. Obstacles to trade caused by private parties which

⁶⁵ *ibid* [70]-[74].

⁶⁶ *ibid* [82]-[87].

⁶⁷ *ibid* [89]-[93].

are permitted by national authorities may be justified if the motivating factor is to protect human rights.

Yet there are aspects of the decision that give pause for thought. As noted by Tridimas, the CJEU (and the AG) accepted ‘in general terms’ that Art. 28 EC could, in principle, be legitimately restricted on the grounds of safeguarding Art.10 and Art.11 of the ECHR, but it did not allocate the basis for the barrier (the protection of rights) into either of the established justificatory categories, namely the Treaty derogations (Art.30 EC now Art.36 TFEU) and the so-called mandatory requirements.⁶⁸ While under increasing strain, convention dictates that discriminatory barriers can only be justified by reference to the Treaty derogations which, moreover, are strictly interpreted, whereas indistinctly applicable measures may be justified also under the CJEU’s rule-of-reason case law: the purported rationale being that discriminatory measures ‘strike at the heart’ of economic integration.⁶⁹

Retracing the CJEU’s steps in *Schmidberger*, it is clear that having found the barrier at issue to be a MEQR, no mention was made of whether the barrier was discriminatory. The CJEU observed that a restriction on Art.28 EC could be justified under either Art.30 EC or the overriding requirements in the public interest, but then proceeded to assess whether an appropriate balance had been struck between the competing interests of free movement and fundamental rights.

It has been mooted that since Art.28 EC applied in conjunction with Art.10 EC to catch inaction on behalf of the Austrian State owing to a barrier caused by private parties, the issue of whether the action of private parties was discriminatory is important. In a thought-provoking article, Agerbeek suggests that ‘if private actions create a discriminatory barrier to imports, then not acting against them could be regarded as a form of protectionism emanating

⁶⁸ Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006) 339.

⁶⁹ Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (5th edn, OUP 2011) 677.

from the State'.⁷⁰ Agerbeek posits that 'the blockade of a highway that is mostly used for imports effectively discriminates against foreign products, irrespective of the aim of the blockade'.⁷¹

The decision in *Commission v France* sheds light on this issue. In that case, since no mention was made by the CJEU of the rule-of-reason justification, it could be taken as read that the barrier was discriminatory (it clearly was). The reference to the mandatory requirements in *Schmidberger* could imply that the barrier was non-discriminatory.⁷² In support of this view, Craig and De Búrca cite *Schmidberger* as an extension of the *Cassis* mandatory requirements i.e. invoking human rights as 'justification for an indistinctly applicable measure'.⁷³

Had the CJEU found the barrier to be discriminatory, it could then only be justified (in principle) by reference to the Treaty derogations. The question would then become: which other general principles and/or EU Charter rights are capable of falling under the Treaty derogations (which are strictly policed by the CJEU) as a basis to justify discriminatory measures. Since the AG and the CJEU refrained from placing the protection of human rights into either of these categories, it seems that it formed a separate free-standing category. This is what distinguishes *Schmidberger* from cases like *ERT*, *Familiapress* and *Carpenter*. In the latter cases, human rights were used as an aid to interpretation by the CJEU to ensure that where a Member State relies on a derogation to justify a national rule which restricts free movement, the justification complies with fundamental rights. In *Schmidberger*, human rights were used 'directly' as a justification for a restriction on free movement. Conversely,

⁷⁰ Felix Ronkes Agerbeek, 'Freedom of Expression and Free Movement in the Brenner Corridor: the Schmidberger case' (2004) 9 ELR 255, 260.

⁷¹ *ibid*, 261.

⁷² *ibid*, 264.

⁷³ Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (5th edn, OUP 2011) 683.

it may be argued that many of the Treaty derogations themselves e.g. public health are bound up with fundamental rights concerns – indeed in the subsequent *Omega Spielhallen* litigation the protection of human dignity formed part of the public policy derogation in Art.46 EC (now Art.52 TFEU).

Despite the rights-friendly dimension to *Schmidberger*, the CJEU has been critiqued in some corners for subordinating fundamental rights *vis-à-vis* the Treaty freedoms.⁷⁴ While the CJEU accepted that the protection of human rights could in principle restrict Art.28 EC, the test of proportionality was applied to the restriction on trade. In just a few paragraphs of its judgment, the CJEU seamlessly traversed from Strasbourg to Luxembourg-style jurisprudence. As mentioned earlier, Skouris asserts that this simply reflects the fact that a human rights component comes into being only as a result of cross-border activity, and therefore it is commonsensical (rather than hierarchical) that the proportionality of restricting cross-border trade is assessed rather than the other way round. After all, it was the transport undertaking who alleged that Art.28 EC had been breached as opposed to the demonstrators claiming that their fundamental rights had been encroached upon by trade action. On the other hand, by adopting the Strasbourg Court's approach (of assessing whether the human rights at issue had been disproportionately affected), the CJEU might have balanced EU interests more equitably.

A more radical critique is that the CJEU ought not to review a Member State's human rights defence at all. As noted by the AG in *Schmidberger*, however, while the protection of human rights may constitute a legitimate restriction of Art.28 EC, it was still for the CJEU to ascertain whether the right is acceptable as a matter of EU law. In *Schmidberger* this was not particularly problematic as the rights raised by the Member State are recognised in many Member State constitutions and the ECHR. Yet it is not beyond the bounds of credulity to

⁷⁴ E.g. Dagmar Schiek, 'Fundamental Rights Jurisprudence Between Member States' Prerogatives and Citizens' Autonomy' in Hans-Wolfgang Micklitz and Bruno de Witte (eds.), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2012) 238.

foresee a situation whereby a Member State seeks to justify a restrictive national rule on the basis of a right which does not find common accord in other Member States which also militates against the objectives of the EU. (Though as cases such as *Mangold* illustrate, it is not always necessary for a right to find common accord in the constitutions of the Member States.) Moreover, as we shall see in the *Omega Spielhallen* case, the CJEU narrows the gap further between rights accepted under EU law (e.g. as rights guaranteed under the ECHR) and rights enshrined at the national level by incorporating them into the general principles of EU law.

It should be noted that while the proportionality test was applied to the protection of rights, it was a light test and the Member States were accorded a wide margin of appreciation. Regarding the margin of appreciation doctrine, it is clear that it applied not in relation to restricting the Treaty freedom *per se*, but in relation to whether banning the blockade would unduly restrict the protesters' human rights. Moreover, it appears that when the authorities elected to permit the demonstration to go ahead, the potential ill effects on EU trade were not even taken into account.⁷⁵ The CJEU was being charitable when it ruled that the authorities were entitled to take the view that a more restrictive ban on the demonstration would have had an even greater effect on intra-EU trade.

The decision in *Schmidberger* represents a corner-stone in the CJEU's fundamental rights jurisprudence. Attributing to fundamental rights more than just an interpretative function is perhaps the hallmark of the case. This rights-friendly approach adopted in *Schmidberger* was cemented in the subsequent case of *Omega Spielhallen*, albeit with a twist.

⁷⁵ Case C-112/00 *Schmidberger*, *Internationale Transporte und Planzüge v Austria* [2003] ECR I-5659 [13].

B. Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn

Simulated acts of violence shall not prevail over human dignity as protected under German and EU law: so ruled the CJEU in the landmark case of *Omega Spielhallen*. In 1994, Omega Spielhallen (“Omega”) opened an establishment in Bonn called ‘Laserdrome’. The original purpose of this charmingly-named establishment was for players to hit *fixed* targets using laser beams. Prior to the Laserdrome’s opening, a chorus of execration rang out from part of the general public and in 1994 the Bonn police authority ordered Omega to clarify the nature of its activities on the site. Police records indicated that contrary to Omega’s claims, one of the activities in the Laserdrome involved players wearing jackets fixed with sensors while other players were armed with sub-machine-gun laser-targeting devices. Stated simply, the objective of the game was to shoot at other players using infra-red beams. Adopting the view that such activity was an affront to human dignity and thus in breach of Art.1(1) of the German Constitution, the police authorities served an order on Omega prohibiting it from allowing games which simulated acts of killing (but not games involving fixed non-human targets). Omega argued that the order infringed Art.49 EC (now Art.56 TFEU) on the freedom to provide services because it received technology and equipment from a British company called Pulsar International Ltd. Seeking interpretative guidance, the national court made a reference to the CJEU.⁷⁶

Regarding the restriction at issue, the referring court noted that under the CJEU’s case law, restrictions on Art.49 EC which are indistinctly applicable are permitted only if justified by reference to the overriding reasons relating to the public interest.⁷⁷ The CJEU did not dwell on whether the restriction applied without distinction (i.e. both to German providers of

⁷⁶ Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2005] ECR I-5659 [3]-[9]. John Morijn, ‘Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution’ (2006) 12 ELJ 15.

⁷⁷ *ibid* [14].

services and service providers established in other Member States). This perhaps reflects the trend of the CJEU in recent years to focus on the impediment to free movement rather than whether any discrimination can be ascertained.⁷⁸ The CJEU briefly stated that the police order was not issued on the basis of the nationality of the providers or recipients of the services, and that in any event measures aimed at safeguarding public policy may be justified under Art.55 EC (Art.62 TFEU).⁷⁹ Hence, the restriction was to be assessed under the Treaty derogation rather than the overriding or ‘imperative’ requirements in the general interest.

While noting that the public policy Treaty derogation was to be interpreted strictly so as to prevent its scope from being ‘unilaterally determined’ by the Member States without ‘oversight from the EU institutions’, the former were permitted a ‘margin of appreciation’ within the ‘limits imposed by the Treaty’.⁸⁰ This was because the specific situations giving rise to reliance on the Treaty derogation varied from Member State to Member State. In this case, the German authorities took the view that simulated acts of violence were not compatible with human dignity enshrined in the national constitution. The CJEU then affirmed that the fundamental right of human dignity formed part of the general principles.⁸¹

The CJEU cited the AG’s Opinion (paragraphs 82-91) as evidence for the proposition that human dignity was a general principle. *Prima facie*, the CJEU passed the buck (back) to the AG rather than conducting its own enquiry as to whether human dignity constituted a general principle. While the AG reached the conclusion that human dignity ought to be considered a general principle, she did observe with trepidation that the CJEU had given the principle a rather broad interpretation in prior case law. The AG highlighted the case of

⁷⁸ Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (5th edn, OUP 2011) 806.

⁷⁹ Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2005] ECR I-5659 [29].

⁸⁰ *ibid* [30]-[31].

⁸¹ *ibid* [33].

*Netherlands v Parliament*⁸² (the so-called Biotech Directive case) and in particular the German version of the judgment, which appears to draw a distinction between ‘respect’ for human dignity on the one hand and human dignity as a (separate) fundamental right on the other. Stated simply, while the former serves as an aid to interpretation (to ensure EU measures are interpreted in compliance with human dignity), the latter operates as ‘an independent head of claim’.⁸³ For good measure, the AG also added Art.1 of the EU Charter to the mix, which reads: ‘Human dignity is inviolable. It must be respected and protected’.

Distinguishing the present case from the litigation in *Schmidberger*, in which freedom of expression *as protected under national law* was balanced against the free movement of goods, the AG advocated that human dignity *as protected under EU law* should be the guiding force to ensure that a Member State is not compelled to permit acts in violation of human dignity on the basis of ensuring the freedom to provide services.⁸⁴

In light of the fact that human dignity was a general principle, and given that the EU institutions and the Member States were obliged to respect fundamental rights, the CJEU ruled that the protection of those rights was a legitimate interest which, in principle, could justify a restriction on Art.49 EC, the caveat being that measures restricting Art.49 EC must be necessary and apply only insofar as less-restrictive measures proved inadequate for the attainment of the objectives sought.⁸⁵

The infamous part of the judgment, however, was that it was not ‘indispensable’ for the restrictive measure to ‘correspond to a conception shared by all the Member States as regards the precise way in which the fundamental right or legitimate interest in question is to

⁸² Case C-377/98 *Netherlands v Parliament and Council* [2001] ECR I-7079.

⁸³ Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2005] ECR I-5659, Opinion of AG Stix-Hackl, [90].

⁸⁴ *ibid* [93].

⁸⁵ Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2005] ECR I-5659 [35]-[36].

be protected'.⁸⁶ (What the CJEU appears to be saying here is that while other Member States of the EU might not feel the need to ban simulated acts of killing, the German authorities were entitled to do so, as a matter of EU law, in order to safeguard the right to human dignity enshrined in national constitutional law. Arguably, this is not an example of the so-called maximalist approach to fundamental rights protection *per se*, as the CJEU is not hoisting human dignity as a binding general principle onto all of the Member States, but rather pertains to the *measures* adopted by the Member States in order to safeguard specific fundamental rights, which need not be deemed necessary by all of the Member States. This is because the restriction, the ban relating to right in question, was subsumed under the public policy derogation which, in most free movement cases, is linked not to commonly protected rights but to specific and unique national *interests* which are not necessarily shared by other EU Member States.)

The CJEU ruled that the ban restricting Art.49 EC would not be *disproportionate* simply because other Member States did not share the same view as regards the precise way of safeguarding the fundamental right in question. Applied to the facts of the case, the prohibition on simulated acts of homicide corresponded to the level of protection guaranteed under the German Constitution. Moreover, the police authorities banned only the *variant* of the game that involved shooting at human targets as distinct from the fixed targets.⁸⁷ The ban did not, therefore, exceed the bounds of necessity in order to achieve the objective pursued.

(i) Critique

The trajectory of the CJEU's decision in *Omega Spielhallen* differs from the earlier case of *Schmidberger* in that the protection of fundamental rights formed part of the public policy

⁸⁶ *ibid* [37].

⁸⁷ *ibid* [39].

derogation, whereas in the latter case the protection of human rights served as a free-standing justificatory category.⁸⁸ The reason for this divergence is not altogether clear and the CJEU was not explicit on this point. Most likely, the restriction was included into the Treaty derogation as the ban was issued by the police on the grounds that simulated acts of killing endangered *public order*.⁸⁹ Another difference is that in *Omega Spielhallen* the CJEU declared human dignity to be a general principle of EU law. In *Schmidberger*, however, whilst the CJEU accepted that freedom of assembly and speech were fundamental rights (under Austrian law and the ECHR) which were recognised under EU law, it did not formally classify them as general principles of EU law. Akin to *Schmidberger*, however, is that it was the proportionality of restricting trade that was assessed rather than the other way round. On the other hand, the German authorities were accorded a margin of appreciation, and the test of proportionality was not exacting since it was solved in just one fleeting paragraph. The decision in *Omega Spielhallen* therefore represents a deeper incursion into EU free movement with regards to the protection of fundamental human rights.

