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Europe's Foundation and its Future

The EU Charter in Focus

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focus
FUNDAMENTALS OF EU CHARTER USE IN SOCIETY

FOCUS is a project which aims to raise public awareness of the EU Charter of Fundamental Rights, its value, and the capacity of key stakeholders for its broader application.

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ON MATTERS CONSTITUTIONAL

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Content

Jakob Gašperin Wischhoff

The EU Charter's Odyssey

A Canvas for a Shared European Identity

Since its inception, the Union has grown into a tremendously powerful political actor through ever-increasing legal harmonization. This development has significantly marginalized the role of national apex courts – the lighthouses of democracy – without adequately substituting the highest level of fundamental rights protection by the Union itself. Moreover, the globally observed trajectory of authoritarian forces from within and outside the Union is shaking its roots and questioning the vision of a lasting European polity. To fend off all these challenges, the Union should be centred around the hard-won humanistic freedoms and common values defined in the Charter, which ought to serve as a basis for common identification and a canvas to project shared visions of a political entity.

While the Charter has undergone a remarkable journey, evolving from soft general principles into a transformative force in EU law, European citizens have not embraced it as their own just yet. Even the Court of Justice of the European Union (CJEU) seems more concerned with operationalising Article 2 of the Treaty on EU, which it calls the identity of the EU,[1] than with directly acknowledging these values from the Charter.[2] To increase solidarity and individual freedoms in the Union, counter authoritarian forces, and withstand the currently unstable global dynamics – where the EU plays a pivotal role – both European citizens and the courts must internalize and fully operationalize the Charter, taking it as their own source and vision for the future. This edited volume is the first of several that aims to help make this a reality. Featuring legal scholars and practitioners examining the most pressing questions surrounding the Charter, we will demonstrate both its already proven transformative power and the areas where its potential has yet to be fully realized.

From coal and steel to individual human dignity

While the concept of a European catalogue of fundamental rights is nearly as old as the Union itself, in 1953, France firmly rejected the Community's commitment to the European Convention on Human Rights (ECHR). Rather than a political project, the Union was seen as merely an economic enterprise, where fundamental rights have no role to play. It took many years, along with significant domestic jurisprudential challenges – exemplified by cases like *Solange I*[3] and *Frontini*[4] – before the Member States finally signed the EU Charter in 2000. It took another nine years for it to become legally binding and to be placed on equal footing with the Treaties.

Then, in 2014, the CJEU issued its Opinion in *Adhésion de l'Union à la CEDH* (C-2/13), effectively nullifying the anticipated and legally mandated accession of the EU to the ECHR. Driven by concerns over losing full autonomy as the ultimate authority on EU law, it indefinitely postponed the prospect of enhanced individual human rights protection under EU law.

Ten years on, the Draft revised Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms[5] is still grinding in a mill, leaving uncertainty about whether this second attempt will succeed with the CJEU. However, this loose relationship appears to benefit the CJEU. On the one hand, it can always rely on its extensive case law for guidance and support, while on the other, it retains the freedom to determine how to effectively balance the rights in question as outlined by the Charter. This approach is emblematic of the CJEU's reluctance to share any power in shaping EU law. This attitude, however, may be detrimental to the protection of European citizens. As several constitutional pluralists have shown, constructive mutual checks and balances – rather than a complete lack of

oversight – contribute to better and more robust protection of fundamental rights.[6]

Given the CJEU's flexibility, national courts have responded in their own ways. For example, in recent *Right to be Forgotten I*[7] and *II*[8] rulings, the German Federal Constitutional Court decided to directly apply the Charter in its own individual constitutional complaint proceedings in those areas which are fully harmonized by EU law. While this case law and its implications will be thoroughly examined in further symposia and edited volumes, this innovative move underscores that the Charter's odyssey is far from over.

A mechanism for unity in diversity

From a commercial cooperation, common coal and steel production, and a single market to avoid financial burdens of trade, Article 1 of the EU Charter nowadays guarantees the inviolability of human dignity. The Union "is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities".

The Union can only fend off accusations of being a captive of Brussels bureaucrats, a distant behemoth, or an undemocratic and opaque entity if the commitments outlined in the Charter are taken seriously. The Union's power is far too pronounced if it fails to embody the characteristics of a liberal democracy, in conjunction with national democracies. And while legal experts nowadays are well-aware of the foundational role the Charter plays within the EU, it has failed to become a document that European citizens have embraced as their own.

In the last decade, Article 2 TEU has played a significant role in recognizing the importance of the rule of law as the central tenet of the Union and its Member States. Curiously, the Charter often seems to take a back seat when discussing issues such as judicial independence, media freedom, the prohibition of discrimination, and solidarity among peoples, to name just a few. While I commend the CJEU for its insightful and necessary interpretation of judicial applicability of Article 2 TEU,[9] the Charter could have assumed a more meaningful role in these discussions. It appears that the Charter is still only at the nascent stage of its substantial transformative potential to help consolidate and reconcile differences in standards of protection of fundamental rights among Member States.

The edited volume assesses the current state of European fundamental rights in light of the ongoing stalemate with the accession to ECHR due to the strong reservations expressed by the CJEU. It examines whether the CJEU has sufficiently altered its approach to the protection of fundamental rights. Finally, in light of the consistent decline in the rule of law standards in several Member States, and the possibility that the EU may need to safeguard these standards itself, this book questions whether and how the Charter can play a more prominent and proactive role, both alongside and beyond Article 2 TEU.

The book

Numerous contributions address urgent topical questions related to the protection of fundamental rights within the EU and the role of the EU Charter of Fundamental Rights. This edited volume aims to stimulate discussion and make expert knowledge accessible regarding the Charter's strengths, weaknesses, impact on case law,

and its broader role in the protection of fundamental rights in Europe.

Whither, the EU Charter of Fundamental Rights, asks **Sionaidh Douglas-Scott**. The Charter is no longer a "sleeping beauty", nor are fundamental rights merely epiphenomena in EU law. As Douglas-Scott explains, "the EU Charter contains the essence of a common language, a currency that all can understand, even if it is interpreted inconsistently and unsystematically. It still provides a means of importing morality and ethics into law, of holding power accountable, the basis for substantive justice – and the EU is better with it than without it".

Tobias Lock explores why today the EU Charter matters more than ever. In his view, the inconspicuous right to an effective remedy under Article 47 of the Charter currently presents one of the Charter's most transformative aspects. Through this remedy, the CJEU has managed to expand domestic law by introducing new remedies, thereby placing considerable pressure on national procedural autonomy. As he explains, the latest decision in *KL v X* (C-715/20) particularly "suggests that the full potential of Article 47 is yet to be deployed". Hence, it "remains at the frontline of the development of the Charter".

To reconcile the apparent contradictions between diversity and an ever-closer harmonization, Pietro Faraguna, Francesco Saitto, and Marjan Kos each undertake a journey to explore solutions to this enduring issue. In his piece, "Pouring New Wine into Old Wineskins", **Pietro Faraguna** suggests that new mechanisms are necessary to address these contradictions, advocating for collaboration between judges from national and European courts. Similarly, **Francesco Saitto** contends that reconciling national and European constitutional legalities requires acknowledging the marginalization of national constitutional courts. He asserts that "the old bal-

ances established in Italy and Germany in the 1980s are no longer adequate", and calls for the integration of the unique roles of national constitutional courts within their respective adjudicative systems. Finally, **Marjan Kos** illustrates that, in the context of deeper integration, the EU may come to recognize that the effectiveness of the market is only one of the principles underpinning the nature of the Union. He proposes an alternative interpretation of Article 53 of the Charter, which could help mitigate constitutional confrontations.

Eleanor Spaventa analyzes how the relationship between the autonomy of EU law and mutual trust, as articulated in Opinion 2/13, has been interpreted as excluding the possibility of meaningfully protecting fundamental rights, thereby effectively closing the doors to the ECHR. She proposes a new reading of autonomy that illustrates the Court's understanding of mutual trust not as a rigid concept indifferent to fundamental rights protection, but rather as a tool to achieve EU objectives. Spaventa offers a nuanced interpretation that would enable the Court to operationalize and enforce the common values outlined in Article 2 TEU while simultaneously upholding its commitment to fundamental rights. In this way, the decade-long stalemate regarding accession to the ECHR may finally be resolved.

Moreover, in a significant recent ruling in *Real Madrid vs. Le Monde* (C-633/22), the CJEU notably shifted its previous approach by prioritizing fundamental rights protection over the traditional objective of seamless judicial cooperation across the EU. In a compelling piece, **Emilia Sandri** explains how the Court has moved away from the principle of mutual trust, allowing national courts to introduce a public policy exception in the process of recognizing and enforcing foreign judgments. Sandri notes that, in the Court's view, manifest breaches of fundamental rights may constitute an

exception. This development significantly alters the landscape by placing fundamental rights protection ahead of the traditional goals of judicial cooperation within the EU.

This shift could importantly facilitate the EU's accession to the ECHR, a possibility that is also relevant to new developments in the area of AI. **Giovanni Zaccaroni** discusses how the groundbreaking Framework Convention on Artificial Intelligence and Human Rights, Democracy, and the Rule of Law – the first of its kind – tailors its content in a way that enables the EU to join the respective Framework Convention. Such an accession would mark the Union's first entry into one of the conventions of the Council of Europe, paving the way for further enhanced cooperation. Accordingly, Zaccaroni highlights the potential of AI cooperation to bridge the ECHR and the EU Charter, fostering a more collaborative and complementary approach to fundamental rights protection in Europe.

Finally, **Ilaria Gambardella**, **Tatiana Ghysels**, **Marleen Kappé**, **Sophie-Charlotte Lemmer**, **Yann Lorans**, **Alexandros Lympikis** and **Alicja Słowik** advocate for a new development regarding the Charter. To ensure that the EU is fully compliant with the Charter, they propose implementing an *ex ante* review of EU legislation. This measure would significantly enhance the protection of individuals and bolster the credibility of the EU as a key player in the realm of fundamental rights protection.

Conclusion

This vibrant array of contributions reflects the significant journey the Charter has undertaken since its inception, as well as the numerous challenges that confront the realization of fundamental rights within the Union. As a supranational political entity

grounded in common values rather than any other qualifiers, the EU must seize on the Charter's capacity to serve as both the common language and unifying factor in a Union characterized by diversity.

For this to happen, European citizens and the courts must become familiar with the Charter and embrace it as their own. The Charter is the foundational element that truly makes the Union a community of individuals, where the inviolable human dignity of each person is respected and protected. And this is the aim of the project *FOCUS* – to raise public awareness of the EU Charter of Fundamental Rights, its significance, and the capacity of key stakeholders for its broader application.

References

1. Jakob Gašperin Wischhoff, 'A Plaidoyer Against the Sisyphean Endeavour to Imagine the Constitutional Identity of the EU' in Jurgen de Poorter, Gerhard van der Schyff, Maarten Stremler, Maartje De Visser, Ingrid Leijten, and Charlotte van Oirsouw (eds.), *European Yearbook of Constitutional Law 2022: A Constitutional Identity for the EU?*, (Springer, 2023).
2. Luke Dimitrios Spieker, *EU Values Before the Court of Justice: Foundations, Potential, Risks* (Oxford University Press, 2023).
3. Bundesverfassungsgericht, *Solange I* (2 BvL 52/71), Decision of 29 May 1974.
4. Corte Constituzionale (Italy), *Frontini* (No. 183/1973), Decision of 27 December 1973.
5. Steering Committee for Human Rights, 'Interim Report to the Committee of Ministers on the Negotiations on the Accession of the European Union to the European Convention on Human Rights, including the Revised Draft Accession Instruments in Appendix', 4 April 2023. https://rm.coe.int/steering-committee-for-human-rights-cddh-interim-report-to-the-committ/1680aace4e.
6. Matej Avbelj and Jan Komárek (eds.), *Constitutional Pluralism in the European Union and Beyond* (Bloomsbury Publishing, 2012).
7. Bundesverfassungsgericht, *Recht auf Vergessen I* (1 BvR 16/13), Decision of 6 November 2019.
8. Bundesverfassungsgericht, *Recht auf Vergessen II* (1 BvR 276/17), Decision of 6 November 2019.
9. Luke Dimitrios Spieker, 'Doctrine: The Judicial Applicability of Article 2 TEU' in Luke Dimitrios Spieker (ed.), *EU Values Before the Court of Justice: Foundations, Potential, Risks*, (Oxford University Press, 2023).

Sionaidh Douglas-Scott

Whither, the EU Charter of Fundamental Rights

So, has the Charter come of age, now that it is nearing its quarter century, and has been binding in force for nearly 15 of those years. According to CJEU President, Koen Lenaerts, as long ago as 2018, Charter rights were playing an appreciable role in at least 10% of cases to come to the Court.[1] Further, in at least some of those cases, the Court is actually annulling EU measures for violating fundamental rights – something it conspicuously declined to do in its earlier days. No longer is the Charter a "sleeping beauty", and no longer are fundamental rights mere epiphenomena in EU law – offshoots framed in the amorphous category of "general principles of law" – creations of the EU's earlier desire for legitimacy in its quest for greater integration.

The fact that over the past few years the CJEU has decided a string of cases on the right to wear the Islamic headscarf at work (*Bougnaoui* (C-188/15), *Achbita* (C-157/15), *WABE and Müller* (C-804/18, C-341/19), *OP v Commune D'Ans* (C-148/22)) illustrates its coming of age as a Court seized with human rights (even if those decisions seem to have satisfied almost no-one). Add to this the fact that the Charter contains a comprehensive catalogue of rights, refreshing in its efforts to maintain the indivisibility of civil and political rights on the one hand, and socio economic on the other. Factor in also the fact that applying the Charter offers the possibility of an effective remedy in national courts, which have the power to invalidate national law in conflict with Charter rights – and you have a recipe for a success story. No wonder the UK declined to include the Charter in the category of "retained EU law" in the 2018 EU Withdrawal Act – for was it not becoming a dangerously powerful instrument?

But of course, there is always another view. It would be easy enough to rain on the Charter's parade. One might start with its limited scope – according to Art 51 (1) Charter it is addressed "to

the Member States only when they are implementing Union law." It is not federal in nature, and, unlike the US Constitution's Bill of Rights, does not apply to EU States' actions within their sole sphere of competence. This fact has of course given rise to some highly complex case law determining when the Charter applies, starting with *Åkerberg Fransson* (C-617/10) (after which the Court almost immediately shifted direction), whereby the scope of EU law has become the main determining factor as to whether any human rights violation may be pleaded. This jurisdictional limit is complex in the extreme (whole treatises have been written on it) transforming legal argument into a debate about the arcane limits of the EU's competences rather than a focus on human rights. So much so, that a great deal of legal advice, and much time, of EU rights lawyers must be spent on determining when Art 51 (1) applies. When will a national measure be caught? And will the Charter be invocable against a private party? How much time will it take to determine this?

Here's a thought: what if the Charter were to apply throughout the EU, regardless of whether EU law applied? This would simplify a complex jurisdictional matter but require (unanimous) amendment of the Charter itself. If the CJEU were to attempt, by some sort of interpretative fiat (perhaps following the 1925 example of the US Supreme Court in *Gitlow v New York*) to broaden the Charter's scope to all Member States' actions, this would likely provoke outrage from national courts and authorities. So, this doesn't seem feasible.

A further issue relates to limitations on the Charter. Art 52 (1) Charter states that these must be "provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised

by the Union or the need to protect the rights and freedoms of others". Art 52 (3) states that where Charter rights correspond to ECHR rights "the meaning and scope of those rights shall be the same as those laid down by the said Convention". Apart from the task of figuring out which rights in the Charter correspond to ECHR rights, there is the problem that limitations to ECHR rights are not worded identically to Art 52 (1). CJEU decisions reveal a lack of methodology in applying exceptions and justifications. For example, when the CJEU applies the Charter and its limitations in the field of discrimination law, it is sometimes unclear which tests it is adopting to determine if conduct interfering with the right to equal treatment is justified. In the 2011 *Tests Achats* case (C-236/09), the Court made no reference to Art 52 (1) in determining the invalidity of the measure under Art 21 Charter. And how do these criteria interact with possible objective justifications for indirect discrimination where e.g. the Race (2000/43/EC) and Framework Employment Directives (2000/78/EC) are at issue?