In terms of methodology, it does seem odd that the AG and the CJEU elevated human dignity to the status of a general principle, particularly as the AG identified that its status under EU law (in the CJEU's previous case law) was unclear. The AG's basis for doing so was that the 'inchoate' nature of the principle meant that it was nigh on 'impossible to equate the substance of the guarantee of human dignity under the German Basic Law with that of the guarantee of human dignity as recognised in Community law'.⁹⁰

⁸⁸ On this point, see: M K Bulterman and H R Kraneborg, 'What if Rules on Free Movement and Human Rights Collide? About Laser Games and Human Dignity: The Omega Case' (2006) 31 EL Rev 93, 97.

⁸⁹ The Bonn Police authority issued the ban under powers conferred by Para 14(1) of the Ordnungsbehördengesetz für das Land Nordrhein-Westfalen (Law governing the North Rhine-Westphalia Police Authorities, "OBG NW") which states: 'The police authorities may take measures necessary to avert a risk to public order or safety in an individual case'. See Case C-36/02, Judgment of CJEU [6].

⁹⁰ *ibid* [92].

Leaving aside the logic of this reasoning, the end result is clear, namely a balance between *EU* fundamental rights and *EU* Treaty Freedoms. This essentially mollifies constitutional courts while keeping primacy concerns at bay. Post Lisbon, Article 4(3) TEU provides another avenue to offset tension between constitutional interests and EU trade law.

C. Dynamic Medien Vertriebs GmbH v Avides Media AG

The seeds planted in *Schmidberger* and *Omega Spielhallen* came into bloom in the case of *Dynamic Medien*. At first blush the case appears to be an orthodox internal-market dispute with no human rights component, yet there is one, and it creeps in at the justification stage.

This ostensibly arid dispute was between two companies (specialising in i-Consumer services) incorporated under German law: *Dynamic Medien* and *Avides Media*. The latter company imported image storage media from the United Kingdom (UK) for the purposes of mail-order sales in Germany via the Internet. At issue was the importation by *Avides Media* of Japanese cartoons in DVD and cassette format from the UK to Germany. Prior to dispatch, the cartoons were examined by the British Board of Film Classifications (BBFC) and were certified as suitable only for children over the age of 15 years old.⁹¹ The cartoons accordingly bore a BBFC label to that effect. *Dynamic Medien*, a rival, brought proceedings before the Regional Court (Germany) seeking to prohibit *Avides Media* from selling such image storage media by email. *Dynamic Medien* argued that the Law on the Protection of Young Persons (*Jugendschutzgesetz*) of 2002 prohibited the sale by mail order of i-Consumer services such as the cartoons in question, as they had not been examined in Germany in accordance with that Law and did not bear an age-limit marker corresponding to a classification determined by a German regional authority.⁹²

⁹¹ Case C-244/06 *Dynamic Medien Vertriebs GmbH v Avides Media AG* [2008] ECR I-505 [12].

⁹² *ibid* [13].

The question for the CJEU was whether the German Law constituted a restriction on Art.28 EC (now Art.34 TFEU) on the free movement of goods and, if so, whether it could be justified under Art.30 EC (now Art.36 TFEU).

Having found the national rule to be a MEQR, the CJEU moved to examine the justification. In their written observations, the UK Government and the Commission adopted the view that the national rule was justified in that it was directed at safeguarding young children and that such an objective could be linked to the Treaty derogations set out in Art.30 EC, namely on grounds of public policy and public morality. The German Government further asserted that the protection of the young was linked to ensuring respect for human dignity. Finally, the Irish Government raised the mandatory requirement of consumer protection derived from the *Cassis de Dijon* judgment.⁹³ Axiomatically, then, the CJEU was faced with a litany of justifications for the restriction on Art.28 EC.

The CJEU affirmed that various international treaties to which the Member States are contracting parties, such as the International Covenant on Civil and Political Rights 1976 and the Convention on the Rights of the Child 1990, recognised the preservation of the rights of the child. Moreover, Art.24(1) of the Charter of Fundamental Rights of the EU ensures that the rights and well-being of the child are protected. Protection of the child was a legitimate interest which, in principle, could justify a restriction on the free movement of goods (*Schmidberger*), though any such restrictions could be permitted only if they were suitable and necessary (*Omega Spielhallen*). Moreover, it was not indispensable for the restrictive measures laid down by the German authorities to ‘correspond to a conception shared by all other Member States as regards the level of protection and the detailed rules relating to it’⁹⁴ (*Omega Spielhallen*). As that conception may vary from State to State, the Member States

⁹³ *ibid* [36]-[37].

⁹⁴ *ibid* [44].

were to be accorded ‘a definite margin of appreciation’.⁹⁵ The CJEU concluded that Art.28 EC did not preclude the operation of the national rule in question.

(i) Critique

The decision in *Dynamic Medien* affirms the outcome in *Omega Spielhallen* in that (i) the justification for protecting human rights formed part of the public policy derogation (as opposed to the approach in *Schmidberger* whereby fundamental rights protection seemingly served as a separate justificatory category) and (ii) when relying on public policy, there need not be consensus regarding the precise way in which a fundamental right is to be protected. The CJEU readily accepts that national legal systems regulate certain rights and interests differently and accordingly grants them a margin of discretion. The outcome is also notable for the multifarious rights-based sources of protection taken into consideration by the CJEU.

D. *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien*

A striking post-Lisbon free movement dispute pertaining to human rights is *Sayn-Wittgenstein*.⁹⁶ The headline of the case could well read as follows: *No barons, no knights, no dukes, no counts, and certainly no princes and princesses permitted, in name, under Austrian law* (“the Law on the Abolition of the Nobility 1919”). But what of the national law’s possible effects on free movement under Art.21 TFEU? This was the pivotal issue for the CJEU.

The facts of the dispute are as follows. The applicant was born *Ilonka Kerekes* in Austria in 1944. In 1991, Ilonka (then aged 47) was adopted in Germany by a German citizen called Mr Lothar Fürst von Sayn-Wittgenstein. Upon adoption, the applicant’s name

⁹⁵ *ibid* [44].

⁹⁶ Case C-208/09 *Sayn-Wittgenstein v Landeshauptmann Von Wien* [2011] 2 CMLR 28.

became *Ilonka Fürstin von Sayn-Wittgenstein*. Ilonka sought to have her adoptive name registered with the relevant authorities in Austria, and in 1992 the authorities issued a new birth certificate.⁹⁷ Working in the upper echelons of the German real estate market (selling castles), the applicant sagaciously traded under her adoptive name.⁹⁸ However in 2003, following an unrelated court judgment, which ruled that in accordance with the Law on the Abolition of the Nobility 1919, Austrian citizens could not acquire a surname designating a former title of nobility (i.e. *Fürstin von*) as a result of adoption by a German citizen, the Austrian authorities informed the applicant (in 2007) of their intention to amend her name in the birth register (of civil status) to *Ilonka Sayn-Wittgenstein*.⁹⁹

The applicant appealed to the *Verwaltungsgerichtshof* (Higher Administrative Court) in Germany asserting (i) her freedom of movement under Art.21 TFEU, (ii) her rights under Art.56 TFEU on the freedom to provide services (on the basis that using different names in different Member States would be a restriction thereof) and that (iii) changing her name would be an infringement of the right to a private life under Art.8 of the ECHR 1950¹⁰⁰ (as she had been known as Ilonka Fürstin von Sayn-Wittgenstein for a decade and a half).

Rather than framing the dispute on the applicant's freedom to provide services, the referring court asked the CJEU whether Art.21 TFEU precluded a national rule which prohibited the use of a surname (*Fürstin von* - the noble element - forming part of Ilonka's

⁹⁷ Case C-208/09 *Sayn-Wittgenstein v Landeshauptmann Von Wien* [2011] 2 CMLR 28, Opinion of AG Sharpston, [25].

⁹⁸ The applicant also had a German driving license and a registered company in her adoptive name. In addition, her Austrian passport had been renewed in 2001 by Austrian authorities in Germany with her adoptive name.

⁹⁹ Case C-208/09 *Sayn-Wittgenstein v Landeshauptmann Von Wien* [2011] 2 CMLR 28, Opinion of AG Sharpston, [27]-[28].

¹⁰⁰ *ibid* [29].

surname under German law)¹⁰¹ of an adoptee determined in another Member State on the basis that it signified a title of nobility contrary to Austrian (Constitutional) law.¹⁰²

Despite persuasive arguments advanced by the *Landeshauptmann von Wien* (Head of Government of the Province of Vienna) and the Austrian and German Governments, namely that the applicant was not required to change her name but merely to *remove the noble element*,¹⁰³ and that in any event removal of the said noble element was not liable to give rise to confusion as to the identity of the applicant,¹⁰⁴ the CJEU disagreed. After stating that ‘a person’s name is a constituent element of his identity and of his private life’ as protected under Art.7 of the EU Charter and Art.8 of the ECHR,¹⁰⁵ the CJEU ruled that ‘serious inconvenience’ would occur ‘from having to alter all the traces of a formal nature of the name...left in both the public and the private spheres’.¹⁰⁶ Refusal by the Austrian authorities to recognise all elements of the applicant’s name as determined in Germany was a restriction of Art.21 TFEU.

As to the justification, the CJEU accepted that the national rule, having ‘constitutional status and implementing the principle of equal treatment’,¹⁰⁷ was an objective consideration which could form part of the public policy derogation. Citing *Omega Spielhallen*, the CJEU emphasised that reliance on public policy was to be ‘strictly interpreted’ so as to prevent

¹⁰¹ Art.109 of the Constitution of the German Empire (Verfassung des Deutschen Reichs) abolished all privileges based on birth or status and declared that titles of nobility were to be regarded only as an element of a surname (para [14]).

¹⁰² Case C-208/09 *Sayn-Wittgenstein v Landeshauptmann Von Wien* [2011] 2 CMLR 28 [32].

¹⁰³ *ibid* [32].

¹⁰⁴ *ibid* [46]-[47].

¹⁰⁵ *ibid* [52].

¹⁰⁶ *ibid* [67].

¹⁰⁷ *ibid* [82].

Member States from ‘unilaterally’ defining its scope,¹⁰⁸ and could be invoked only if there was ‘a genuine and sufficiently serious threat to a fundamental interest of society’.¹⁰⁹ Nonetheless, Austria was to be accorded a margin of appreciation within the limits imposed by the Treaty in order to take account of the specific circumstances justifying recourse to the concept of public policy which may vary from State to State.¹¹⁰

The CJEU highlighted that the national rule sought to implement the principle of equality between Austrian citizens, and that the EU itself strove to ensure equality as a general principle of EU law which, moreover, is enshrined in Art.20 of the Charter of Fundamental Rights.¹¹¹ The CJEU affirmed that a restrictive measure need not find accord with other Member States as regards the precise way in which a fundamental right or interest was to be safeguarded.¹¹² Adding a new component to the case law, the CJEU opined that ‘in accordance with Art.4(2) TEU, the EU is to respect the national identities of its Member States, which include the status of the State as a Republic’.¹¹³ Accordingly, Art.21 TFEU did not preclude the operation of a national rule which sought to prohibit the surname of an Austrian national containing a title of nobility.

(i) Critique

The case of *Sayn-Wittgenstein* does not depict the interface between economic Treaty freedoms and fundamental rights *per se*, but rather national constitutional interests *vis-à-vis* the free movement of EU citizens. Yet, while the referring court did not cite Art.56 TFEU on

¹⁰⁸ *ibid* [86].

¹⁰⁹ *ibid* [86].

¹¹⁰ *ibid* [87].

¹¹¹ *ibid* [88]-[89].

¹¹² *ibid* [91].

¹¹³ *ibid* [92].

the provision of services, the applicant did rely on it at the national level, and the CJEU also ruled that Art.56 TFEU was, in principle, an alternative head of claim for the applicant. In addition, the justification advanced by the Austrian Government was linked to the principle of equality, which is a general principle of EU law and protected in the EU Charter of Fundamental Rights. Moreover, the basic blueprint for reconciling market freedoms and human rights was followed in this case i.e. reliance on public policy, the margin of appreciation doctrine, and the specific factors justifying recourse to public policy - which may vary from State to State.

Distinct from cases like *Omega Spielhallen*, however, is that the CJEU did not translate the Austrian ‘constitutional concern into an EU Constitutional concern’¹¹⁴ i.e. the discernible tension was between *EU* free movement law and *national* constitutional interests, though the latter was indirectly linked to the EU general principle of equality. The implication, therefore, is that the abolition of titles of nobility in the name of equality of Austrian citizens is not an EU concern, and remains within the competences of the Member States. Rather than conceptualising the case on the basis of twin EU objectives, the novelty of the judgment was the CJEU’s reference to the national identity clause enshrined in Art.4(2) TEU.

While the reference to Art.4(2) TEU was fleeting, the potential implications are multifarious. First, it seems that the reference bolstered the Austrian Government’s position, in that the only determinative factor regarding the proportionality of the restriction was the invocation of Art.4(2) TEU itself.¹¹⁵ Second, it might be the case that Art.4(2) TEU operates in conjunction with the margin of appreciation doctrine accorded to the Member States, that

¹¹⁴ Stephen Weatherill, ‘Economic Rights to Fundamental Rights’ in Stephen Weatherill, Ulf Bernitz and Sybe de Vries (eds.), *The Protection of Fundamental Rights in the EU After Lisbon* (Hart Publishing 2013) 32.

¹¹⁵ Leonard Besselink, ‘Case C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, Judgment of the Court (Second Chamber) of 22 December 2010, nyr, Respecting Constitutional Identity in the EU’ (2012) 49 CML Rev 671.

is, as an additional tool for the CJEU to affirm the legitimacy of a national rule restricting a Treaty freedom. What is clear from the judgment is that Art.4(2) TEU does not immunise a national rule from being subjected to a test of proportionality. Stated differently, a restriction linked to national identity still forms part of the public policy derogation rather than a separate justificatory category which is exempt from scrutiny by the CJEU. In this regard, the CJEU maintains its position as ‘the Supreme Constitutional Court of Europe’.¹¹⁶

One thorny issue, however, is that if Art.4(2) TEU is interpreted too broadly (i.e. allowing too many interests to qualify) by the CJEU, then it could destabilise the uniform application and effectiveness of EU law. If interpreted too narrowly, then it risks being robbed of any utility.¹¹⁷ In its current guise, Art.4(2) TEU (previously Art.F(1) TEU, then Art.6(3) TEU) states that the EU is to respect the Member States’ ‘national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government’. Semantically, this is liable to inspire a broad reading.¹¹⁸ On the other hand, the CJEU is bound to unpack the national identity clause carefully on a case-by-case basis: in the subsequent case of *Runevič-Vardyn*, the CJEU ruled that safeguarding a State’s official language fell under Art.4(2) TEU.¹¹⁹ Needless to say, not any and every rule or practice linked to national identity will be accepted as valid by the CJEU.