More generally, the CJEU often focuses on whether the interference with a Charter right has been in pursuance of a legitimate interest, and if so, whether that interference was proportionate. But what is a legitimate interest? And what standard of proportionality should be applied? In *Weiss* (2 BvR 859/15, 5 May 2020, not a fundamental rights case, but one on ECB bond purchases) the German Constitutional Court refused to follow the ECJ's judgment in *Weiss* (C-493/17), on the grounds that CJEU failed to apply the German interpretation of proportionality and had not fully "balanced" economic arguments. The assessment of the proportionality is only as good as the reasoning and motives of those engaging in it, and, as we can see, reasoning can differ. In this way, Charter rights claims can be exhausted by the weighty, technical, often casuistic operation of the law.

And this is before we even get on to claims of substance. Has the Charter been a success story in terms of outcomes? How many litigants have (after sometimes years of litigation) benefited from its rights protection? How many are even aware of its existence? A 2019 Eurobarometer survey, on the 10th anniversary of its becoming legally binding, revealed that the majority (57%) of those surveyed were unaware of it.[2] Although the Charter is now far more frequently litigated in the CJEU, there is an unevenness in the Court's application and resolution of Charter rights – some are far more frequently and effectively deployed than others. Art 47, the right to an effective remedy and a fair trial, is more frequently and robustly enforced than say, Charter rights on Solidarity in Title III (which also proved of little effect during the Eurocrisis). The right to the confidentiality of business information has been just as energetically furthered by the CJEU as have rights to asylum or immigration. Further, in cases such as *Viking* (C-438/05) and *Laval* (C-341/05), the CJEU has placed the right to free movement (of business rights) above any collective rights of bargaining or industrial action. Is there still a residual favouring of economic rights over other types of rights by the Court? Although non-discrimination rights have the longest history in EU law, dating back to early litigation on Art 119 EEC in *Defrenne* (Case 43-75), the Race and Framework Directives have often proved disappointing in their enforcement – or lack of it – for many litigants, and Art 21 Charter has too often been ignored as a supplement, as in *Jyske Finans* (C-668/15), *Bougnaoui* (C-188/15) or *Achbita* (C-157/15). There is also of course the problem with Charter "principles"[3]. What are they? Are they mainly confined to the social field? Which Charter rights are also, or only, principles? How much time and reasoning (of judges, Advocates-General, lawyers, jurists) will be spent to work this one out?

And there is also the issue that the CJEU has shown itself to have a very strong concern with the autonomy of EU law. Notably, the Explanations (2007/C 303/02) to Art 52 Charter (requiring limitations to Charter rights to be read in the light of the ECHR) also note this should occur "without thereby adversely affecting the autonomy of Union law and of that of the Court of Justice of the European Union." The Court's Opinion 2/13 on the possibility of EU accession to the ECHR was replete with pronouncements on the autonomy and special position of EU law, and most particularly concern for the Court's own prerogatives as ultimate determinant of the EU legal order. How can this concern with EU autonomy work itself out in an EU of 27 States, in the field of fundamental rights, where there may be 28 (i.e. including that of EU officials themselves) conceptions of what rights are, and how they should operate?

Within any field of law, human rights rarely, if ever, function as straightforward rules. More often, like Dworkin's definition of legal principles,[4] they have a "dimension of weight" – i.e. freedom of expression may sometimes be outweighed by pressing societal interests such as national security. Rights may be phrased very simply in terms of brevity and concision (e.g. "Congress shall pass no law abridging the freedom of speech") yet be epistemologically complex in relying on general, transcendent ideas – as to, for example, what it is that constitutes "speech". So it is with human rights in the EU. Their complexity depends on their culture, which determines how these provisions are understood, but also therefore introduces contestation into the concept of human rights, rendering them less than straightforward to apply.

What happens when the autonomy of EU law runs into the culture and contestation of national human rights (especially when the majority of cases in which the Charter figures have come by

way of a preliminary reference from national courts)? Will the CJEU eventually elaborate a complex "margin of appreciation" doctrine (following, or distinguishing itself, from the ECtHR) or evolution of the "rule of reason" it applied in the *Cassis de Dijon* (Case 120/78) case? If not, will there be more cases like *Weiss*, or *Ajos*[5] – in which the Danish Supreme Court refused to follow the CJEU on age discrimination?

But if this is to happen – i.e. if the CJEU is to conceive a margin of appreciation for EU Charter cases, where would legitimacy for the elaboration of such a doctrine come from, given there exists no apparent source in the Charter, and its development in the ECHR is in any case viewed with suspicion. Furthermore, (still, 70 years on) somewhat terse style of CJEU judgments, originally modelled on those of the French Conseil d'Etat, is not particularly productive of substantive discussion of human rights case law. Especially given the requirement that judgments must be unanimous, which – for better or worse – appears to stifle creativity. CJEU judgements, even when dealing with intimate human interests, can be terse and gnomic.

So, the prognosis for the Charter may be ambiguous. However, to conclude – in 1977, the English Marxist historian, EP Thompson, surprised (and was ostracized by) many by describing the rule of law as "an unqualified human good".[6] He did so, he wrote, because, even if the rule of law operated as an ideology, it also operated to require those governing to acknowledge constraints on how they governed, to acknowledge "effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims". Might we say the same of the EU Charter? The EU Charter contains the essence of a common language, a currency that all can understand, even if it is interpreted inconsistently and unsystematically. It still provides a means of importing morality and ethics into law, of

holding power accountable, the basis for substantive justice – and the EU is better with it than without it.

References

1. Koen Lenaerts, 'The ECHR and the CJEU: Creating Synergies in the Field of Fundamental Rights Protection. Dialogue between Judges 2018 ' (26 January 2018), https://prd-echr.coe.int/documents/d/echr/speech_20180126_lenaerts_eng.
2. European Commission and Kantar (eds.), 'Awareness of the Charter of Fundamental Rights of the European Union: Report' (1 June 2019), https://data.europa.eu/doi/10.2838/753949.
3. Tobias Lock, 'Rights and Principles in the EU Charter of Fundamental Rights' (2019) 56:5 *Common Market Law Review*.
4. Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 2001).
5. Mikael Rask Madsen, Henrik Palmer Olsen, and Urška Šadl, 'Legal Disintegration? The Ruling of the Danish Supreme Court in *AJOS*' (2017) *Verfassungsblog*.
6. Edward P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (Breviary Stuff, 1977).

Tobias Lock

Why the EU Charter Matters

The Right to an Effective Remedy under Article 47

This chapter argues that the most interesting aspect of the Charter of Fundamental Rights at the moment is its impact on remedies in national law. Almost 15 years since its entry into force, it is not unusual to meet domestic lawyers and judges who will voice doubts as to whether the Charter really matters in practice. Yet, through the right to an effective remedy under Article 47, the Charter opens up domestic law for new (or modified) remedies, thus placing national procedural autonomy under strain.

The relevance of the Charter

Many might argue that most (if not all) Member State legal orders protect fundamental rights at a constitutional level and have also incorporated various international human rights treaties into their legal systems. Hence, given that the Charter appears to be a mere amalgam of existing domestic and international fundamental rights protections, where is its added value?

This impression would be wrong, however. Not only because the Charter contains a number of substantive rights not found in every domestic legal order (e.g. the right to the protection of personal data or the social and economic rights – so far as they are not mere principles – found in Title IV), but crucially because of the remedies associated with the Charter. Most notably the right to an effective remedy found in Article 47 (1) CFR. This provision – as it applies in domestic law – is the focus of this chapter.

Let us briefly recall the basics: According to Article 51 (1) of the Charter of Fundamental Rights (CFR), the Charter applies to the EU Member States only when they are implementing Union law. We have known since *Åkerberg Fransson* (C-617/10) that this means that the Member States are bound to comply with the Charter whenever they are acting within the scope of EU law. In the words

of the EU's Court of Justice (CJEU): "The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter". In other words, whenever a Member State is either applying EU law or deviating from an EU law obligation, that measure must be Charter-compliant.

The path well-trodden: substantive Charter rights

When it comes to the Charter and remedies, it is worth distinguishing between two broad groups of cases. The first concerns Member State conduct within the scope of the Charter that violates one of the substantive rights of the Charter. E.g., a Member State must not remove an asylum seeker to another Member State, where the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment in violation of Article 4 CFR in that other Member State (see e.g. the case of *N.S. and M.E.*, C-411/10 and C-493/10). In such a case, the Charter comes with the bells and whistles of EU law: it has direct effect and it has primacy over any conflicting national law (including the constitution), meaning that the latter must not be applied and that the Charter must be applied instead. This is a clear advantage of the Charter in remedial terms. Depending on the precise status in national law of domestically sourced fundamental rights (including international treaties given domestic effect in the Member State concerned), and the limits of judicial review, this advantage can be relevant in practice (or not).

What follows is basic EU law and is being recalled only for sake of completeness. In a Member State that does not permit its courts to judicially review parliamentary legislation, the primacy of EU law means that they must nonetheless disapply parliamentary legislation if it conflicts with the Charter (ever since *Costa v ENEL*, Case 6/64). In Member States which limit such judicial review of le-

gislation to the constitutional court (e.g. Italy or Germany), the primacy of the Charter means that all national courts may (and must) disapply such legislation in case of a conflict with the Charter (without being required to first ask the constitutional court as to that legislation's constitutionality – *Simmenthal*, Case 106/77). And where the offending provision is contained in the constitution itself, the Charter still prevails (*Internationale Handelsgesellschaft*, Case 11/70).

The one to watch: the right to an effective remedy under the Charter

The focus of this chapter is on the second group of cases, which concerns the right to an effective remedy enshrined in Article 47 (1) CFR. Like all Charter rights, Article 47 CFR applies to the Member States when they are implementing Union law. What makes Article 47 CFR so interesting is that it applies in all cases in which a Member State applies EU law. In that sense it differs from the substantive fundamental rights contained in the Charter, which typically require a more classical fundamental rights angle to the case, e.g.: an EU measure requiring the stunning of certain animals prior to slaughter may interfere with the freedom of religion (Article 10 CFR) of Jews and Muslims (*Centraal Israëlitisch Consistorie van België and Others*, C-336/19); or a Member State measure removing an EU citizen from the state may interfere with their right to family life (Article 7 CFR); and so on.

By contrast, the right to an effective remedy applies regardless of whether there is a violation of a substantive fundamental right. In other words, Article 47 CFR applies in all domestic proceedings that deal with EU law, so that one could modify the CJEU's above-

quoted quip and say that the applicability of EU law entails the applicability of Article 47 (1) CFR. Article 47 (1) is potentially far-reaching in that it may require national courts to make available otherwise unavailable remedies. It therefore has the potential of restricting national procedural autonomy to a much greater extent than other Charter rights.

This is an important development ascribable to the entry into force of the Charter. The right to an effective remedy found in Article 47 (1) CFR partially overlaps with but should be differentiated from the principle of effectiveness, which hitherto formed an important limit to national procedural autonomy in EU administrative law (going back to *Rewe*, Case 33/76). According to that case law, in the absence of harmonization, "it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of [EU] law" (*Rewe*). National procedural autonomy is subject to two limits: the principle of equivalence and the principle of effectiveness, both rooted in the duty of loyal cooperation under Article 4 (3) TFEU.

Given their different roots, the right to an effective remedy should not be equated with the principle of effectiveness (on this see e.g. Widdershoven[1]), but seen as a separate limit on national procedural autonomy. This is particularly apparent when it comes to remedies. Where the principle of effectiveness and remedies are concerned, the CJEU traditionally tended to tread with caution.

While there were instances in which the principle of effectiveness was successfully invoked to challenge the non-existence (or non-availability) of a remedy, it was generally considered exceptional: the most famous example was probably *Factortame II* (C-213/89) where the CJEU held that the principle of effectiveness

meant that a national court had to order a remedy that ordinarily existed in domestic law (interim relief) and disapply a national rule which excluded the availability of that remedy in certain cases (here: against the Crown (the state).

Contrast this with another famous case: in *von Colson and Kamann* (Case 14/83), the Court held that an existing remedy in domestic law was not sufficiently effective for the Member State to be in compliance with its obligations under an EU Directive for it lacked deterrent effect. However, having said this, the Court left it to the Member State's legislature to determine the appropriate remedy. In other words, this finding did not affect the immediate outcome of the case.[2]

The case law on Article 47 (1) CFR and remedies suggests that the right to an effective remedy has given the CJEU an additional tool to strengthen the enforcement of EU law in the domestic courts. On the basis of Article 47 (1) CFR, the CJEU has shown a greater willingness than previously to interfere with national procedural rules that obstruct the effective enforcement of EU law. The following four short examples illustrate this.

Four examples of how the right to an effective remedy operates

In *Braathens Regional Aviation* (C-30/19), the question arose whether the Swedish transposition of the Race Equality Directive (Directive 2000/43/EC) complied with Article 47 (1) CFR. In that case an airline passenger had been the victim of race discrimination. The airline agreed to pay compensation to the passenger, however, without recognising that discrimination had occurred. According to Swedish law, all the national court could do in such a case was to award the compensation. It was unable to formally record that the passenger had been subjected to discrimination. The

CJEU held that this limitation was incompatible with the Directive read in light of the right to an effective remedy (even though the Directive did not expressly require such recognition to be made). As a consequence, the national court was asked to disapply the national rule of civil procedure, which allows the court to deliver a judgment based on the acquiescence alone without an express recognition of discrimination.

While the CJEU was at pains to reiterate that "EU law does not as a general rule require Member States to create before their national courts remedies to ensure the protection of rights that parties derive from EU law other than those established by national law", it nonetheless appears to have gone out of its way to ensure that the remedy of a formal recognition of discrimination would be available to the claimant. To achieve this the Court seems to have adopted an understanding of the relevant Swedish civil procedural rules to generally require a recognition that discrimination had occurred – without specifying this any further, presumably on the understanding that ordinarily compensation is awarded after discrimination has been established by the national court following a trial – and that the agreement to pay compensation (which then did not involve a further formal recognition of discrimination) was the exception. This allowed it to order that particular rule of Swedish procedural law should be disapplied.

The CJEU thus technically followed in the footsteps of *Factortame* but was ostensibly generous in its interpretation of how domestic law in Sweden operates in order to justify its request for a declaration whilst staying on the firm ground of EU law primacy. The CJEU's ruling also marked a relatively far-reaching incursion into Swedish civil procedure, which is governed by the principle of party autonomy – at least this is what the judges of the

Swedish Supreme Court remarked after having received the case back from the CJEU (as pointed out by Wallermann Ghavanini[3]).[4]

In a similar way, the Court held in the case of *Fuß* (C-243/09) that Article 47 (1) CFR prevented an interpretation of the Working Time Directive (Directive 2003/88/EC) that would allow an employer to transfer an employee to a new job in response to that employee's request for the employer to comply with the requirements of the Working Time Directive. Domestic law did not contain a remedy against such reprisal measures. Even though the worker in question did not suffer a quantifiable detriment – he was still employed and paid his salary – this was incompatible with Article 47 (1) CFR since "[f]ear of such a reprisal measure, where no legal remedy is available against it, might deter workers who considered themselves the victims of a measure taken by their employer from pursuing their claims by judicial process, and would consequently be liable seriously to jeopardise implementation of the aim pursued by the directive". The resolution in technical terms again followed the doctrine of primacy in that the CJEU ordered the national court to disapply national rules which enabled the transfer of the worker on the ground that the worker has requested compliance with the Working Time Directive.

In *Egenberger* (C-414/16), the Court held severe restrictions to judicially review the "religious ethos exception" contained in Article 4 (2) of Directive 2000/78 to be contrary to Articles 21 and 47 (1) CFR. German law decreed that the question whether a church or other religious organisation could refuse to employ a person on the basis that that "person's religion or belief constitute a genuine, legitimate and justified occupational requirement" could only be reviewed as to whether it was plausible on the basis of the church's self-perception. Again, the national court was asked to disapply

that limiting national provision in order to give effect to Articles 21 and 47 (1) CFR.