The decision in *Sayn-Wittgenstein* could also be seen as a departure from, or an addition to, the CJEU’s pure human rights case law insofar as national rules linked to constitutional identity constitute a justifiable restriction on trade or free movement i.e. as well as established human rights grounds. Alternatively, one could readily make the case that

¹¹⁶ Siniša Rodin, ‘National Identity and Market Freedoms After the Treaty of Lisbon’ (2011) 7 CYELP 11.

¹¹⁷ Ibid 41.

¹¹⁸ Logic dictates that respect for national identities would also apply in ‘agency’ situations. Thus, an EU Regulation or a Directive would also have to take account of Member State national identity in order to be valid.

¹¹⁹ Case C-391/09 *Runevič-Vardyn and another v Vilniaus Miesto Savivaldybės Administracija and others* [2011] 3 CMLR 13, [86].

fundamental rights protection itself should be linked to, or subsumed under, Art.4(2) TEU, i.e. as a manifestation of national constitutional interests.¹²⁰ Conversely, in *Sayn-Wittgenstein*, it was not the human right of equality which was determinative *per se*, but rather Austria's national identity as a Republic (which sought to eradicate titles of nobility) which the EU was bound to respect. While human rights and national interests are closely related, they need not necessarily be conflated. What is clear is that the net of justifications has been cast wider as a result of Article 4(2) TEU.

V. (Economic) Treaty Freedoms and Fundamental (Social) Rights

If the above case law dispelled the 'not' taking rights seriously narrative often levelled at the CJEU, then the subsequent *Viking Line* and *Laval* litigation perhaps recast a shadow over the CJEU's newly acquired reputation for taking rights seriously.

A. International Transport Workers' Federation and Finnish Seaman's Union v Viking Line ABP and OU Viking Line Eesti

The material issue in *Viking Line* was whether threatened strike-action constituted a valid restriction on the Treaty provisions on freedom of movement, and in particular the right of establishment under Art.43 EC (now Art. 49 TFEU).

A Finnish ferry company called Viking Line ABP (Viking Line) operated a vessel (the *Rosella*) under the Finnish flag manned by a crew who were members of the Finnish Seaman's Union (FSU), an affiliate of the International Transport Workers' Federation (ITF). The *Rosella* had been running at a loss on the Tallinn-Helsinki route between Estonia and Finland as a result of competition from Estonian-flagged vessels plying the same route (Estonian crew wages being lower than Finnish crew wages), and so Viking Line sought to

¹²⁰ The CJEU's fundamental rights jurisprudence can be viewed as the first wave of national identity cases insofar as the protection of fundamental rights such as human dignity are linked to national identity and culture.

reflag the vessel and register the *Rosella* in Estonia (in 2003).¹²¹ At the request of the FSU, the ITF issued a circular¹²² to affiliated unions informing them not to enter into negotiations with Viking Line - thus foreclosing any possibility of the Finnish operator entering into negotiations with Estonian unions in order to benefit from lower wages paid to Estonian seamen. Crucially, the FSU also threatened industrial strike action. Fearing that this would materialise, Viking Line provisionally agreed not to commence its reflagging agenda (until 2005).

The ITF never withdrew its circular and its effects on Viking Line remained in place. All the while, the *Rosella* continued to operate at a loss. Viking Line therefore intended to reflag the *Rosella* in Estonia after the expiry of a manning agreement in 2005. In 2004, foreseeing industrial action over the horizon from the FSU and ITF, Viking Line sought injunctive relief from the High Court of Justice (England and Wales) asking that (i) the ITF withdraw the circular and (ii) the FSU not impede Viking Line's Treaty right to reflag the vessel in Estonia. The injunction was granted on condition that Viking Line would not make its crew redundant due to reflagging.¹²³

Following an appeal to the Court of Appeal (Civil Division), a reference was made to the CJEU to ascertain, *inter alia*, whether: collective action fell within the ambit of Art.43 EC; whether Art.43 EC had horizontal direct effect so as to confer rights on Viking Line which could be relied on against the trade unions; whether threatened collective action was a restriction on Art.43 EC and, if so, whether the restriction was discriminatory, indirectly

¹²¹ AG Maduro notes that '[s]o long as the *Rosella* is under the Finnish flag, Viking is obliged under Finnish law and the terms of a collective bargaining agreement to pay the crew wages at the same level as those applicable in Finland. Estonian crew wages are lower than Finnish crew wages'. See Case C-438/05 *International Transport Workers' Federation v Viking Line ABP* [2007] ECR I-10779, Opinion of AG Maduro, [9].

¹²² As noted by the CJEU, 'the circular stated that the *Rosella* was still beneficially owned in Finland and therefore that the FSU retained the negotiating rights'. See Case C-438/05 *International Transport Workers' Federation v Viking Line ABP* [2008] ECR I-10779 [11].

¹²³ Case C-438/05 *International Transport Workers' Federation v Viking Line ABP* [2007] ECR I-10779, Opinion of AG Maduro, [10-12].

discriminatory or non-discriminatory; and whether the restriction could be justified on the basis of the right to strike and/or the protection of workers.

Having found that collective action fell within the ambit of Art.43 EC, the CJEU ruled that the right to take collective action, including the right to strike, was a fundamental right forming part of the general principles of law, and that Art.28 of the Charter of Fundamental Rights of the EU also enshrined the right to strike.¹²⁴ In line with the previous case law, the CJEU asserted that the protection of fundamental rights was a legitimate interest which, in principle, justified a restriction on Art.43 EC. The CJEU also found that Art.43 EC was capable of conferring rights on Viking Line which could be relied on against the FSU and ITF. While the trade unions were not public law entities, they did exercise legal autonomy which was conferred on them by domestic law.¹²⁵

The CJEU held that actual and threatened strike action by the FSU and ITF was an impediment to Art.43 EC as it had the effect of rendering less attractive, or making nigh on pointless, the exercise of Viking Line's Treaty freedoms.¹²⁶ As regards possible justifications for the restriction on Art.43 EC, the CJEU linked the right to take collective action with the protection of workers as an overriding reason of public interest.¹²⁷ After emphasising that the EU had not only a market but also a social agenda, the CJEU opined that it was for the referring court to ascertain whether the objectives pursued by the FSU and ITF corresponded to the protection of workers, that is, whether Viking Line's intention to reflag the Rosella in fact jeopardized the jobs and/or working conditions of FSU members.¹²⁸ If so, the national

¹²⁴ Case C-438/05 *International Transport Workers' Federation v Viking Line ABP* [2007] ECR I-10779 [43-44].

¹²⁵ *ibid* [60].

¹²⁶ *ibid* [72].

¹²⁷ *ibid* [77].

¹²⁸ *ibid* [83].

court would then have to assess whether such action was suitable and necessary in order to attain the objectives sought.¹²⁹ The CJEU stressed that the referring court had to examine whether the FSU had at its disposal means which were less restrictive to Viking Line's rights under Art.43 EC and whether the FSU had exhausted those means prior to commencing action.¹³⁰

(i) Critique

Attempts can be made to draw the kindly veil of palliation over the CJEU's decision, namely on economic grounds. *Prima facie*, it seems that the dispute rests on *Viking Line's* freedom to benefit from cheaper labour costs. Yet it could be argued that had the CJEU leaned in favour of the unions, then it would have had adverse effects on *Estonian workers* insofar as they would be precluded from being able to 'undercut' seamen from other Member States who command higher wages. Thus, the decision can be viewed as ensuring seamen from poorer Member States are able to gain a competitive advantage over crewmen from more affluent Member States protected by powerful unions.¹³¹ On the other hand, the long-term effect would be to dismantle social welfare and the advantage would equalise. Indeed, it may be argued that rather than helping a poorer Baltic State and ensuring the free market in labour costs, the CJEU is enforcing the interests of a transnational corporation.