In the recent case of *KL v X* (C-715/20), the CJEU went one step further. The case concerned the (under Polish law entirely lawful) termination of a fixed term employment contract. According to Polish law the employer was under no obligation to give reasons for the termination, whereas such an obligation existed where an employer terminates a contract of indefinite duration. The Court considered this to be contrary to Clause 4 of the Framework Agreement on fixed term work, which is given effect in EU law by Directive 1999/70. The problem, however, was that the employment dispute at issue was with a private employer, so that – according to long-standing case law of the CJEU – the Directive could not be accorded direct effect (most recently confirmed in *Thelen Technopark*, C-715/20). This differentiates the case from *Fuß*, where the Court was able to invoke the Working Time Directive interpreted in light of Article 47 (1) CFR directly.

The Court found a way out of this using the famous *Mangold*-line of case law (C-144/04) (to which *Egenberger* also belongs). In that line of cases the Court managed to circumvent the limitations of the no horizontal direct effect doctrine by applying an identical provision of primary law instead. E.g., in *Mangold*, the right to non-discrimination on the basis of age in Directive 2000/78 was also found to exist as a general principle of EU law (now Article 21 CFR), allowing the Court to apply the general principle instead of the Directive. In *KL v X*, the Court went a step further than in *Mangold* or *Egenberger* in that it relied solely on Article 47 CFR (and not on one of the substantive rights in the CFR) to achieve the goal of asking the national court to disapply the offending national legislation.

In a nutshell, the reasoning was the following. When adopting its laws on fixed term contracts, Poland was implementing Union law, so the Charter applies "and must therefore ensure compliance, *inter alia*, with the right to an effective remedy enshrined in Article 47 of the Charter". By not forcing the employer to divulge the reasons for a dismissal, the national legislation at issue deprives the employee of important information, which the employee might need to assess "beforehand whether he or she should bring legal proceedings against the decision terminating his or her employment contract". Thus, the offending national legislation had to be disapplied. The consequences of this decision are potentially far-reaching. First, it confirms that Article 47 CFR applies in all cases in which EU law applies. Moreover, it might mean that Article 47 CFR could be invoked against any national procedural limitation to rights contained in a Directive, even in horizontal cases. Finally, it uncouples the *Mangold* construction from the need to find a substantive right in the Charter mirroring the right in the Directive. This in turn might help to blur the distinction between rights and principles in the Charter.

Concluding remarks: from effectiveness to an effective remedy

These decisions – which represent a small selection of Article 47 cases – suggest that national procedural autonomy is under greater constraint from Article 47 (1) CFR than it was from the principles of effectiveness and equivalence. While the CJEU makes a clear attempt at staying within traditional doctrinal boundaries, it at the same time appears to be stricter and thus more prescriptive than previously when it comes to deficiencies of national procedural law. The decision in *KL v X* in particular suggests that the full potential of Article 47 CFR is yet to be deployed. Article 47 (1) CFR

therefore remains at the frontline of the development of the Charter and is the Charter provision to watch.

This chapter is partly based on a forthcoming report on the "EU Charter of Fundamental Rights and the Windsor Framework" commissioned by the Northern Ireland Human Rights Commission co-authored with Eleni Frantziou and Anurag Deb. Thanks are due to Eleni Frantziou for her comments on an earlier draft. All errors or inaccuracies are, of course, my own.

References

1. Rob Widdershoven, 'National Procedural Autonomy and General EU Law Limits' (2019) 12:2 *Review of European Administrative Law (REALaw)*.
2. For further reading on this consult any good EU Administrative Law textbook, such as Paul Craig, *EU Administrative Law* (Oxford University Press, 2018).
3. Anna Wallerman Ghavanini, 'Remedies for Non-material Damages: Striking Out in a New Direction? *Braathens*' (2022) 59:1 *Common Market Law Review*.
4. Swedish Supreme Court, *Diskrimineringsombudsmannen v Braathens Regional Aviation AB* (Ö 2343-18), Judgment of 21 December 2021.

Pietro Faraguna

Pouring New Wine into Old Wineskins

Protection of Fundamental Rights Between National Constitutional Courts and the CJEU

The three seemingly trivial observations that follow inform three substantive proposals regarding the protection of fundamental rights within the EU. To effectively address the challenges faced by national constitutional courts and the Court of Justice, it is essential to leverage existing procedural tools within domestic legal systems. While focusing primarily on recent trends in Italian constitutional case law, these insights may resonate across various jurisdictions in the EU. The suggested approach will ensure the direct effect of EU law, uphold its primacy, and provide robust protection of fundamental rights across both domestic and European legal frameworks. Additionally, expanding the applicability of these versatile tools and considering a structural revision of the judicial bodies within the Union and its Member States may facilitate the creation of hybrid entities that could collaboratively address major issues, thereby steering constitutional developments in the EU.

The first truism - the driving role of the apex courts

The first trivial statement is as follows: constitutional courts have played a driving role in developing and strengthening constitutional democracy in the European Union. The most striking example of this role is the impetus that the case law of national constitutional courts has provided for the Union to have a Parliament directly elected by citizens and for the European legal system to have a Charter of Fundamental Rights (*Solange* and *Frontini*).

The second truism - EU democracy and its impact on national decision-making power

The second trivial statement is that these challenges, occasionally taken up with success by political bodies, have then generated new ones: on the front of democratic legitimacy, the electability of the European Parliament has understandably generated increasing pressure for that body to be given more incisive powers in the decision-making process. In turn, this has generated concern among the guardians of national democracy about the excessive erosion of the decision-making margins of national parliaments (Maastricht and Lissabon). On the front of fundamental rights protection, the provision of bill of rights in the European legal system has naturally generated increasing friction between judicial circuits. Which fundamental rights are to be protected? How much to protect one right at the expense of the other? And above all: who does what?

The third truism - the unfriendly change of tone vis-à-vis the Court of Justice

This inflationary process (Avbelj[1]) in the circuits of constitutional rights protection has now become a topos of constitutional literature. In the face of these new challenges – this is my third and final trivial statement – it is known that several constitutional courts have changed their approach in dealing with the Court of Justice of the European Union. For at least a decade now, there has been an increasingly aggressive use of the notion of constitutional identity, especially by apex courts in Central and Eastern Europe. Even

among the founding Member States, where the process of European integration traditionally enjoys broad political and public support (how uncritical that support is, is another matter), there has been a shift in constitutional jurisprudence, with an increasingly *europarechtsunfreundlich* approach. This change in approach emerges, in particular, in cases where there is competition between constitutional and European sources in the protection of the same constitutional rights.

Re-centralising the dialogue

For several years, there has been a tendency for constitutional courts to re-centralize the dialogue with the Court of Justice. The Italian Constitutional Court has made this shift in perspective explicit since 2017 (Tega[2]). Through an *obiter dictum*, the Court stated that in cases of "double preliminary ruling" (when a law is suspected of being in conflict with both the Constitution and the Charter of Fundamental Rights of the European Union), it was no longer necessary to go to Luxembourg first, and then to the national Constitutional Court (see on this development and its successive fine--tuning Scarcello[3]). This jurisprudence has since been confirmed and refined several times (especially excluding that the judge is obliged to go to Rome before Luxembourg, see orders no. 216[4] and 217[5] of 2021: the judge can but does not have to go to the Constitutional Court first), and it can now be said to be constant jurisprudence (see, lately, judgment n. 1 of 2025 and n. 181 of 2024).

In the face of this trend, the reaction of the Court of Justice has not always been crystal clear. The Court has reiterated its classic jurisprudence on primacy and direct effect. However, it has also allowed some openness to these signals coming from national constitutional courts. These openings have materialized both in some

retreats on the merits (one thinks of the CJEU *Taricco* case, (C-105/14), the Italian Constitutional Court referral[6] and CJEU *M.A.S. M.B.* (C-42/17) second-thoughts), and in method, allowing that in cases where a characteristic feature of a specific constitutional tradition of a Member State is at stake, it is up to the apex courts of that State to interpret the content of the national constitutional specificity (*RS*, (C-430/21), reiterated, very recently, in *Energotehnica,* (C-792/22)). It will then be up to the Court of Justice to draw the consequences in terms of the application of European Union law, while the fundamental principles that mark the traits of the constitutional identity of the European Union itself cannot give way to abusive and unconstitutional interpretations of national constitutional traditions.

Since 2009, in summary, it is inevitable that the juridification and judicialization of the Charter of Fundamental Rights of the European Union has led to a progressive increase in opportunities for confrontation, overlap, and friction with the jurisprudence of national constitutional courts. Different interpretations have been given of this trend. Some have considered it the unmasking of the legal and, before that, logical impossibility of constitutional pluralism (Kelemen and Pech[7]); others have considered that conflicts are physiological in the polemical spirit of European constitutional law (Martinico[8]). Often, it has been hoped, as a preventive remedy to possible conflictual degenerations, that a dialogical approach is necessary (Cartabia[9]).

Using national constitutional leverages for EU law

If we want to go beyond mere abstract speculation and the world of good intentions, it is necessary to identify tools to make this hope-for-dialogue more efficient from the perspective of

protecting fundamental rights and the founding principles of constitutionalism. A significant advancement necessary for ensuring the effective protection of fundamental rights within the EU is a more robust role for the Court of Justice in assessing the validity of EU secondary law.

Additionally, an important consideration is the integration of constitutional review mechanisms that evaluate the compatibility of national legislation with European Union law. Given that the majority of national constitutions include provisions mandating respect for EU law, European Union law can serve as a valid criterion for assessing the constitutional legitimacy of national laws in most Member States. Consequently, rulings by national constitutional courts could provide more effective guidance for judges and public administration in upholding compliance with European Union law.

The goat, the cabbage, and the wolf

However, it is certainly not possible to return to relations between domestic law and European Union law that date back to schemes of 50 years ago, when ensuring the primacy of European Union law required navigating the rulings of constitutional courts. To reconcile the goat, the cabbage, and the wolf, it is essential to seek unconventional solutions within the framework of existing law. To this end, the procedural tools that already exist in the Member States could be adapted to ensure both the principle of the primacy of law and direct effect.

In Italy, a promising procedural tool has been introduced as a civil remedy to address specific cases of discrimination. Concerning this remedy, the recent case may be instructive (see Judgment No. 15 of 2024[10]). The cases pertained the requirements for certifying

the non-ownership of other residential property (this was a prerequisite in order to access a first home owner or tenant grant). According to the challenged regulation, non-EU citizens had to submit documentation establishing that no member of the family unit owns any residential housing in their country of origin or in the country of previous residence following procedures that differ from those applicable to Italian and EU citizens.

In the specific case addressed through this anti-discriminatory civil action, the common judge initially chose to disapply the law and regulations that guided the administration in a manner incompatible with Union law. This approach ensured the direct effect of the European norm, granting the individual applicant what they were entitled to under EU law. However, the flexibility of this procedural tool allowed the judge to extend their influence beyond the individual case.

Under this unique anti-discriminatory action, the judge can instruct the public administration to develop a plan to eliminate the established discrimination. Given that this discrimination stemmed from the application of the law, the judge did not simply order the administration to disapply the law – which they could have done in strict legal terms – but instead referred the matter to the Constitutional Court, requesting to declare it unconstitutional. This request was promptly granted, effectively removing the source of discriminatory effects from domestic legislation and permanently resolving the conflict with Union law.

Thus, the versatility of the "two-speed" procedural tool, exemplified by the anti-discriminatory action above, enabled the protection of both the interests associated with direct effect and those linked to the primacy of Union law.

New challenges, new tools

The legal system does not always have such tools. Where they do not exist, it would be appropriate to introduce them. Just as it would be appropriate to introduce even more articulated tools to facilitate a formal judicial interaction between the Court of Justice and national constitutional courts whenever useful elements for decisions can be drawn from that confrontation. This could take the form of a "summons" issued by the CJEU to national constitutional courts, an *amicus curiae* system allowing these courts to file briefs to the CJEU, or even a more developed judicial framework featuring a hybrid judiciary composed of members from both the Court of Justice and national constitutional courts. Such a system would enable the referral of issues of particular significance for the development of the European constitutional order. These are structural innovations that have been discussed by the legal scholarship (e.g. Weiler and Haltern[11] and Lindseth[12]) for some time now, and they seem even more necessary today than when they were first proposed.

It is obvious to everyone that both the Court of Justice and national constitutional courts are facing entirely new challenges, partly generated by their own actions. Accordingly, new challenges sometimes require equipping our legal system with new tools.

References

1. Matej Avbelj, 'Human Rights Inflation in the European Union' in Lorenza Violini and Antonia Baraggia (eds.), *The Fragmented Landscape of Fundamental Rights Protection in Europe*, (Edward Elgar Publishing, 2018).
2. Diletta Tega, 'The Italian Constitutional Court in Its Context: A Narrative' (2021) 17:3 *European Constitutional Law Review*.
3. Orlando Scarcello, 'An Empirical Analysis: Practices of Italian Courts on Dual Preliminarity (2018-2022). A Mixed Response' (2023) *Italian Journal of Public Law*.
4. Corte Costituzionale (Italy), *Ordinanza N. 216*, Decision of 23 September 2021.
5. Corte Costituzionale (Italy), *Ordinanza N. 217*, Decision of 21 October 2021.
6. Corte Costituzionale (Italy), *Ordinanza N. 24*, Decision of 23 November 2016.
7. R. Daniel Kelemen and Laurent Pech, 'Why Autocrats Love Constitutional Identity and Constitutional Pluralism' (2018) 2 *RECONNECT – Reconciling Europe with its Citizens through Democracy and Rule of Law. Working Paper*.
8. Giuseppe Martinico, 'The "Polemical" Spirit of European Constitutional Law: On the Importance of Conflicts in EU Law' (2015) 16:6 *German Law Journal*.
9. Marta Cartabia, 'Europe and Rights: Taking Dialogue Seriously' (2009) 5:1 *European Constitutional Law Review*.
10. Corte Costituzionale (Italy), *Sentenza N. 15*, Decision of 23 November 2023.
11. Joseph H.H. Weiler and Ulrich Haltern, 'IV. Redefining the Decisive Question' in, *Who in the Law is the Ultimate Judicial Umpire of European Community Competences? The Schilling - Weiler/Haltern Debate*, (Jean Monnet Working Papers, 1996).
12. Peter Lindseth, 'Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community' (1999) 99:3 *Columbia Law Review*.

Francesco Saitto

Reconciling National and European Constitutional Legalities

How National Constitutions Strive to Recover Their Normative Force in Response to the Constitutionalization of the European Legal Order

In light of the increasingly established autonomous European constitutional legality, national constitutional courts are now compelled to reconsider their roles. Through a progressive expansion of its direct applicability by national ordinary judges, the Charter of Fundamental Rights risks fostering the marginalization of national constitutional courts. To address this challenge, and to continue their task of resolving the tensions between legal and constitutional legality, they must include the European constitutional legality in their scope. To this end, however, the old balances established in Italy and Germany in the 1980s are no longer adequate. I argue that the solution lies in a highly differentiated consolidation of constitutional legalities that integrates and embraces the unique roles of national constitutional courts in their respective systems of adjudication.

The Charter of Fundamental Rights and the centralized judicial review of legislation: a tense relationship

Given the legal status of the Charter, national constitutional courts must be equipped, on one hand, to safeguard the normative force of national constitutions and, on the other hand, to assert their role as courts of European fundamental rights. In relation to these goals, within the broader process of constitutionalizing the Union's legal system, the traditional structures that have been consolidating since the 1980s now seem inadequate.

This explains the reaction of some constitutional courts, starting in 2012[1], to the risk of marginalization[2] by the EU legal order. Initially, the issue arose with the recognition of the EU Charter of Fundamental Rights as having the same legal value as the Treaties. This was further intensified by the Court of Justice's interpretation

of Articles 51 and 53 of the Charter, particularly following the *Åkerberg Fransson* (C-617/10) and *Melloni* (C-399/11) cases. In this context, to comprehend the most recent developments, it is essential to consider, from a comparative perspective, the procedural tools that characterize each legal system and differentiate the various centralized systems of constitutional justice.

In Italian constitutional literature, the discussion surrounding the tension between legal legality and constitutional legality is a well-established topic. Today, this debate can be particularly productive when viewed in light of the transformation brought about by the introduction of the Charter. After World War II, rigid constitutions filled with principle-based norms significantly reshaped the traditional 19th century conception of the rule of law. The impact of a written constitution, safeguarded by a constitutional court, has altered the principle of formal legality, necessitating to rethink the very nature of fundamental rights. These rights are now viewed not only as limits on public authorities' actions but also as driving norms whose realization is essential in the constitutionalization of the legal system. Constitutional legality, therefore, remains in a continuous state of tension with legal legality, since the full implementation of the constitutional text is an ongoing process that can never be considered fully complete.

From this perspective, judicial review of legislation becomes a crucial tool for managing the tension between these two forms of legality and serves as a privileged mechanism for the ordinary legislator. Allowing ordinary judges to directly apply European constitutional principles through the Charter could be seen as a threat to this prerogative, imposing on them the responsibility of managing and resolving that tension as if they were functioning within a decentralized system of judicial review. This approach suggests a substitutive effect of European constitutional legality

over national constitutional legality. As a result, it becomes imperative to establish a new equilibrium in which national constitutional courts can play an active role in addressing the tension between constitutional legality and legal legality. Constitutional courts must be able to continue playing their role in constructing the unity of diverse legalities, among which European constitutional legality must now be included.

Constitutional and legal legality within a centralized judicial review system: practical implications

In the landmark case *McCulloch v. Maryland*[3], Chief Justice Marshall, articulating his guiding principle for constitutional interpretation, famously reminded us that "we must never forget that it is a Constitution we are expounding". In that context, constitutional legitimacy review is decentralized. As is well known, this means that any judge can determine the unconstitutionality of a federal law and decide not to apply it to the case they have to solve. As a consequence, the relationship between constitutional legality and legal legality is resolved so that the constitutional text can be fully applied by ordinary judges, not only to assess the unconstitutionality of statutes, but also to guide their application in practice.

In continental Europe, this solution – known and debated since the 19th century – has been firmly rejected. At that time, on the one hand, the concept of the Constitution as paramount law remains contentious. On the other, the creation of a genuine constitutional legality requires acknowledging both the normative force and the primacy of constitutions. This process culminated after World War II with the establishment of centralized review mechanisms, inspired by Kelsen, which serve as judicial safeguards

for constitutions. These constitutions, however, embody rich sets of values, and thus, since then, in Europe, constitutional legality does not merely reflect the completion of the 19th century notion of the rule of law. Over time, the role of the constitutional judge has expanded beyond merely verifying compliance with hierarchical legal principles, assuming a primary role in protecting and promoting the values embodied in constitutions. As such, the tension between constitutional legality and legal legality is structural and cannot be definitively resolved.

In this framework, however, recognizing the normative force of constitutions has entailed acknowledging that constitutional principles must be treated as *ius quo utimur*. Although centralized judicial review is entrusted to a specialized court, this does not fully encompass the practical application of constitutional principles. A fundamental role remains for the broader legal system, starting with ordinary judges. It is not surprising, therefore, that someone has paraphrased Carl Schmitt's famous *Diktum* by suggesting that the true sovereign is the one who has the final say on constitutional interpretation (Püttner[4]). From this point of view, in Germany, the *Urteilsverfassungsbeschwerde* (constitutional complaint procedure against judicial decisions) has over time positioned the German Federal Constitutional Court (Bundesverfassungsgericht) at the apex of constitutional adjudication, particularly with respect to the interpretation and application of constitutional principles. In contrast, in Italy, this has not occurred, and a significant part of the Constitution's practical application escapes the Constitutional Court's oversight.

This leads to a reflection on the characteristics of centralized judicial review of legislation from a comparative perspective. In facing the emergence of a European constitutional legality, even minor differences between national systems may become signific-

ant. More specifically, the centralized structure of constitutional justice models does not, by itself, ensure that specialized courts function uniformly. No single model can be considered paradigmatic. Consequently, different approaches to constructing the unity of legality emerge. Constitutional legality and legal legality can only interact in diverse ways, depending on the degree of penetration allowed for the former and the scope of the constitutional court's intervention to ensure uniform application, potentially valid *erga omnes*.

Considering these points, it is essential to assess the recent developments concerning the Charter of Fundamental Rights of the EU and the necessity of involving national constitutional courts in defining the new unity of legality in the European *Verfassungsgerichtsverbund*. This might require revisiting certain long-established arrangements concerning the process of constitutionalization of Union law.

From the old balance to the risk of isolation of national constitutional courts

These considerations shed a new light on the need to rethink the traditional structures that have developed over time, especially through the ongoing interaction between the Court of Justice, the Italian Constitutional Court, and the German Federal Constitutional Court.

The Charter of Fundamental Rights, through a progressive expansion of its direct applicability by national ordinary judges, risks fostering the marginalization of national constitutional courts. Its ability to produce an effect similar to incorporation[5], compelling the ordinary judge not to apply domestic law without referring to

the national constitutional court, could thereby replace the normative force of the national constitution with the European constitutional legality. However, to understand why the displacement effect produced by the Charter operates differently in various legal systems, it is essential first to reconstruct the old framework of relationships.

In particular, I refer to the doctrine established in Italy starting in 1984 with the *Granital* decision (Judgment No. 170 of 1984[6]), and to the *Trennungsthese*[7] of the German Federal Constitutional Court. The *Granital* decision imposed an obligation on ordinary judges to disapply domestic law that conflicts with European regulations, rendering constitutional legitimacy questions inadmissible when Union law has direct effect ("*Granital* rule"). Meanwhile, the *Trennungsthese* has allowed the German Federal Constitutional Court to gradually develop the idea – based on the principles of *Solange II*[8], – that the Basic Law cannot serve as a standard of review in areas fully determined by Union law.

Despite taking different paths, and with the exception of issues related to constitutional identity and *ultra vires* reviews, these premises have led to the gradual isolation of constitutional judges from matters concerning Union law in both countries. For a long time, constitutional courts tolerated the reduction of their jurisdiction, under the assumption that Union law impacted only a limited number of areas. For example, in the *Frontini* decision (Judgment No. 183 of 1973[9]), cited in the *Sondervotum* (dissenting opinion) of *Solange I*[10], the Italian Constitutional Court asserted the following:

> *"[T]he legislative competence of the EEC bodies is provided for in Article 189 of the Treaty of Rome only with regard to matters concerning economic relations, that is, matters for which our Constitution does establish a reservation of law or a reference to the*

> *law, but the precise and specific provisions of the Treaty provide a sure guarantee, so much so that it appears difficult even in the abstract to envisage the hypothesis that a Community regulation could affect matters of civil, ethical-social, or political relations with provisions contrary to the Italian Constitution."*
> (cons. in dir. para. 9).

The isolation of the constitutional judges has also fostered distrust of the preliminary reference procedure, which seemed to risk subordinating constitutional jurisdiction to the Court of Justice. However, in both Italy and Germany, there have been attempts to mitigate this trend. In Italy, one notable development has been the use of Union law without direct effect as an intermediate standard of review (see, ie. Judgment No. 263 of 2022[11] in the so-called *Lexitor* case). Due to the use of Union law as an intermediate standard, the Italian Constitutional Court has long been able – despite some criticism – to intervene in applying derivative law by invalidating statutes that, while not directly subject to disapplication based solely on Union law (see *Thelen Technopark* (C-261/20)), are nonetheless deemed unconstitutional for violating Articles 11 and 117, paragraph 1, of the Italian Constitution. In Germany, since *Solange II*, it is significant that individuals can file complaints for violations of the right to a legally appointed judge in cases where the obligation to raise a preliminary ruling has not been properly fulfilled.

Today, however, this outcome no longer seems sound. For some time, Italian legal scholars have criticized the strict correlation between direct effect and inadmissibility, while in Germany there has been an intense debate on the need to move beyond *Solange II* and the *Trennungsthese*. This debate is largely driven by the recognition that the once seemingly straightforward balance can no

longer accommodate the increasing activism of constitutional courts, as exemplified by the case decided in the *Beschluss Europäischer Haftbefehl II*[12].

Similar problems, different paths: the need to strengthen an integrated European constitutional jurisdiction

The strength of the German Federal Constitutional Court can be attributed to its consistent consideration of the relationship with the EU legal order to ensure adequate standards of protection. This approach reflects the idea of material integration between constitutional yardsticks. From this point of view, since the *Solange II* decision, national values have played a crucial role in shaping common constitutional traditions. In contrast, the Italian Constitutional Court's engagement with the EU legal order has been marked by a more formal conception of the relationship between legal systems, focusing primarily on resolving conflicts between legal norms.

Today, as the need to integrate standards becomes increasingly apparent, this historical divergence in approaches is highly significant. The challenge of constructing a European jurisdiction in the area of fundamental rights should hinge on the balance between European constitutional legality, national constitutional legality, and legal legality. The ability to bring about this balance, nevertheless, depends largely on the procedural role that national constitutional courts are afforded, particularly regarding the modes of access and the scope of their constitutional jurisdiction. For example, in Germany, a distinct and autonomous *Grundrechtsgerichtsbarkeit* exists, which allows for comprehensive control over the substantive constitutional application of law. In contrast, in Italy, the jurisdic-

tion over fundamental rights of the Constitutional Court is entirely subsumed within the review of the constitutional legitimacy of statute laws or acts with the force of law.

These systemic differences must necessarily be taken into account when one aims to construct a European constitutional jurisdiction that includes national constitutional judges. It should be noted that it is impossible to establish a one-size-fits-all rule that applies to all centralized constitutional judges. Given these two distinct experiences, it is evident that the process of integrating European constitutional legality with national constitutional legality cannot operate through identical mechanisms. From this point of view, the Court of Justice seems to be cognizant of the unique characteristics of different legal systems, even though, since *Åkerberg Fransson* and *Melloni*, it has appeared particularly focused on establishing a dialogue with the German Federal Constitutional Court. The so-called "*Melloni*-limits" are emblematic of this approach, as they reflect both an acceptance and moderation of the principle that recourse to national standards is permissible only if the area is partially determined, while also presenting a significant challenge to the so-called *Trennungsthese*. Then, in three decisions from 2019, including *Pelham GmbH* (C-476/17), which preceded the turning point established with the *Right to be Forgotten I*[13] and *II*[14], the German framework has been explicitly described by the referring court and, under certain conditions, endorsed by the Court of Justice.

In Italy, overcoming the isolation of the Italian Constitutional Court proves challenging due to the necessity of moving away from the older jurisprudence on "dual preliminarity" (*doppia pregiudizialità*) and, then, to correct the "*Granital* rule". The risk here lies in potentially setting off a process that could revert the moderation established in *Granital* back to the principles of Judg-

ment No. 232 of 1975[15], which culminated in the *Simmenthal* decision (C-106/77). Since *Melki* (C-188/10), however, it has become increasingly clear that, under certain conditions, the Court of Justice does not consider it problematic for ordinary judges to act first by referring a case to the constitutional court. The openness toward the Italian Constitutional Court is particularly noticeable in the *O.D.* ruling (C-350/20), where the Court of Justice, following a referral from the Constitutional Court, highlighted the specific features of the Italian constitutional process, justifying why it considered the procedure admissible.

Conclusion

The theoretical acceptance of *Parallelanwendbarkeit* of fundamental rights catalogues, along with the practice of using the Charter as a yardstick against the specialized courts' rulings, as seen in Germany, presents a significant challenge. Similarly, the Italian Constitutional Court's use of the Charter as an intermediate standard for assessing the validity of statutes, even when Union law has direct effect, as established in Judgment No. 269 of 2017[16], adds to this complexity. The challenge lies in the gradual construction of proper material integration between different constitutional standards.

It is crucial to establish a dialogue that seeks to optimize the integrated level of rights protection across Europe without undermining the progress already achieved or questioning the principles of direct effect and primacy. This dialogue should focus on the substance of protection while being mindful of the risks of a potential "patriation" of the Charter, which could diminish its normative value. This dialogue, which strikes at the core of the traditional role of constitutional courts in balancing constitutional legality with

legal legality, should involve constitutional courts and take into account their political sensitivity in dealing with constitutional principles and values.

In light of this, it seems that this new constitutional legality presents a distinct challenge to the European *Verfassungsgerichtsverbund*. How constitutional courts can engage in this process will depend on the national procedural rules and the practical functioning of constitutional adjudication systems. The role of these courts must be clearly considered to ensure that the multiple and diverse values safeguarded by national constitutions, which underpin social coexistence, are not overlooked. One should not fear that existing arrangements will change or that current balances will shift dramatically. Conversely, it must be considered that even though no singular constitutional text exists at the European level, the provisions in question have a materially constitutional nature. As Chief Justice Marshall once warned, this recognition is essential for understanding their significance. This is why, in Europe, it is not feasible to merely allow a general substitutive effect linked to the power of ordinary judges to disapply statute laws, ignoring the role of constitutional courts in building the unity of legality.

In the coming years, it will be up to the Court of Justice, in cooperation with national judges, to develop a differentiated approach to European constitutional jurisdiction. This approach must integrate national constitutional courts while considering the procedural particularities of each system of constitutional adjudication.

References

1. Verfassungsgerichtshof (Austria), *U 466/11-18, U 1836/11-13*, Judgement of 14 March 2012.
2. Jan Komárek, 'National Constitutional Courts in the European Constitutional Democracy' (2014) 12:3 *International Journal of Constitutional Law*.
3. US Supreme Court, *McCulloch v Maryland* (17 US 316), Decision of 6 March 1816.
4. Günter Püttner, 'Der schwierige Weg der Verfassungsgerichtsbarkeit' in Dieter Wilke (ed.), *Festschrift zum 125jährigen Bestehen der Juristischen Gesellschaft zu Berlin*, (De Gruyter, 1984).
5. Aida Torres Pérez, 'The Federalizing Force of the EU Charter of Fundamental Rights' (2017) 15:4 *International Journal of Constitutional Law*.
6. Corte Costituzionale (Italy), *Granital* (No. 170/1984), Decision of 8 June 1984.
7. Daniel Thym, 'Separation versus Fusion – or: How to Accommodate National Autonomy and the Charter? Diverging Visions of the German Constitutional Court and the European Court of Justice' (2013) 9:3 *European Constitutional Law Review*.
8. Bundesverfassungsgericht (Germany), *Solange II* (2 BvR 197/83), Decision of 22 October 1986.
9. Corte Constituzionale (Italy), *Frontini* (No. 183/1973), Decision of 27 December 1973.
10. Bundesverfassungsgericht, *Solange I* (2 BvL 52/71), Decision of 29 May 1974.
11. Corte Costituzionale (Italy), *Lexitor* (No. 263/2022), Decision of 11 August 2022.
12. Bundesverfassungsgericht, *Europäischer Haftbefehl II* (2 BvR 2735/14), Decision of 15 December 2015.
13. Bundesverfassungsgericht, *Recht auf Vergessen I* (1 BvR 16/13), Decision of 6 November 2019.
14. Bundesverfassungsgericht, *Recht auf Vergessen II* (1 BvR 276/17), Decision of 6 November 2019.
15. Corte Costituzionale (Italy), *Sentenza N. 232*, Decision of 30 October 1975.
16. Corte Costituzionale (Italy), *Sentenza N. 269*, Decision of 11 July 2017.

Marjan Kos

Stuck Between Unity and Diversity

Squeezing the EU Charter Between the Floor and the Ceiling

The role of the EU Charter in disputes concerning fundamental rights standards between the EU and Member States (MS) has been characterized by ambiguity ever since the Charter's inception. While many different approaches have been devised in theory, practice struggles to provide clear guidance in concrete cases. As the EU deepens integration of MS to effectively face the challenges ahead, the appropriate interpretation of the Charter may counterbalance this progressive harmonisation by embracing diverse fundamental rights standards. In particular, I advocate for a pluralistic interpretation of Article 53 of the Charter that allows for a greater degree of accommodation of national particularities. In that way, one would not only reduce constitutional tensions but perhaps even find that there may be unity in diversity after all.