Aside from the economic rationale pervading the CJEU's decision, other aspects of the case merit attention. While the CJEU recognised that the right to take collective action, and in particular the right to strike, was not only a fundamental right but also a general principle of law, it was linked to the protection of workers. It was not a right in and of itself which could serve as a legitimate restriction, since the objective of strike action was

¹²⁹ *ibid* [84].

¹³⁰ *ibid* [87].

¹³¹ Danny Nicol, 'Can Justice Dethrone Democracy in the European Union? A Reply to Jurgen Neyer' (2012) 50 *JCMS* 508, 516-517.

materially relevant. This contrasts with the decision in *Schmidberger*. There, the CJEU held that the objective of the restriction (a protest to raise awareness about adverse effects on the environment caused by excessive commuting) was irrelevant. The relevant factor was that the national authorities had permitted the restriction on the basis of the protestors' fundamental rights. On this point, it has been argued that it was erroneous of the CJEU in *Schmidberger* to not consider whether the motive of the protest was acceptable 'as a matter of [EU] law'.¹³² Had the authorities permitted a protest to occur which was strongly in favour of animal cruelty or against same sex marriage, then the CJEU would surely have been less inclined to accept that there had been a restriction on trade which could be justified under EU law on the basis of freedom of expression. *Viking Line* and *Schmidberger* are distinct in that in the latter case it was the duty of the Member State to ensure the free flow of goods, whereas in the former case the right to strike was invoked defensively and horizontally. As noted by ACL Davis, 'there is more than a little sleight of hand in the CJEU's use of *Schmidberger* as authority for its application of the proportionality test in *Viking*'.¹³³

Perhaps the most criticised aspect of the case is the way in which the right to strike was subjected to the proportionality test. Akin to cases like *Omega Spielhallen* and *Schmidberger*, it was the restriction on trade that was assessed for its proportionality (i.e. the onus was on the trade unions to demonstrate the proportionality of the restriction). Yet as noted by Barnard, the right to strike and proportionality are 'unlikely bedfellows'.¹³⁴ Put simply, the more effective a strike is the less proportionate it will be. Moreover, the 'less restrictive alternative' test advanced by the CJEU is questionable insofar as many alternatives

¹³² Christopher Brown, 'Case C-112/00, Eugen Schmidberger, Internationale Transporte und Planzuge v Austria, Judgment of 12 June 2003, Full Court' (2003) 40 CML Rev 1499, 1404.

¹³³ ACL Davis, 'One Step Forward, Two Steps Back? The Viking and Laval Cases in the CJEU' (2008) 37 ILJ 126, 141.

¹³⁴ Catherine Barnard, A Proportionate Response to Proportionality in the Field of Collective Action (2012) 37 EL Rev 117, 123. See also: Alan Bogg, '*Viking* and *Laval*: The International Labour Law Perspective in Mark Freedland and Jeremias Prassl (eds.) *Viking, Laval and Beyond* (Hart Publishing 2015) 41, 50, 54, 56, 57.

such as leafleting or short-term strikes are unlikely to be ‘genuine alternatives’.¹³⁵ The CJEU’s ruling renders strike action more onerous in that unions have to satisfy not only domestic law rules but also EU law requirements laid down in *Viking Line* (i.e. in cross-border situations).¹³⁶ While the final decision was left to the UK Court of Appeal,¹³⁷ the exacting guidance offered by the CJEU reveals more than a kernel of economic bias.

The tender balance between economic freedoms and social rights was again tilted in favour of the former in the case of *Laval*. While *Laval* is a complex case, the nuance need not detain us here. Suffice it to say, the pivotal issue was whether Art.49 EC (now Art.56 TFEU) on the freedom to provide services precluded Swedish trade unions from engaging in collective action (in the form of a blockade) to compel a Latvian undertaking, Laval un Partneri Ltd (Laval), which posted workers to Sweden (to work on building sites), to apply a Swedish collective agreement (regarding terms and conditions of employment for the building sector) in a situation where Swedish legislation contained no explicit provision on key employment terms and conditions *viz* minimum rates of pay in collective agreements.¹³⁸

Unlike in *Viking Line*, the CJEU in *Laval* left no room for manoeuvre to the *referring court*, finding the restriction to be disproportionate. While collective action was a general principle of law¹³⁹ which, in principle, justified a restriction on Art.49 EC on the basis of the protection of workers (which constitutes an overriding reason of public interest), forcing Laval to enter into negotiations with trade unions regarding rates of pay for posted workers

¹³⁵ ACL Davis, ‘One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ’ (2008) 37 ILJ 126, 143.

¹³⁶ Catherine Barnard, A Proportionate Response to Proportionality in the Field of Collective Action (2012) 37 EL Rev 117, 128.

¹³⁷ The dispute was settled out of court before the Court of Appeal had a chance to rule on the matter.

¹³⁸ Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767 [51].

¹³⁹ The CJEU cited a raft of sources to support this proposition, namely: the European Social Charter, International Labour Organisation (ILO) Convention No. 87, the Community Charter of the Fundamental Social Rights of Workers, and the EU Charter of Fundamental Rights (at paragraph 90).

(not defined in national legislation) and to sign a collective agreement (more favourable than the minimum requirements stipulated in Art.3(1) of the Posted Workers Directive)¹⁴⁰ could not be justified.

In contrast to cases like *Schmidberger* and *Omega Spielhallen*, no margin of appreciation was to be afforded in order to take account of the specific (industrial relations) context giving rise to the restriction. The fact that the CJEU did not accord a margin of appreciation is perhaps explicable by the fact that the dispute was horizontal, that is, as a private party a trade union could not benefit from a margin of appreciation in the same way as *national authorities*. Yet given that the motive of collective action in *Viking Line* and *Laval* was determinative, and since the onus was not on the State but on the unions to regulate strike action, it might be thought that the latter ought to be given a finite margin of discretion. Taken together, *Viking* and *Laval* illustrate that despite the rhetoric of fundamental rights (and in these cases collective labour rights) being on par with economic freedoms, the former are strictly scrutinised when invoked as a restriction on the latter. The rationale appears to be that while industrial action to protect workers from ‘social dumping’ is legitimate in principle (the *social* EU), trade unions may not ring-fence domestic labour markets *vis-à-vis* lower paid foreign workers from other Member States (the *market* EU).¹⁴¹

Finally, both cases exemplify the horizontal application of fundamental rights in tandem with the Treaty provisions on establishment and services (Art.49 TFEU and Art.56 TFEU). However, the degree to which the Treaty provisions on establishment and services apply horizontally to private individuals is not entirely unequivocal. In seeking to draw a distinction between restrictions owing to the actions of private individuals and actions of the

¹⁴⁰ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1.

¹⁴¹ Koen Lenaerts and Jose A Gutierrez-Fons, ‘The Constitutional Allocation of Powers and General Principles of EU Law’ (2010) 47 CML Rev 1629, 1666.