Deeper integration doesn't equal greater unification

During the last two decades, the EU has been struggling to effectively keep up with the global challenges. It seems that to position itself as a relevant global actor and preserve its relevance, it needs to deepen the level of integration.[1] Since a Treaty change seems politically unrealistic,[2] enhanced integration will need to proceed within the existing Treaty provisions and rely on secondary legislation.

Further integration does not and should not be equated with complete unification. The clearest indication of this is the prospect of widening of the EU to new MS. As past practice has shown, furthering the integration within the EU will be theoretically and practically impossible without differentiation. Widening and deepening has always been accompanied by (transitional or permanent) differentiation among the MS.[3] Moreover, EU's legislative activity has not consistently held up to the axiom of uniformity. As studies

of differentiation show, a significant portion of EU law entails differentiation.[4] At the level of secondary law, this approach is most often adopted by ways of partial or minimum harmonization, entailing safeguard clauses. Establishing deeper integration will entail both unification and accommodation of diversity (for a recent study, see van den Brink and Passalacqua[5]). This chapter focuses on situations where secondary EU law affords a degree of deference to the MS, leaving aside instances of either no or full harmonization, as these raise separate issues with regards to the Charter.

In the area of fundamental rights protection, principled and pragmatic reasons justify deference to the MS. In terms of public intervention by the EU, its legitimacy will be linked to the level of accommodation of MS preferences available under EU law. In that sense, the protection of pluralism, inherent to the EU's fundamental rights landscape, presents a normative value by itself. Additionally, adopting such deference is a politically opportune choice. This applies even more in fundamental rights protection, as rights represent the foundational value choices of given societies and are often inviting topics to stir political turmoil. When regulating areas where discrepancies among the levels of fundamental rights protection are expected, the EU should therefore adopt mechanisms which allow such accommodation.

Accommodating fundamental rights diversity in secondary law

Numerous acts of secondary legislation allow MS to apply their own fundamental rights standards (e.g. Article 1 (7) of Directive 2006/123/EC or Article 13 of Directive (EU) 2016/343). The underlying idea is that MS are allowed to occupy the fields not (fully) regulated by EU law by providing their own (higher) stand-

ards of protection, reaching above the "floor". They are generally free to adopt their own rules, insofar as they do not interfere with their primary law obligations, namely the "ceiling".

In terms of fundamental rights, the margin of discretion, and especially the role of the Charter, remains somewhat fogged. The main question is whether the Charter is supposed to play a role in determining the scope of deference left to the MS between the floor and the ceiling. Noting the ambiguity in the case law, this chapter proposes a more pluralistic understanding of Article 53 of the Charter (see Millet[6] and de Witte[7]), mainly based on its role in resolving cases of conflicting standards.

The application of the Charter

Fundamental rights protection in the EU (as in any federal-type structure) is essentially tied to the allocation of competences. Hence, the first question is whether the Charter even applies in the area between the floor and the ceiling. This relates to its scope of application as elaborated in the case law (C-40/11 *Lida*, para. 79; C-206/13 *Siragusa*, para. 25) of the CJEU. As explained by Dougan, Charter rights are second-order norms that are only invoked when a first-order norm of EU law triggers their application.[8] Whether this is the case in the situations discussed here is wrapped in a degree of mist (for detailed discussions, see de Cecco[9, 10] or Spaventa[11]). For the purpose of this chapter, we will presume the applicability of the Charter, meaning that we are left with the question whether the Charter has anything to say about the rebalancing of rights at the MS level.

Does the Charter say anything about diverse fundamental rights standards?

In some cases of minimum harmonization, against the express will of the legislator, the CJEU (somewhat paradoxically) employed the Charter to limit the scope of MS' discretion, even converting a floor into a ceiling (for example *Alemo Herron,* C-426/11 or *AGET Iraklis,* C-201/15). This prompts the question whether the Charter sets any rules determining the leeway left to the MS in striking a different balance between competing rights from the one that follows from EU law. This appears to be linked to Article 53 of the Charter. The ambiguity, however, follows from the fact that there is essentially only one case (*Melloni,* C-399/11) where the CJEU engaged in a substantive discussion on Article 53 of the Charter as a conflict of rights norm, and none of the minimum harmonization cases even mention it.

This seems to confirm the predominant position in the literature, ascribing Article 53 of the Charter (only) symbolic value,[12] being a politically useful "inkblot".[13] In contrast to this narrative, I argue that in light of the normative arguments in favour of legal certainty and preservation of pluralism, Article 53 of the Charter should be used in a more progressive manner to adjudicate such cases as well. This is even more relevant in the face of Kleinlein's[14] and Torres Pérez's[15] findings that expanding EU fundamental rights protection could lead to a unification of standards.

How to (re)use Article 53 of the Charter?

The main concern behind the prevailing interpretations of Article 53 of the Charter – implicitly reinforced by the CJEU's limited ref-

erences to it – is the potential threat it poses to the principle of primacy of EU law. As the narrative goes, applying national fundamental rights standards based on Article 53 of the Charter would allow the MS courts to override EU law, inviting them to review EU law against national standards. This would not be in line with the mandate of the framers of the Charter, nor was it their intention.[16] Several arguments can be made against this position.

First, measuring MS action against national fundamental rights standards does not equal adjudication of the validity of EU law based on those standards. A MS may be allowed to adopt different fundamental rights standards and stay fully in line with EU law. This should arguably be the norm in situations of minimum harmonization.

Second, the concern over primacy is only valid if the national courts unilaterally disregard the relevant EU law. Conversely, if a different standard is condoned by the CJEU, then MS action is fully in line with EU law. If the CJEU allows a MS to adopt higher standards under Article 53 of the Charter, the MS is not violating the principle of primacy, rather, it is acting in full accordance with it. In true pluralist sense, the key then lies in loyal cooperation between national courts and the CJEU.

Third, interpreting Article 53 of the Charter to allow higher national standards in situations of minimum harmonization can arguably be presented as fully in line with *Melloni* – the only reference point thus far. There, the CJEU stated that the "[…] national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised" (para. 60).

Focusing on primacy, this must clearly mean that primacy is not always violated if MS adopt higher national standards. To put it differently, the CJEU permits the use of national standards as long as primacy is safe and well. Primacy will only be infringed if a MS unilaterally disregards the EU standard. If, however, the CJEU grants a margin of discretion to the MS to go beyond the threshold (which should be the norm under minimum harmonization), then it is still EU law itself which determines the measure of its own validity. The degree of deference left to the MS would rest on the level of exhaustiveness of the relevant EU legislation (*Åkerberg Fransson,* C-617/10, para. 29). In different circumstances this seems to have been implicitly confirmed in *M.A.S. and M.B,* C-42/17.

It follows that insofar as EU law does not exhaustively regulate an issue, Article 53 of the Charter should be read to allow the MS, in cooperation with the CJEU, to occupy the space between the floor and the ceiling under secondary EU law with its own standards of fundamental rights protection (*Jeremy F,* C-168/13 and *Google v CNIL,* C-507/17). Article 53 of the Charter would then function as a guiding principle, requiring of the CJEU to allow MS to adopt higher standards of fundamental rights protection unless this was exceptionally not possible due to a violation of other principles of EU law. This interpretation of the provision would add normative weight to the argument that national fundamental rights diversity needs to be preserved. This should be a cause for celebration for the remaining few constitutional pluralists out there. It offers a new platform for dialogue on effective fundamental rights protection in Europe.

Primacy is only threatened if the CJEU, even in cases where the legislator intended to leave scope for MS discretion, insists on a narrow interpretation of EU law provisions for the sake of effectiveness. If the CJEU grants broader discretion to national courts,

accepting that the unity and effectiveness of EU law must be balanced with other EU law principles, then the concerns over primacy are mostly dissolved.

Why should the Court start referring to Article 53 of the Charter?

The proposed reading of Article 53 of the Charter would be beneficial for two main reasons. It would provide clearer guidance regarding the extent to which the MS are allowed to exercise their discretion under secondary EU legislation. The "rules of engagement" would become more predictable, leading to less constitutional confrontations.

Moreover, the said interpretation is more in line with the pluralistic underpinnings of the EU. It makes a step away from the paradigmatic focus on *effet utile*, based on the internal market logic. Instead, it leads to the realization that effectiveness is just one of the principles determining the EU legal order, which must be balanced against others. In the wake of deeper integration, spreading into many rights-sensitive areas, the continuing application of internal market logic seems somewhat obsolete and incompatible with the reality.[17] The proposed reading of Article 53 of the Charter would also foster MS legitimacy and further reduce the risk of constitutional confrontations.

Paradoxically, adopting a deferential stance towards national fundamental rights standards in harmonized areas may end up encouraging deeper integration among the MS. They may be less reserved, knowing that the fundamental tenets of their systems will not be compromised, eventually resulting in a higher level of effectiveness of EU law.[18] Perhaps there is unity in diversity after all.

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References

1. Darren Harvey, Madlen Karg, Janine Prantl, Clara Rauchegger, and Bernadette Zelger (eds.), *Reforming the EU Treaties* (Bloomsbury Publishing, 2023).
2. Minna Ålander, Nicolai von Ondarza, and Sophia Russack (eds.), 'Managed Expectations: EU Member States' Views on the Conference on the Future of Europe' (2021) 3 *SWP Working Papers*.
3. Marjan Kos, 'Constitutional Diversity and Differentiation in the EU: What Role for National Constitutional Demands under EU Law?' in Maja Sahadžić, Marjan Kos, Jaka Kukavica, Jakob Gašperin Wischhoff, and Julian Scholtes (eds.), *Accommodating Diversity in Multilevel Constitutional Orders*, (Routledge, 2023).
4. Frank Schimmelfennig and Thomas Winzen, 'Instrumental and Constitutional Differentiation in the European Union' (2014) 52:1 *Journal of Common Market Studies*; Frank Schimmelfennig and Thomas Winzen, 'Differentiated EU Integration: Maps and Modes' (2020) *EUI - Working Paper*.
5. Ton Van Den Brink and Virginia Passalacqua (eds.), *Balancing Unity and Diversity in EU Legislation* (Edward Elgar Publishing, 2024).
6. François-Xavier Millet, 'Why Article 53 of the Charter Should Ground the Application of National Fundamental Rights in Fully Harmonised Areas?' in Michal Bobek and Jeremias Adams-Prassl (eds.), *The EU Charter of Fundamental Rights in the Member States*, (Bloomsbury Publishing, 2020).
7. Bruno de Witte, 'Article 53 – Level of Protection' in Steve Peers, Tamara Hervey, Jeff Kenner, and Angela Ward (eds.), *The EU Charter of Fundamental Rights. A Commentary*, (Bloomsbury Publishing, 2021).
8. Michael Dougan, 'Judicial Review of Member State Action Under the General Principles and the Charter: Defining the Scope of Union Law' (2015) 52:5 *Common Market Law Review*.
9. Francesco De Cecco, 'Room to Move? Minimum Harmonization and Fundamental Rights' (2006) 43:1 *Common Market Law Review*.
10. Francesco de Cecco, 'Minimum Harmonization and the Limits of Union Fundamental Rights Review: *TSN and AKT*' (2021) 58:1 *Common Market Law Review*.
11. Eleanor Spaventa, 'Federalisation versus Centralisation: Tensions in Fundamental Rights Discourse in the EU' in Michael Dougan and Samantha Currie (eds.), *50 Years of the European Treaties: Looking Back and Thinking Forward*, (Hart Publishing, 2009).
12. Bruno de Witte, 'Article 53 – Level of Protection' in Steve Peers, Tamara Hervey, Jeff Kenner, and Angela Ward (eds.), *The EU Charter of Fundamental Rights. A Commentary*, (Bloomsbury Publishing, 2021).
13. Jonas Bering Liisberg, 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?' (2001) 38:5 *Common Market Law Review*.

14. Thomas Kleinlein, 'Federalisms, Rights, and Autonomies: The United States, Germany, and the EU' (2017) 15:4 *International Journal of Constitutional Law*.

15. Aida Torres Pérez, 'The Federalizing Force of the EU Charter of Fundamental Rights' (2017) 15:4 *International Journal of Constitutional Law*.

16. Jonas Bering Liisberg, 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?' (2001) 38:5 *Common Market Law Review*.

17. Maartje de Visser and Anne Pieter van der Mei, 'Flexibility and Differentiation: Plea for Allowing National Differentiation in the Fundamental Rights Domain' in Bruno De Witte, Andrea Ott, and Ellen Vos (eds.), *Between Flexibility and Disintegration*, (Elgar Publishing, 2017).

18. François-Xavier Millet, 'Why Article 53 of the Charter Should Ground the Application of National Fundamental Rights in Fully Harmonised Areas?' in Michal Bobek and Jeremias Adams-Prassl (eds.), *The EU Charter of Fundamental Rights in the Member States*, (Bloomsbury Publishing, 2020).

Eleanor Spaventa

The Tail That Wags the Dog

Reflections on the Principle of Mutual Trust and the Autonomy of EU Law

In Opinion 2/13[1] , the Court of Justice held that accession to the ECHR must not interfere with the operation of the principle of mutual trust as to do so would affect the autonomy of EU law. The link between mutual trust and autonomy has then been interpreted as an almost absolute bar to accession, as well as requiring national courts to give effect to EU law even when to do so would mean disregarding most alleged violations of fundamental rights in other Member States.

In this contribution, I offer a different reading of the relationship between autonomy and mutual trust: autonomy here means simply that since the EU is an autonomous legal system, the EU legislature has the discretion to enact legislation based upon mutual trust between Member States. But mutual trust is not a general principle capable of having autonomous legal effects – consequently it must be triggered through the free movement provisions or secondary legislation and can (and should) be limited by the constitutional principles of the EU, including fundamental rights. Furthermore, mutual trust is acquiring a novel value by strengthening the case for the progressive operationalisation of the foundational values of the EU ex Article 2 TEU. Read in this way, mutual trust has then the potential to enhance fundamental rights protection and is certainly no bar to accession to the ECHR – it is the dog of core values that wags the tail of mutual trust and not vice versa.

The doctrine of mutual trust

In the EU context, the doctrine of mutual trust is closely related to the doctrine of mutual recognition first developed in the context of the free movement provisions. There, as it is well known, the Court demanded that Member States recognise one another's regulatory

standards. Mutual recognition in turn required a high level of trust not only in relation to the soundness of the other Member States' regulatory standards but also in relation to the effectiveness of national enforcement systems of those very standards. The doctrine of mutual recognition and the underpinning mutual trust, however, was never absolute. Lacking EU rules, Member States remained free to refuse mutual recognition in order to protect a mandatory requirement of public interest.

Over time, EU law also demanded mutual recognition of certain legal products, such as certificates, official decisions or judgments. Again, mutual recognition of legal products is only possible to the extent to which Member States trust one another. Furthermore, aside from the recognition of certain certificates required to facilitate the right to free movement, mutual recognition of legal products requires intervention by the EU legislature. Take for instance asylum decisions: since there is no EU legislation requiring mutual recognition, and even though there is harmonization of many aspects of decisions granting asylum, Member States are not obliged to recognise each other's decisions.

On the other hand, where there is co-ordinating legislation, such as in relation to the European Arrest Warrant and the Dublin system of returns, Member States might be obliged to recognise each other's decisions or be empowered to return individuals to the port of first entry. In these fields, the Court of Justice has been very dogmatic in imposing a near absolute mutual trust obligation. This, in turn, has created tensions with national courts, which have not always been willing to accept that fundamental rights are adequately protected in all Member States. After all, not only do standards differ widely, but the EU also lacks effective tools to enforce fundamental rights standards against Member States. Here it is sufficient to recall the EU's inability to protect its foundational

values in relation to rule of law backsliding. The doctrine of mutual trust then introduces a fracture in the EU fundamental rights space. On the one hand, national authorities are required by the Court to abide by an almost absolute presumption of compliance with fundamental rights across the Member States of the EU, whilst on the other hand there is no effective means of general fundamental rights enforcement at EU level. This fracture became especially problematic in those fields where individuals are most at risk of fundamental rights violations, in particular in relation to the European Arrest Warrant and the field of migration/asylum.