State, the CJEU (in *Viking Line*) was not explicit on whether actions by private individuals did not require a collective dynamic to be caught or whether only actions by private parties, i.e. trade unions which wield vast autonomous power to regulate collective working conditions, are caught.¹⁴² What is clear is that once it has been established that the Treaty provisions apply horizontally, this then acts as a trigger for the general principles and fundamental rights to apply (in *Viking Line* and *Laval*, ‘defensively’ to delimit the companies’ free movement rights).

¹⁴² Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (5th edn, OUP 2011) 768.

VI. Conclusion

This chapter has sought to examine the role of fundamental rights in the context of the internal market. In particular, the aim has been to appraise the view that fundamental rights and Treaty freedoms are polar opposites or that the former are hierarchically subordinate to the latter. In hindsight, no singularly definitive narrative emerges from the jurisprudence. The most that can be said is that the protection of fundamental rights fits into a pre-existing internal market (judicial) template for assessing national restrictions on EU free movement. It can be argued, however, that this phenomenon serves to ‘further soften’ EU trade law.¹⁴³

As regards the distinction between the Treaty freedoms and fundamental rights, it has been shown that the CJEU often regards, and refers to, the former as fundamental *economic* rights. In relation to the alleged pecking order between the Treaty freedoms and fundamental rights, it has been shown that two scenarios can be distinguished. In cases like *ERT*, *Familiapress* and *Carpenter*, Member States must comply with fundamental rights when adopting national rules that restrict free movement, whereas cases like *Schmidberger*, *Omega Spielhallen* and *Viking Line* illustrate a *prima facie* clash between fundamental rights and EU free movement. In the latter scenario, the case for a market bias can be made insofar as the CJEU assesses the proportionality of restricting EU trade as opposed to the other way round. From the standpoint of judicial method, this reflects the fact that fundamental rights are not free-standing. In other words, there must (first) be a cross-border element and a *prima facie* breach of free movement (thus bringing the dispute within the scope of EU law) in order for (second) fundamental rights to apply. In *Schmidberger* it was not the protestors who asserted a breach of their freedom of expression; rather, it was the transport undertaking which claimed that the Austrian State’s failure to ensure free movement amounted to a violation of Article 34 TFEU. Accordingly the CJEU had to determine whether the free movement of

¹⁴³ Stephen Weatherill, ‘Economic Rights to Fundamental Rights’ in Stephen Weatherill, Ulf Bernitz and Sybe de Vries (eds.), *The Protection of Fundamental Rights in the EU After Lisbon* (Hart Publishing 2013) 29.

goods had been infringed, albeit in the name of protecting the protestors' fundamental rights, for being disproportionate. On the other hand, cases like *Viking Line* highlight the problem of applying the proportionality principle to specific fundamental rights. Whilst proportionate strike action might be permissible under EU trade law, proportionate strike action might be ineffectual.

Ultimately, the case law in this area is best viewed not as a clash between Treaty freedoms and fundamental rights, but as the interpenetration of multiple forces (Treaty freedoms, fundamental rights, proportionality, the margin of appreciation principle, and national constitutional identity) and a resulting synthesis (the softening of the internal market edifice). Cases like *Omega Spielhallen*, *Dynamic Medien* and *Sayn-Wittgenstein* all serve as authority for the proposition that fundamental rights can operate as grounds for restricting EU trade law. Moreover the CJEU readily accepts that Member States regulate certain fundamental rights and national interests differently and, accordingly, grants the latter a variable margin of appreciation within the limits imposed by the Treaty, resulting in a porous internal market.¹⁴⁴

¹⁴⁴ *ibid* 22.

CONCLUSION

The central research question of the thesis was whether there is a methodological framework that can be deduced from the CJEU's jurisprudence and, if so, whether it is adequate. It has been demonstrated that a sound methodological approach can be discerned from the case law.

Upon reflection, various explicative and prescriptive conclusions can be drawn. In relation to the former, the main thrust of the thesis has been to trawl through the case law in a bid to capture the CJEU's method. On the one hand, the flux of the CJEU's case law militates against any notion of methodological grandeur. On the other hand, an overarching methodological framework can be discerned and it comprises the *function* of fundamental rights, the *factors* shaping adjudication, and the *scenarios* in which fundamental rights apply.

The salient findings which emerge from the framework warrant recapitulation. It was shown that the CJEU incorporated fundamental rights into the overarching general principles of law. As a judicial tool, the general principles are utilized to fill gaps in the EU legal system and as principles of interpretation and invalidation. More generally, the general principles operate as ballast for the rule of law which, in the interpretation and application of the Treaties, the CJEU is obligated to ensure. The inclusion of fundamental rights into the general principles also expands the administrative remit of the latter by imbuing them with constitutional esteem. Yet the CJEU's general principles case law is not without its deficiencies. It is axiomatic that the CJEU plays fast-and-loose when it comes to classificatory precision, making it difficult to determine which rights are general principles and also whether other concepts and principles of Union law are general principles.¹ A curious dichotomy also materialised from the outset between the proximate terms of fundamental rights and human rights, with reference only to the former in the jurisprudence.

¹ Case C-101/08 *Audiolux SA v Groupe Bruxelles Lambert SA (GBL)* [2009] ECR I-9823, Opinion of AG Trstenjak, [67].

Arguably this reflects the idea that fundamental rights are constitutional in nature, in that they are applicable only within the scope of EU law and are thus distinct from universal human rights. In name and in scope, the EU Charter of Fundamental Rights cements this dichotomy.

Filling a gap in the legal literature, it has also been shown that fundamental rights adjudication can be viewed as a two-stage process of derivation and enforcement. Whilst the CJEU proclaims to draw inspiration from the legal systems of the Member States for the elaboration of EU fundamental rights, in practice it seldom does, as it relies instead on the ECHR. Moreover, the EU Charter now furnishes the CJEU with a codified Bill of Rights, making the derivation stage more transparent. In terms of the enforcement of rights, it has been shown that a *troika* of legal factors emerge as central forces in the CJEU's decision-making process, namely: determining the scope of EU law (now enshrined in Article 51 of the Charter); the application of the proportionality principle (now incorporated in Article 52 of the Charter (laying down the scope of the rights contained therein and the rules for their interpretation)); and the utilization of the EU's own margin of appreciation principle.² The genesis of the CJEU's unwritten framework, or methodological blueprint, was also identified.³ It was shown that the CJEU's initial review of EU action for compliance with fundamental rights set the tone as regards the means by which the CJEU resolves disputes. In that connection, the EU Charter has not created a sea of change in terms of judicial method.

As regards the CJEU's review of Member State activity for compliance with fundamental rights, the scope of EU law is a Copernican theme and the CJEU's approach is expansionist. A striking example of this phenomenon is the so-called *horizontal application* of fundamental rights e.g. the general principle of non-discrimination (now enshrined in Article 21 of the EU Charter). On the one hand, the horizontal applicability of fundamental

² See chapter II.