It is in this light that we should look at the Court's Opinion 2/13: as mentioned, there the Court held that the Draft Accession Agreement was incompatible with the Treaty since it would interfere with the mutual trust obligation imposed on Member States. In other words, the Court of Justice was worried that upon Accession national courts would not be able to give effect to a decision based on mutual trust if to do so would entail a breach of the ECHR – this would upset the "underlying balance of the EU and undermine the autonomy of EU law" (para. 194).

The evolution of the mutual trust obligation

The absolute approach to mutual trust espoused by the Court of Justice led to reservations by both national courts and the European Court of Human Rights. The latter, in *Avotiņš*[2], had the chance to clarify its own stance in relation to the extent to which the doctrine of mutual trust justified the forfeiture of fundamental rights scrutiny by the executing national court. In relation to a case concerning recognition of judgments under the Brussels I Regulation (Regulation (EU) No 1215/2012), the ECtHR clarified that the fact that the national court is giving effect to a mutual recognition

instrument (based on mutual trust) is not sufficient to exclude, for that only reason, its jurisdiction. Rather, if there is no discretion of the national court in giving effect to the mutual recognition instrument, then the *Bosphorus* presumption of equivalent protection between EU law and the ECHR applies but so does the possibility for the claimant to rebut the presumption and argue that the protection in the requesting Member State had been deficient. Hence, the *Avotiņš* ruling imposes an external limit to the applicability of the mutual trust doctrine placing national courts in a difficult position. When a manifest deficiency is pleaded, they risk conflicting with EU law by examining the complaint or with the ECHR by refusing to do so.

It is perhaps for this reason that the Court of Justice has relaxed its stance in relation to the mandatory execution of European Arrest Warrants. In the very early stages, it had decided that no fundamental rights exception could limit the mutual trust obligation. However, the Court later accepted that national courts could refuse execution of an EAW if a double test was satisfied: the existence of systemic violations or generalised deficiencies in the issuing Member State, coupled with substantial grounds of a real risk for the individual concerned of breach of Article 4 Charter/ Article 3 ECHR (protection from torture and ill treatment) and/or Article 47 Charter (effective remedy/fair trial). More recently, in *GN* (C-261/22), the Court accepted that violations of the right to private life and the best interests of the child might justify a refusal to execution as well (subject to the dual test of systemic violations and individualised risk), although subsequent case law in the field of Dublin,[3] might indicate a return to a more rigid approach. In any event, the Court has acknowledged that the mutual trust obligation is subject to constraints imposed by the constitutional principles (and obligations) of the EU.

Autonomy of EU law

Given the evolution of the Court of Justice's approach to mutual trust, what should we make of Opinion 2/13, where the Court linked the doctrine of mutual trust to the principle of autonomy? It might be worth recalling the reasoning of the Court in that respect. The EU legal order is based on the premiss that Member States share a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the law of the EU that implements them will be respected" (para. 168). If, and when, mutual trust is given effect through provisions of EU (secondary) law and if, and when, it presupposes that Member States abstain from fundamental rights scrutiny, then this lack of fundamental rights review must be reflected in the Accession Agreement. Otherwise "accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law". In Opinion 2/13 then the principle of mutual trust becomes conceptualised as being part of the "autonomy" of EU law, an elusive concept which embraces the key principles of the EU legal system as an autonomous legal order, which are not open to contestation either at national or at international level, and upon which international agreements cannot encroach (see to this effect also *Achmea (*C-284/16), *CETA* (Opinion 1/17[4], para. 109). See also Odermatt[5], Shuibhne[6], and Contartese[7]). However, the link between autonomy and mutual trust is far from obvious.

After all, and as we have seen above, mutual trust is simply a presumption which operates either together with the free movement provisions, in which case it can be limited to protect any mandatory requirement of (State) public interest or by virtue of ex-

press requirements in secondary legislation imposing mutual recognition. However, unlike other general principles such as proportionality, mutual trust does not operate independently just because the matter falls within the scope of EU law. Take for instance the lack of recognition of asylum decisions adopted in other Member States. In the absence of an explicit political decision in a legislative instrument, mutual trust does not require Member States to recognize each other's asylum decisions, despite the fact that many criteria related to asylum and international protection are established by EU law. In areas not governed by free movement, mutual trust does not impose any requirement unless there is a political decision to that effect.

Taken at face value it is therefore difficult to understand how mutual trust can be conceptualised as forming part of the autonomy of EU law, when it is not capable of having an autonomous normative value. This notwithstanding, in *Hungary v EP and Council* (C-156/21), on the lawfulness of the Conditionality Regulation, the Court again made the link between mutual trust and the autonomy of EU law (and in relation to Article 2 TEU, see also *PPU ML* (C-220/18) , para. 48), although in this case in a more nuanced way. With reference to the premiss that all Member States must abide by the values in Article 2 TEU, the Court held:

> *"That premiss is based on the specific and essential characteristics of EU law, which stem from the very nature of EU law and the autonomy it enjoys in relation to the laws of the Member States and to international law. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised and, therefore, that the EU law that implements them will be respected […]."*
> (Case C-126/21, para. 125, see also Case C-127/21, para. 143).

Two final remarks are necessary at this stage. In Opinion 2/13, the Court does not seem to be protecting mutual trust per se, which is not an independent general principle, but rather the EU's legislature discretion in affecting given choices. Particularly in providing (and sometimes imposing) mutual recognition of given legal products, instrumental for the creation of an area of freedom, security and justice. Henceforth, mutual recognition is instrumental to the "implementation of the process of integration that is the *raison d'être* of the EU itself"[8] (Opinion 2/13, para. 172).

In other words, Opinion 2/13 can be interpreted as demanding the recognition of the autonomy of the EU legislature in adopting co-ordinating legislation, even when that legislation does not provide for fundamental rights guarantees. That is because all fundamental rights, but Article 3 ECHR, can be limited by public interest considerations, albeit such limitations must be necessary and proportionate (C-633/22, para. 48). But Opinion 2/13 does not say that those fundamental rights guarantees cannot be imposed by means of interpretation by the Court of Justice, which, as noted above, is progressively happening. This more nuanced approach to the relationship between autonomy and mutual trust is reflected in Article 6 of the revised Draft Accession Agreement[9] which states:

> *"Accession of the European Union to the Convention shall not affect the application of the principle of mutual trust within the European Union. In this context, the protection of human rights guaranteed by the Convention shall be ensured."*

Finally, and this is a trend across the case law, the principle of mutual trust is acquiring new significance as a means to give effect to Article 2 TEU. Henceforth, at least to a certain extent, mutual trust remedies the lack of independent enforceability of EU fundamental

rights. After all, it is not only the area of freedom, security, and justice which is affected by persistent violations of Article 2 TEU, but any area of EU law, not least the internal market, given that enforcement of EU law is an essential element for its operation.

Read this way, the dog has regained control of its tail – mutual trust could shift from being an obstacle to enforcing fundamental rights to a principle that enables better enforcement of the EU's foundational values.

References

1. ECJ, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (Opinion 2/13), Opinion of 18 December 2014.
2. ECtHR, *Avotiņš v. Latvia* (Appl. no. 17502/07), Judgment of 23 May 2016.
3. See the Joined Cases *Ministero dell'Interno* (C-228/21, C-254/21, C-297/21, C-315/21 and C-328/21), Judgment of 30 November 2023.
4. ECJ, *Comprehensive Economic and Trade Agreement Between Canada, of the One Part, and the European Union and Its Member States, of the Other Part (CETA)* (Opinion 1/17), Opinion of 30 April 2019.
5. Jed Odermatt, 'The Principle of Autonomy: An Adolescent Disease of EU External Relations Law?' in Marise Cremona (ed.), *Structural Principles in EU External Relations Law*, (Bloomsbury Publishing, 2018).
6. Niamh Nic Shuibhne, 'What is the Autonomy of EU Law, and Why Does that Matter?' (2019) 88:1 *Nordic Journal of International Law*.
7. Cristina Contartese, 'The Autonomy of the EU Legal Order in the ECJ's External Relations Case Law: From the "Essential" to the "Specific Characteristics" of the Union and Back Again' (2017) 54:6 *Common Market Law Review*.
8. ECJ, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (Opinion 2/13), Opinion of 18 December 2014.
9. Council of Europe, 'CDDH Ad Hoc Negotiation Group ("46+1") on the Accession of the European Union to the European Convention on Human Rights' (46+1(2023)33), 8 March 2023. https://rm.coe.int/cddh-ad-hoc-negotiation-group-46-1-on-the-accession-of-the-european-un/1680aa79f4.

Emilia Sandri

Fundamental Rights Come Off the Bench

Manifest Breaches of Fundamental Rights as a Public Policy Exception in the Real Madrid Case

In 2014, the European Court of Justice clearly prioritised the EU's position on the unity and effectiveness of EU law over the protection of fundamental rights (Opinion 2/13, *Accession of the Union to the ECHR*). This so-called *pro-integratione* approach[1] defined the instrumentalisation of fundamental rights to realise the borderless internal market to its fullest potential. The Court has achieved this goal by building on the principle of mutual trust, which prevents Member States from demanding a higher level of national protection for fundamental rights from other Member States than what is provided by EU law. Furthermore, mutual trust precludes Member States from verifying compliance with fundamental rights in other Member States. Ten years later, in October 2024, a judgment pitting football against the media seems to have turned the tables.

In *Real Madrid vs Le Monde* (C-633/22), the Court held that excessive defamation damages may breach the freedom of the press and trigger the public policy exception under Brussels Ia Regulation (Council Regulation (EC) No 44/2001) concerning recognition of foreign judgments. In doing so, the ECJ allowed national courts to conduct a substantive review of foreign judgments despite the principle of mutual trust. This ruling marks a significant shift in the ECJ's approach, prioritising fundamental rights protection over the traditional objective of seamless judicial cooperation across the EU.

Facts of the case and the judgment of the ECJ

In 2006, Spanish football club Real Madrid and a member of its medical team sued French newspaper Le Monde and one of its journalists for defamation over an article alleging the football club's involvement in doping scandals. In 2009, the Court of First Instance of Madrid ordered Le Monde and its journalist to pay

330.000€ to Real Madrid and its medical team member. After the Court of First Instance of Madrid ordered the judgment's execution, the Regional Court of Paris issued a declaration of enforceability of the order in France. Le Monde appealed to the Court of Appeal of Paris which, in 2020, overturned the declaration on the ground that it was contrary to French international public policy. In response, Real Madrid appealed before the French Court of Cassation, which stayed the proceedings and referred seven questions to the ECJ for a preliminary ruling.

The ECJ examined the conditions to refuse enforcement of the judgment being manifestly contrary to public policy under Articles 34 (1) and 45 (1) of Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ia Regulation), now replaced by the Brussels Ib Regulation (Regulation (EU) No 1215/2012). Namely, whether a national court may refuse enforcement of a judgment that orders a newspaper and a journalist to pay compensatory damages for harm caused to someone's reputation by published information. This refusal is based on the ground that the judgment breaches freedom of the press under Article 11 of the Charter of Fundamental Rights of the European Union (CFR), and thus violates public policy.

In line with the Opinion of Advocate General Szpunar[2] , the Judgment of the ECJ addressed the question methodically, by analysing the Brussels Ia Regulation, Article 11 CFR, and, finally, by combining them in a joint interpretation. Firstly, the Court recalled that the public policy exception under Article 34 (1) of the Brussels Ia Regulation must be used only when enforcing a foreign judgment would result in a manifest breach of a legal norm with fundamental character within the legal order of the Union, or within the Member State of the court where enforcement is sought (the enforcing court), (*Diageo Brands,* C-681/13; *Charles Taylor*

Adjusting, C-590/21). Since the Brussels Ia Regulation constitutes implementation of EU law, the Court reminded that the enforcing court must comply with the requirements arising from the CFR. The ECJ also recalled that due to the principle of mutual trust, the enforcing court cannot verify whether the foreign court, where the judgment was adopted (the issuing court), respected fundamental rights, save in exceptional circumstances (Opinion 2/13, *Accession of the Union to the ECHR*). For example, in cases of a manifest breach of fundamental rights, the enforcing court may rely on public policy and refuse to recognise or enforce a foreign judgment.

The Court then embarked on an analysis of the content of Article 11 CFR, relying on the corresponding Article 10 of the European Convention of Human Rights. It concluded that while Article 11 CFR is not absolute, exceptions must be interpreted narrowly. Defamation victims can seek damages, but these must not be manifestly disproportionate, to avoid a chilling effect that could deter journalists from engaging in similar discussions on matters of public interest.

As a result, the ECJ ruled that when assessing whether a judgment ordering the press to pay damages for reputational harm constitutes a manifest breach of Article 11 CFR, the enforcing court must consider whether the damages are proportionate to the harm and consistent with similar cases, considering factors like the severity of the fault, the defendant's financial means, and any other penalties imposed. If this leads to the conclusion that the damages could deter the freedom of the press, the enforcing court may rely on public policy and revoke the enforcement order. The ECJ concluded that the enforcing court should limit its refusal of enforcement to the parts of the foreign judgment that involve manifestly disproportionate damages.

Mutual trust above all

This case offers crucial insights into mutual trust limitations in civil judicial cooperation instruments. The rules on recognition and enforcement laid down in the Brussels Ia Regulation are underpinned by the principle of mutual trust, which requires each Member State to trust that all other Member States respect EU law and fundamental rights included thereunder (Opinion 2/13, *Accession of the EU to the ECHR*). As a result, mutual trust prevents Member States from demanding a higher level of national protection of fundamental rights from other Member States than that provided by EU law (*Melloni,* C-399/11).

In line with this, Articles 36 and 45 (2) of the Brussels Ia Regulation prohibit national courts from reviewing the substance of a foreign judgment. This is meant to prevent the enforcing court from refusing recognition or enforcement of a foreign judgment only because the legal rules, applied by the issuing court, differ from its own. Similarly, the jurisprudence of the ECJ has clarified that the enforcing court cannot review the accuracy of the assessments of law or fact made by the issuing court (*Apostolides,* C-420/07; *Meroni,* C-559/14). Mutual trust requires the enforcing court to assume that any legal or factual errors would have been corrected by exhausting the legal remedies available in the issuing court's Member State since all Member States respect EU law.

On the other hand, Articles 34 (1) and 45 (1) of the Brussels Ia Regulation allow an enforcing court to refuse recognition or enforcement of a foreign judgment based on public policy. While Member States may define the content of their public policy, the ECJ strictly interprets this concept and reviews the boundaries within which courts may have recourse to it

(*Apostolides,* C-420/07; *Diageo Brands,* C-681/13). Accordingly, the threshold to trigger the public policy clause is quite high, and only manifest breaches of a norm that is fundamental to the legal order of the Union or the Member State concerned can justify the refusal of recognition or enforcement of a foreign judgment. This may include cases of fundamental rights violations (*Krombach,* C-7/98), The ECJ's strict approach to public policy prevents national courts from misusing this concept to bypass the ban on substantive review of foreign judgments which, in turn, safeguards mutual trust.

Substantive review in disguise?

Since only manifest infringements of the rights enshrined in the CFR can trigger the public policy clause, the ECJ spent a significant portion of its judgment on determining such breaches. In the context of Article 11 CFR, the ECJ provided several considerations for the enforcing court to assess whether the damages awarded in a defamation claim against a newspaper and a journalist may deter the freedom of the press. The most interesting item from the Court's list is that the enforcing court may consider the sums typically awarded in its jurisdiction for comparable harm. This seems to directly contradict the Court's insistence – repeated in four separate paragraphs of the judgment – that differences in the application of the law between the Member States of the enforcing and issuing courts do not justify refusing recognition of a judgment.

Moreover, despite its categorical stance against substantive review of foreign judgments, the ECJ allowed considerable leeway for the enforcing court to determine what constitutes a manifest breach of a fundamental right under the public policy clause. If the enforcing court is empowered to assess the seriousness of the fault,

the extent of the harm caused, the proportionality of the sanction in relation to the harm suffered, the defendant's financial means compared to the awarded damages, the presence of additional sanctions and, as a cherry on top, the proportionality of the damages compared to those awarded in similar defamation cases in its jurisdiction, is it then not asked to perform a substantive review of a case?

The fact that the ECJ concluded that the enforcing court should refuse enforcement only on parts of a judgment where damages are manifestly disproportionate reinforces this presumption. This means that, in so far as the awarded damages constitute a manifest breach of a fundamental right, or otherwise of a norm that is of fundamental character in the legal order of the enforcing court's Member State, the enforcing court is allowed to reshape the foreign judgment, retaining only those portions that fit its legal system. While substantive review of foreign judgments is officially excluded by the Brussels Ia Regulation to uphold mutual trust, allowing judges to construe a foreign legal decision *à la carte* effectively reintroduces substantive review through the backdoor.

Fundamental rights gain a foothold

Three key aspects show that *Real Madrid vs Le Monde* is a win for fundamental rights. Firstly, the Court clarified that mutual trust and the free circulation of judgments cannot justify compromising fundamental rights. This breaks from the *pro-integratione* approach, reflecting the ECJ's growing tendency to contemplate exceptions to mutual trust to protect fundamental rights. A similar pattern has emerged in judicial cooperation in criminal matters, where the case law on the European Arrest Warrant illustrates the ECJ's inclination to adjust the application of mutual trust by

weighing judicial cooperation obligations against the need to respect fundamental rights (*GN,* C-261/22).

Secondly, by allowing national courts to review the compatibility of foreign judgments with fundamental rights, the ECJ effectively called for a substantive review of foreign legal decisions. This opens the door for national courts to horizontally control one another when fundamental rights are at stake, complementing the vertical control on the Member States exercised by the Court.

Thirdly and lastly, by allowing enforcing courts to remove only the portions of a foreign judgment that are in manifest breach of fundamental rights, and by defining such breaches with reference to, *inter alia*, the enforcing courts' national laws, the ECJ empowered Member States to demand a higher level of national protection of fundamental rights from other Member States than that provided by EU law. Enforcing courts in Member States with stronger guarantees for specific fundamental rights than those encompassed by EU law may modify foreign judgments to match their legal system, *de facto* applying higher levels of fundamental rights protection across the EU.

As a result, fundamental rights emerge as increasingly prioritised over mutual trust and the uniformity of EU law. Not only are fundamental rights assessments under EU law progressively integrated into judicial cooperation instruments based on mutual trust, but national levels of fundamental rights protection also gain prominence. Striking a balance between safeguarding fundamental rights and the EU's traditional goal of seamless integration of different national legal orders is a delicate game, but in *Real Madrid vs Le Monde*, fundamental rights might have finally come off the bench to play.

References

1. Dean Spielmann, 'The Judicial Dialogue Between the European Court Of Justice and the European Court of Human Rights Or How to Remain Good Neighbours After the Opinion 2/13' *FRAME* (27 March 2017), https://www.fp7-frame.eu/wp-content/uploads/2017/03/ECHRCJUEdialog.BRUSSELS.final_.pdf.
2. ECJ, Advocate General Maciej Szpunar, *Real Madrid v Le Monde* (C-633/22), Opinion of 8 February 2024.

Giovanni Zaccaroni

Of Artificial Intelligence and Fundamental Rights Charters

How AI Could Bridge the EU and the Council of Europe to Strengthen Fundamental Rights

In the past five years, the Council of Europe has made significant strides to address the urgent need for a dedicated instrument that protects democracy and fundamental rights in the context of disruptive technologies and AI. Acting with remarkable speed, it has adopted the Framework Convention on Artificial Intelligence and Human Rights, Democracy, and the Rule of Law (CETS 225) – the first of its kind. Notably, the Framework Convention includes provisions specifically tailored to enable the European Union's participation. At the same time, the EU has developed its own complex legal framework around AI, striking a careful balance between technological advancement and human rights.

Together, these legal instruments hold the potential to strengthen the safeguarding of fundamental rights in Europe in an era defined by rapid technological advancements. Yet, the diversity of these legal sources also contributes to a complex and fragmented landscape. To better harmonize these frameworks and safeguard democracy and fundamental rights from technological misuse, I argue that the EU should adopt the Framework Convention, making an essential first step toward integrating the protection of fundamental rights of the EU Charter of Fundamental Rights and of the European Convention on Human Rights. Ultimately, this should help to create a common constitutional language where national apex courts retain the independence to establish their own national standards while consistently referencing both the EU legal framework, particularly the Charter, and the Framework Convention.

The possibility of the EU accession to the Framework Convention

The EU signed the Framework Convention on 5 September 2024.[1] The Framework Convention is unique in many ways (including being the first AI treaty), one of them being its relationship to the EU. The Framework Convention, which is currently signed by 7 State members of the Council of Europe as well as 2 States that are non-Members,[2] provides for the EU to join with the status of *sui generis* organisation that characterises the autonomy of the EU legal order (see on this Lenaerts[3], 2018; Nic Shuibhne[4], 2019; Lionello[5], 2024). Provided it is not challenged by EU Member States before the Court of Justice of the EU, this accession will mark the first time the EU joins a Council of Europe convention.

Many will recall the ongoing saga of the accession of the EU to the European Convention of Human Rights (ECHR), where the Court of Justice eventually determined that the 2013 Accession Agreement "is liable adversely to affect the specific characteristics of EU law and its autonomy" (para. 200, Opinion 2/13[6]). It should be noted that the Framework Convention does not mention directly the ECHR, and perhaps rightfully so. The process of EU accession to the Framework Convention and the parallel process of EU accession to the ECHR should be kept clearly apart. However, the difference lies in the fact that the Framework Convention has been designed with the EU accession in mind, including a specific norm aimed at preserving the autonomy of the EU legal order. Article 27 (2) of the Framework Convention allows the Member States to continue applying EU law rules on AI within the EU internal market, provided that it does not affect the full application of the Convention (paras.

147 and 148 of the Explanatory Report to the Framework Convention[7]).

The Council of Europe Framework Convention and the EU legal framework

The Council of Europe Framework Convention obviously does not operate in a legal vacuum. The legal framework on AI in the EU is already fairly advanced, with Regulation (EU) 2024/1689 (the AI Act) being the key piece of legislation. Additionally, AI is going to be regulated by other instruments which are currently being negotiated, including the revision of the Product Liability Directive (Proposal 2022/0302(COD)) and the Directive on Non-contractual Liability (Proposal 2022/0303(COD)). Other EU legal acts that are already in force and will inevitably impact on AI are, of course, the General Data Protection Regulation (Regulation (EU) 2016/679, GDPR), the Digital Services Act (Regulation (EU) 2022/2065, DSA), the Media Freedom Act (Regulation (EU) 2024/1083) and the Platform Workers Directive (Directive (EU) 2024/2831). The GDPR is already mentioned several times in the AI Act, while the DSA and the Media Freedom Act have specific provisions that will also be applicable to AI products that operate in the field of digital services (such as social media) or media freedom (as AI can be used to produce or fabricate news contents). The Platform Workers Directive contains rules on the algorithmic management of workers that will also be applicable to enterprises and businesses using artificial intelligence.

The AI Act, in particular, has the potential to be closely intertwined with the Framework Convention, as it was negotiated concurrently and will serve as the primary instrument for its im-

plementation in the event of the EU's accession to the Framework Convention (on the differences between the AI Act and the Framework Convention see Ziller[8]). Article 27 of the AI Act mandates a fundamental rights impact assessment for AI high risk systems that should align with the impact assessment outlined in the Framework Convention. Consequently, the Framework Convention will serve as a crucial instrument for EU judges, enabling them to interpret the impact assessment instruments in the AI Act and in other EU secondary legislation in a manner that protects democracy, fundamental rights, and the rule of law.

The Framework Convention and the Charter of Fundamental Rights of the EU

The main question is how the Framework Convention will interact with other instruments for the protection of fundamental rights in Europe, and in particular with the Charter of Fundamental Rights of the EU.

As mentioned above, Article 27 of the Framework Convention explicitly allows the application of EU rules on AI among EU Member States. The Charter is applicable to the EU institutions and to the Member States when implementing EU law (Article 51). This means that once EU law applies, the Charter is applicable as well. The Charter is almost 18 years old, considering its latest proclamation in Strasbourg in 2007, and almost 25 years old if we take into account its proclamation in Nice in 2000. Henceforth, one could argue that the Charter needs a revision to effectively interact with the Framework Convention and the EU body of secondary legislation on AI.

However, I contend that such an amendment is unnecessary. In fact, the Charter is already well-suited for the digital age. Specifically, the fundamental rights of the first generation, outlined in Titles I and II of the Charter, are applicable to situations involving artificial intelligence, as they result from the implementation of EU law or the work of EU institutions. A strictly positivist approach (the tension between EU law and legal positivism has been described masterfully by La Torre[9]) might suggest that the Charter requires amendment because the legal issues arising from AI and disruptive technologies were not considered during its drafting. Yet, the counterargument is that the Charter should be interpreted as a living instrument by both EU and national judges (Palmisano[10]).

Additionally, it is often argued that the Charter is not applied extensively by national judges in domestic disputes, and this can be justified for several reasons. Some judges may defer to higher courts that, depending on national procedural autonomy, could directly or indirectly discourage lower courts from applying primary EU law. Others, although this is becoming less common, might refrain from applying primary EU law (and the Charter) due to the complex case law governing its scope of application. Finally, much to the dismay of European law scholars, a significant number of national disputes lack a clear link with EU law.

To promote its application, the EU should continue to support the dissemination of the Charter through targeted funding and proactive initiatives that demonstrate how to effectively utilize existing fundamental rights instruments to safeguard democracy and fundamental rights in the context of AI and other disruptive technologies.[11]

Once these measures are in place, the Framework Convention is more likely to serve as a valuable tool for national judges, enabling

them to interpret other EU legal instruments – particularly the Charter – in ways that address situations where democracy, fundamental rights, and the rule of law are at stake.

Embracing complexity but avoiding overcrowding

The opportunity lies in the potential of the Framework Convention to assist judges in clarifying the application of EU law to situations where democracy and fundamental rights intersect with artificial intelligence, bridging the EU and the Council of Europe legal systems. Although the tide has been partially turned during the trialogues on the AI Act, it is difficult to overlook that the AI Regulation in the EU is primarily designed around the internal market – and perhaps rightfully so. Therefore, once EU accession to the Framework Convention is finalized, it may aid both national and EU judges in accurately interpreting and applying the EU framework on AI.

To add complexity to the picture, this delicate role played by the Framework Convention must be balanced with that of national constitutional courts, which often compete with other European courts to ensure the most appropriate degree of protection. However, the problem lies in the overcrowding of charters of rights and instruments for the protection of fundamental rights. The exponential increase in the number of instruments and levels of protection could ultimately undermine legal certainty.

One suggestion is to foster a common constitutional language of digital fundamental rights in Europe by incentivising last-instance national courts and constitutional courts to reference the Charter, as well as the Framework Convention, and other international conventions alongside national constitutional or primary law provisions. Ultimately, interpretation of national and EU legal

instruments will rest with the competent court – whether EU, international or national – but this approach might help navigate the complexities arising from the stratification of legal instruments while preserving legal certainty.

References

1. European Commission, 'Commission Signs Council of Europe Framework Convention on Artificial Intelligence', Press Release of 5 September 2024. https://digital-strategy.ec.europa.eu/en/news/commission-signs-council-europe-framework-convention-artificial-intelligence#:~:text=The%20Commission%20has%20signed%20the,on%20behalf%20of%20the%20EU.&text=The%20Convention%20is%20the%20first,AI%20regulation%20in%20the%20world..
2. Council of Europe, 'Chart of Signatures and Ratifications of Treaty 225 (Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law)', Status as of 9 December 2024. https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=225.
3. Koen Lenaerts, 'The ECHR and the CJEU: Creating Synergies in the Field of Fundamental Rights Protection. Dialogue between Judges 2018 ' (26 January 2018), https://prd-echr.coe.int/documents/d/echr/speech_20180126_lenaerts_eng.
4. Niamh Nic Shuibhne, 'What is the Autonomy of EU Law, and Why Does that Matter?' (2019) 88:1 *Nordic Journal of International Law*.
5. Luca Lionello, *L'autonomia dell'ordinamento giuridico dell'Unione Europea. Significato, portata e resistenze alla sua applicazione* (Giappichelli, 2024).
6. ECJ, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (Opinion 2/13), Opinion of 18 December 2014.
7. Council of Europe, 'Explanatory Report to the Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law' (CETS 225), 5 September 2024. https://rm.coe.int/1680afae67.
8. Jacques Ziller, 'The Council of Europe Framework Convention on Artificial Intelligence vs. the EU Regulation: Two Quite Different Legal Instruments' (2024) *CERIDAP*.
9. Massimo La Torre, 'EU Law and Legal Theory' (2024) *Verfassungsblog*.
10. Giuseppe Palmisano (ed.), *Making the Charter of Fundamental Rights a Living Instrument* (Brill | Nijhoff, 2015).
11. European Commission, 'Funding to Promote, Protect and Enforce Fundamental Rights. 2024 Annual Report on the Application of the EU Charter of Fundamental Rights' (COM(2024) 456 final), 10 October 2024.

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Enhancing Fundamental Rights Protection

Proposals for Ex Ante Review of EU Legislation (PEARL)

The EU should ensure fundamental rights' compatibility of EU legislation before its adoption. To that effect, we propose three distinct paths to improve the EU control mechanisms. At present, the EU is increasingly active in fundamental rights-sensitive matters.[1] Its recent legislative efforts in regulating artificial intelligence or combating child sexual abuse are just two examples among many initiatives with strong fundamental rights implications. Against this backdrop, it has been noted in literature that current mechanisms to ensure compliance of EU legislation with fundamental rights prove insufficient.[2] *Ex post* judicial remedies that allow EU acts to be challenged for their compliance with fundamental rights are not always satisfactory, given the limited interest of institutional players and the strict *locus standi* rules for private actors to launch an action for annulment under Article 263 (4) TFEU. Moreover, the lack of resources and ineffective representation of private actors, especially amongst vulnerable groups, further reduces access to this action. Whilst mechanisms to ensure quality control in the process leading to the adoption of EU acts do exist within the EU's institutional setting, primarily in the form of impact assessments, these mostly remain a merely formal exercise. In line with the resolution of the European Parliament,[3] we therefore suggest strengthening the *ex ante* fundamental rights review of EU legislation. Below, we explore several options to that effect, each presenting varying degrees of feasibility and effectiveness.

Improving fundamental rights protection through (inter-)institutional practices

In order to mainstream fundamental rights protection from the early stages of preparation of legislative proposals, the European Commission[4] and the Council[5] have their own "fundamental rights check-list" which is now included in the 2023 "Better regulation" toolbox n. 29[6]. However, this practice has been criticised as a sole "box-ticking" process.[7] Moreover, the toolbox currently only provides general guidelines without offering right-specific instructions.

To address these shortcomings, we first suggest improving the qualitative requirements of the toolbox, by imposing an obligation to specify the degree of negative impact on fundamental rights. Another measure would involve the adoption of right-specific toolboxes, providing further details as to when each right is likely to be breached. We also invite the EU institutions to adopt a common fundamental rights-specific check-list, to be established and regularly updated in cooperation with the FRA. Furthermore, we propose to enhance the scrutiny of Commission initiatives concerning fundamental rights by improving impact assessments. Fundamental rights impact assessments are currently not systematic. According to the Better Regulation toolbox, they are only required for Commission initiatives "likely to have significant economic, environmental or social impacts or that entail significant spending, and where the Commission has a choice of policy options".

We suggest making a fundamental rights impact assessment systematic, if necessary, by adding a mandatory separate fundamental rights section to the impact assessments. As it is rather common for EU institutions to outsource these impact assessments

to external experts, another suggestion is to establish quality standards for this outsourcing, such as requirements for expertise, independence, and other key criteria.

Once the Commission's impact assessment has been drafted, the Regulatory Scrutiny Board (RSB) is competent to review its quality. The RSB's members are however not always specialised in fundamental rights protection. Furthermore, RSB reports do not consistently review whether the impact on fundamental rights has been assessed in a satisfactory manner. A valuable adjustment is to establish a Fundamental Rights Scrutiny Board, specifically in charge of reviewing the quality of fundamental rights impact assessments. Alternatively, one section within the RSB could be dedicated to scrutinising the quality of the fundamental rights impact assessments. Ultimately, the process of appointment of the RSB, or the FRSB, ought to be revised to ensure greater independence vis-à-vis the Commission.