³ See chapter III.

rights may constitute a natural evolution of the CJEU's case law.⁴ On the other hand, it may be proof of the CJEU allowing EU fundamental rights to become a runaway train. (It is to be recalled that the EU Charter is addressed, first and foremost, to the EU institutions. As regards the Member States, doubts had even been raised as to whether the EU Charter applied in the derogation scenario.) Viewed in this light, the horizontal application of fundamental rights, either as part of the general principles or via the EU Charter, was largely unforeseen.⁵

In relation to the derogation scenario, it has been shown that the protection of fundamental rights feeds into a pre-existing internal market template. In particular, when Member States seek to justify national measures that restrict the Treaty freedoms, those measures must comply with the general principles, including fundamental rights. In addition, national measures restricting the Treaty freedoms can be justified on fundamental rights grounds, so long as those measures are proportionately pursued; and national authorities are typically granted a variable margin of manoeuvre by the CJEU to take account of localised concerns. As noted by Weatherill, the utilization of the margin of appreciation principle in fundamental rights disputes 'restrain[s] the deregulatory potential of EU free movement law',⁶ illustrating the 'porous' nature of the internal market edifice.⁷ On the flip side, the *milieu* of the internal market inevitably tinges fundamental rights with an economic complexion.

⁴ Ulf Bernitz and Nergelius Joakim, *General Principles of EC Law in a Process of Development* (Kluwer Law International 2008); Ulf Bernitz, Xavier Groussot and Felix Schulyok, *General Principles of EU Law and European Private Law* (Kluwer Law International 2013).

⁵ Takis Tridimas, *The General Principles of EU Law* (2nd edn, OUP 2006) 47.

⁶ Stephen Weatherill, 'Viking and Laval: The EU Internal Market Perspective' in Mark Freedland and Jeremias Prassl (eds.) *Viking, Laval and Beyond* (Hart Publishing 2015) 37.

⁷ Stephen Weatherill, 'From Economic Rights to Fundamental Freedoms' in Syres de Vries, Ulf Bernitz and Stephen Weatherill (eds.) *The Protection of Fundamental Rights in the EU After Lisbon* (Hart 2013) 22.

Various *prescriptive* conclusions may also be put forward. Though not a human rights Court,⁸ the CJEU could enrich its jurisprudence by injecting a metaphysical dimension. Even if guilty of artistic license, Article 2 TEU states that the Union is founded on the visceral ideals of ‘respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights’. The realization of these non-economic aspirations requires the CJEU to grasp the nettle and establish a substantive notion of fundamental rights fit for the post-Lisbon era. One option is for the CJEU to draw on vast reserves of critical scholarship on the nature of fundamental rights in order to off-set the oft-glib tone of its jurisprudence.⁹

As regards adjudication, it has already been alluded to above that whilst the constitutional traditions common to the Member States constitute a source of inspiration for the elaboration of the general principles (Article 6 TEU), the CJEU rarely has recourse to the legal systems of the Member States in a profound way. Moreover, irrespective of the origin of fundamental rights, they are then secured within the framework of the structure and objectives of the EU. The risk with this approach, however, is of the CJEU developing a heliocentric notion of fundamental rights driven by the exigencies of the EU, which is detached from the ground level of the Member States. Post Lisbon, Article 4(2) TEU provides a vital avenue for the CJEU to draw on, and make reference to, the plurality of national values.¹⁰ Article 4(2) TEU enacts that the EU is to respect ‘the national identities of the Member States, inherent in their political and constitutional structures’. Whilst the case law on Article 4(2) TEU is relatively exiguous, it seems that akin to fundamental rights the clause can be invoked not only to justify restrictions on free movement, but also as a basis for

⁸ See Leonard F.M. Besselink, ‘The ECJ as the European “Supreme Court”: Setting Aside Citizens’ Rights for EU Law Supremacy’ (*Verfassungsblog*, 18 August 2014) <<http://www.verfassungsblog.de/en/ecj-european-supreme-court-setting-aside-citizens-rights-eu-law-supremacy/#.VZvCAflViko>> accessed 07 July 2015.

⁹ E.g. Tom Campbell, Keith Ewing and Adam Tomkins, *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011); Sionaidh Douglas-Scott, *Law After Modernity* (OUP 2013).

¹⁰ See chapter II.

challenging EU secondary legislation. And while fundamental rights protection ought not to be conflated with Article 4(2) TEU, the nexus between constitutional rights and constitutional identity is self-evident.¹¹

The margin of appreciation principle also provides an avenue for the CJEU to take account of Member State pluralism regarding fundamental rights protection. In terms of restrictions on EU trade law, it has been shown that the CJEU proceeds on the basis that the adoption of national rules to safeguard fundamental rights need not correspond to a conception shared by all of the Member States as regards the level of protection required and the motive for doing so; as that conception may vary from State to State due to divergences in national values, Member States are granted a margin of manoeuvre within the limits imposed by the Treaty.¹²

The margin of appreciation principle was not incorporated into Article 52 of the EU Charter (enshrining a general rule on limitations of rights), presumably because in EU law the principle operates to allow Member States to restrict free movement on the basis of protecting fundamental rights, rather than as a tool for gauging limitations of rights. Despite not being codified in law, the principle plays a pivotal role in defining relations between the CJEU and the Member States, in that it enables the former to balance State interests and rights on the one hand with EU objectives (free movement, fundamental rights etc) on the other. The principle can therefore facilitate the development of a symbiotic conception of fundamental rights which is informed by national diversity and secured within the EU's legal framework.

The final prescriptive remark pertains to the application of the EU Charter. It is undeniable that the Charter enhances transparency in that it codifies the CJEU's

¹¹ Case C-213/07 *Michaniki AE v Ethniko Simvoulío Radiotileorasis* [2008] ECR I-9999, Opinion of AG Maduro, [32].

¹² Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609 [30]; Case C-244/06 *Dynamic Medien Vertriebs GmbH v Avides Media AG* [2008] ECR I-505 [43]; Case C-208/09 *Sayn-Wittgenstein v Landeshauptmann von Wien* [2011] 2 CMLR 28 [87].

jurisprudence, provides detailed rules on the scope and interpretation of rights, and enshrines an extensive catalogue of rights. Moreover, the integration of the Charter by the EU institutions in the legislative process not only makes fundamental rights more visible but also shifts the institutional focus; preventative action by the EU institutions reduces the need for remedial action by the CJEU. Armed with a codified Bill of Rights, the CJEU also seems less pusillanimous in its post-Lisbon jurisprudence regarding its review of Union legislation for rights-based compliance.¹³

Yet, as is often the case, the quest for progress is accompanied by unintended consequences. First, the sheer breadth of the Charter alone (50 substantive Articles) has the potential to transform any given dispute that falls within the scope of EU law into a fundamental rights dispute. Second, the emerging post-Lisbon picture reveals that the CJEU is a tad zealous with its reliance on the Charter insofar as it is not drawing on other sources or the case law of other human rights courts and is instead developing an autonomous and detached *oeuvre* of law.¹⁴ As regards the former, the CJEU will have to stamp its authority and filter out frivolous claims on a case-by-case basis. In relation to the latter, the solution is clear: the CJEU must ensure its jurisprudence is informed by ‘a wide range of legal texts and the case law of other courts’, as advocated by the Fundamental Rights Agency of the EU in 2012.¹⁵ Solipsism by the CJEU may lead to soliloquy unless it is able to heed this prophetic warning.

¹³ See chapter III.

¹⁴ Gráinne de Búrca, ‘After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?’ (2013) 20 MJ 168, 174.

¹⁵ European Union Agency for Fundamental Rights, ‘Bringing the Charter to Life: Opportunities and Challenges of Putting the Charter of Fundamental Rights into Practice’ (Copenhagen Seminar Report Danish Presidency of the Council of the EU and EU Agency for Fundamental Rights, Copenhagen, 15-16 March 2012) <<http://fra.europa.eu/en/publication/2012/bringing-charter-life-opportunities-and-challenges-putting-eu-charter-fundamental>> accessed 17 July 2015.

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