In order to implement the previous proposals, adjustments to existing soft law instruments could be made. However, we suggest adopting a new interinstitutional agreement on "Better Fundamental Rights Compliant Regulation", which would allow the centralization of good fundamental rights practices, shared by the European Commission, the European Parliament, and the Council. In our view, the proposals included in this first section would constitute a good – if not entirely novel – first step towards enhanced protection of fundamental rights in EU legislation, even though we recognize that this might signify an additional burden for the institutions' legislative work.

Involving FRA as an independent body ensuring external ex ante fundamental rights review

There are several good reasons to involve the FRA in *ex ante* review mechanisms. Its independent nature according to Article 16 of the FRA Regulation (Regulation (EC) No 168/2007) ensures a more neutral and objective assessment of fundamental rights compliance of draft legislation. Moreover, the internal structure and composition of the FRA guarantee a high degree of knowledge and expertise in fundamental rights matters. Furthermore, there is a diversity and plurality of perspectives represented via the FRA's composition (e.g. academic voices, national input, perspectives from the Council of Europe as well as representatives of the European Commission). This diverse composition gives the Agency legitimacy and authority, also vis-à-vis other actors in the legislative procedure. Finally, equipping FRA with new prerogatives could fill an institutional gap: whereas some Member States – such as the Netherlands, Belgium, or France – have independent institutions advising on the fundamental rights compatibility of draft legislation (i.e., the Conseil d'État/Raad van State), the EU does not yet have such an actor.

We envisage two options to involve the FRA more prominently in *ex ante* control of EU legislation, both requiring amending the FRA Regulation.

Our preferred recommendation for reinforcing the FRA's role is to grant it the right to issue public opinions on fundamental rights compliance of draft legislation on its own initiative. According to the current version of Article 4 (2) of the FRA Regulation, FRA may issue an opinion on positions taken by the institutions in the course of legislative procedures only where such a request has been

made by the respective institution. By granting it the possibility of giving advisory opinions spontaneously during the legislative process instead, the *ex ante* review becomes more comprehensive. Such rights of issuing spontaneous opinions already exist in the EU legal order. For instance, the European Economic and Social Committee may issue an opinion to the Commission, the Council, and the Parliament if it deems it appropriate, according to Article 304 (1) TFEU. The necessary modification of Article 4 (2) FRA Regulation – which would require unanimity in the Council following Article 352 (1) TFEU – could thus be modelled on this wording.

Our second suggestion goes one step further. Consulting FRA would become mandatory – instead of discretionary – for the Commission upon finalising legislative proposals. This could be achieved by modifying Art 4 (1), adding the mandatory consultation to the list of the FRA's task. Again, such a duty to ask for an external organ's opinion on draft legislation in matters of fundamental rights would not be novel, as illustrated by the Commission's existing duty to consult the European Data Protection Supervisor when a legislative proposal impacts the protection of individuals' personal data.[8] This option, however, entails a risk of excessively lengthening the legislative procedure. An answer to this problem could be to establish a one-stop-shop mechanism inside the agency which would be in charge of running a quick (limited) preliminary check in order to decide whether issuing an in-depth opinion is necessary, or whether the procedure can continue before the European Parliament and the Council. This solution would require additional resources for the FRA to properly execute this task without hindering its other functions.

Even though such advisory opinions of the FRA would not be binding, they would probably lead to a strengthening of fundamental rights compliance, especially as the Court of Justice of the

EU (CJEU) may take it into account in its reasoning when ruling on annulment actions.

Introducing an ex ante fundamental rights judicial review

A final option to enhance the protection of fundamental rights would entail establishing a procedure of *ex ante* judicial review of EU legislation by the CJEU. This option of a "pre-emptive review of norms at the CJEU" has been considered by the Parliament in its proposals for the amendment of the Treaties.[9] It also exists in some national legal systems, such as France[10] and Poland[11]. At the EU level, the introduction of such abstract pre-emptive review of draft legislation would require a major treaty reform.

In the framework of a pre-emptive fundamental rights review, the CJEU could give a binding opinion on the compatibility of an envisaged legislative act with fundamental rights at the very end of the legislative procedure. Such a mechanism could be modelled after the existing mechanism for reviewing the compatibility of envisaged international agreements with EU primary law provided for in Article 218 (11) TFEU.

Nonetheless, this might entail several risks. Setting up an *ex ante* judicial review mechanism presents an evident threat of of extending the legislative process excessively, generating abuses in the use of such procedure and overburdening the CJEU. For this reason, the use of the pre-emptive control procedure would need to be subject to strict admissibility conditions. Furthermore, introducing this procedure should be preceded by a thorough reflection on its interactions and overlaps with the annulment action provided for in Article 263 TFEU. The scopes of the two mechanisms could be separated, for instance, by limiting the grounds of *ex ante* review to fundamental rights-related matters.

Conclusion

The constantly growing body of EU secondary legislation in fundamental rights-sensitive fields calls for a serious debate on the potential refinement of *ex ante* review of EU legislative acts. Whereas the establishment of fully-fledged control mechanisms – similar to those existing in several Member States – of EU legislation would imply a major overhaul of the current institutional setting, significant adjustments may be realised via the improvement of already practiced solutions. A number of the aforementioned refinements such as those concerning the "Better regulation" toolbox or the way impact assessments are conducted constitute changes that could be introduced through the spreading of good practices. Their effective implementation, potentially coupled with an enhanced involvement of FRA in the legislative process would increase the credibility of the EU in its role as a key player in the field of fundamental rights protection.

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References

1. Elise Muir, 'The Fundamental Rights Implications of EU Legislation: Some Constitutional Challenges' (2014) 51:1 *Common Market Law Review*.
2. Elise Muir, 'Winds of Treaty Change? Taking Fundamental Rights in the EU Yet More Seriously' (2023) 30:5 *Maastricht Journal of European and Comparative Law*; Phillip Alston and Joseph H.H. Weiler, 'An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights' (2008) 9:4 *European Journal of International Law*.
3. European Parliament Resolution on Proposals of the European Parliament for the Amendment of the Treaties' (2022/2051(INL)), 22 November 2023.
4. European Commission, 'Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union' (19 October 2010), https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0573:FIN:en:PDF.
5. Council of the European Union, 'Guidelines on Methodological Steps to Be Taken to Check Fundamental Rights Compatibility at the Council Preparatory Bodies', 20 January 2015. https://data.consilium.europa.eu/doc/document/ST-5377-2015-INIT/en/pdf..
6. European Commission, '"Better Regulation" Toolbox', July 2023. https://commission.europa.eu/document/download/9c8d2189-8abd-4f29-84e9-abc843cc68e0_en?filename=BR%20toolbox%20-%20Jul%202023%20-%20FINAL.pdf.
7. Mark Dawson, *The Governance of EU Fundamental Rights* (Cambridge University Press, 2017).
8. See Art 57 Regulation (EU) 2018/1725 on the Protection of Natural Persons with Regard to the Processing of Personal Data by the Union Institutions, Bodies, Offices and Agencies and on the Free Movement of Such Data.
9. European Parliament Resolution on Proposals of the European Parliament for the Amendment of the Treaties' (2022/2051(INL)), 22 November 2023.
10. French Constitution (04 October 1958), Art 61.
11. Polish Constitution (2 April 1997).

Eleonora Di Franco

Two Courts, Two Visions

Implications of the Right to a Fair Trial for EU Accession to the ECHR

The diverging standards of protection concerning the right to a fair trial, as interpreted by the CJEU and the ECtHR, remain a critical obstacle to the EU's renewed attempt at accession to the ECHR. In this field, the two Courts seem to be drifting further apart rather than converging, leading to unresolved conflicts between the standard of fundamental rights protection and mutual trust obligations in the EU. Except in the unlikely event of a course-correction by the CJEU, this means that we are no closer to accession today than we were ten years ago, when the now-infamous Opinion 2/13[1] was handed down.

The new accession agreement: third time's the charm?

The process of EU accession to the ECHR has been a long one, thwarted so far by two negative opinions of the CJEU (firstly in Opinion 2/94[2] and subsequently in Opinion 2/13). Since 2020, a third attempt at completing the process of accession has been ongoing. This culminated with the provisional approval of a new accession agreement in March 2023.[3] Negotiations for this agreement were structured around the main concerns raised by the CJEU in Opinion 2/13, which have been extensively discussed in the last ten years (see e.g. the symposium on Verfassungsblog[4] and Peers[5]).

It is remarkable to observe how some of these concerns, however, have been given more attention than others. Even a cursory reading of the negotiation meeting reports shows that the issue of mutual trust, which had been central in Opinion 2/13, was dismissed with a quick reference and not much substance.[6] The agreement merely states that accession shall not affect the application of the principle of mutual trust, while at the same time remarking that the ECHR standard of protection of human rights must be guaranteed (Article 6 Draft Accession Agreement).[7] This is

supported by a laconic reference to an increasing convergence in the case law of the two Courts, which according to the negotiators means that mutual trust today is no longer a roadblock to accession (paras. 87-88 Explanatory Memorandum[8]).

As already discussed elsewhere, this convergence is questionable.[9] By handpicking selected cases that demonstrate convergence,[10] the negotiators attempted to present mutual trust as a non-issue. However, this does not fully reflect reality. In particular, the case law concerning the right to a fair trial (enshrined in Article 6 ECHR and correspondingly in Article 47 (2) Charter) shows a very different picture: one of increasing divergence in the required standard of protection.

Mutual trust as an obstacle for accession

In order to understand the relevance of divergence in the right to a fair trial case law for accession, it is useful to recall briefly why and how mutual trust became such an obstacle for accession in the first place. As well as introducing a duty to accede to the ECHR (Art 6 (2) TEU), the Lisbon Treaty also introduced some limitations to this accession, including the need to preserve "the specific characteristics of the Union" (Protocol No 8).

One of those characteristics is the autonomy of EU law, which finds its *raison d'être* in the principle of mutual trust. Mutual trust comprises the idea that Member States must trust that other Member States comply with EU law and consequently must recognise their legal outcomes (e.g. judicial decisions or standards) without questioning their fundamental rights' compliance. This is essential to allow the creation and maintenance of an area without internal borders – particularly for what concerns the EU's Area of Freedom,

Security, and Justice – and ensure coherency in the application of EU law.

The issue arose in Opinion 2/13 because disagreements had emerged between the CJEU and the ECtHR on the extent to which Member States should check each other's fundamental rights compliance, especially in cases related to asylum and European Arrest Warrants (EAW). The CJEU was concerned that accession would oblige Member States to check that other States observed fundamental rights in individual cases, as required by the ECtHR, rather than accept its own requirement of an automatic application of mutual trust. This was liable to upset the autonomy of EU law by putting into question the presumed sufficiency of its fundamental rights protection.

Since 2014, the case law on permissible derogations from mutual trust has developed substantially. These developments have sometimes softened the conflict between the Courts, as highlighted in the accession agreement, and sometimes exacerbated the tension. The right to a fair trial is an example of the latter: while the CJEU continues to apply a stringent test to derogate from mutual trust, the ECtHR has seemingly lowered its threshold. The coming sections explore these developments to show the remaining areas of divergence and their implication for accession.

The CJEU doubles down on the two-step test

The CJEU has developed an extensive body of case law (re)defining which exceptional circumstances might justify the suspension of mutual trust. The prototypical formulation is set out in *Aranyosi and Căldăraru* (Joined Cases C-404/15 and C-659/15 PPU). This two-step test prescribes that mutual trust may only be suspended if national courts can demonstrate that systemic deficiencies in the

issuing Member State create a real risk of violation of a fundamental right and that, in the specific case, there are substantial grounds for concluding that the individual subject to the EAW request will concretely run that risk.

In some areas, such as violations of the prohibition of inhuman and degrading treatment (Article 3 ECHR and Article 4 Charter), the CJEU has loosened the requirement of systemic deficiencies (see e.g. *C.K. and Others* (C-578/16 PPU)). This brings it in alignment with the ECtHR's duty for national courts to check for the existence of a manifest deficiency of any serious allegation of the right not be subject to inhuman or degrading treatment (see also the comparative case compilation of the negotiating group[11]). However, for most other cases, the construction of exceptions to mutual trust continues to be strictly interpreted. The CJEU's EAW cases under Article 47 (2) Charter, which have been prominent of the Court's agenda due to the rule of law backsliding in several Member States that has systematically affected judicial independence standards, demonstrate this.

The first case in point is *LM* (C-216/18 PPU). This case concerned the question of whether an individual could be surrendered when the executing authority has serious doubts whether they would receive a fair trial in the issuing state. In this case, the concerns stemmed from the lack of judicial independence resulting from changes to the Polish judicial system. Alluding to the independence of courts as the "essence of the right to a fair trial" (para. 59), the CJEU took the view that it would in principle be possible to suspend the execution of an EAW in case of a real risk of breach of an individual's Article 47 Charter. However, this would only be the case if both steps of the Aranyosi-test were discharged (for a wider critique, see the respective symposium on Verfassungsblog[12] as well as Bárd and Van Ballegooij[13]).

Since then, the CJEU has consistently confirmed the application of the two step-test in cases concerning Article 47 (2) Charter. In *Openbaar Ministerie I* (C-354/20 and C-412/20 PPU; independence of the issuing state's judiciary) and *Openbaar Ministerie II* (Joined Cases C-562/21 PPU and C-563/21 PPU; right to a tribunal established by law in the issuing state), the CJEU held that the mere existence of systemic deficiencies concerning excessive political influence in judicial appointments in a Member State is insufficient to modify existent limits to mutual trust. It confirmed that a concrete impact on the individual must be demonstrated, and that the executing authority must request supplementary information on the individual's real risk of their right to a fair trial before the non-execution of an EAW (para. 84 and subsequent). *Openbaar Ministerie II* further specifies that the burden of proof of this second step remains with the individual subject to the EAW (para. 83).

The 2023 ruling on the surrender of Catalan politicians who fled to Belgium after the independence referendum, *Puig Gordi and Others* (C-158/21), goes even further, clarifying that both steps must be proven independently of one another. In the absence of proven, reliable and specific information which demonstrates that there are systemic deficiencies in relation to Article 47 (2) Charter, a Member State cannot refuse to execute the EAW, even if there is a serious risk of a rights breach for the specific individual (para. 111). In doing so, Callewaert argues, the CJEU is essentially resuscitating the original, collective test set out in *N.S. and Others* (Joined Cases C-411/10 and C-493/10), which is hard to reconcile with the ECtHR' requirement to apply an individual test.[14]

In short, the CJEU's jurisprudence shows that contesting the presumption of mutual trust in fair trial cases remains narrow and reserved for exceptional circumstances. The evidentiary require-

ments for the second step of the test are excessively demanding and in practice almost impossible to discharge, especially considering the burden of proof is on the individual. The continued deterioration of the independence and impartiality of the judiciary in several Member States also seems at odds with the insistence of the CJEU in applying the second step of the Aranyosi-test (on this point, see also Inghelbrecht[15], Gotovuša[16] and Holmøyvik[17]). Given that the right to a fair trial is the pre-condition for the exercise of all other rights derived from EU law and that the lack of judicial independence jeopardises all fundamental rights (*ASJP* para. 59[18]) such a high threshold for disapplication of mutual trust seems also manifestly incompatible with the character and absolute nature of Article 47 (2) Charter.

The ECtHR looks ahead: an either/or approach to the two-step test?

In parallel, the ECtHR has developed its own jurisprudence, although it deals with comparatively fewer cases that directly concern mutual trust. This is due to the Bosphorus-presumption, under which the ECtHR considers the protection of fundamental rights within the EU to be, in principle, equivalent to that under the ECHR. This presumption is applicable in the absence of any margin of discretion in complying with an EU law obligation and when the full potential of the supervisory mechanisms provided for by EU law is deployed. Even here, it can still be rebutted if there are signs of manifest deficiency in the protection provided by EU law.

The application of Bosphorus jointly with the almost-automatic application of mutual trust schemes creates an evident gap in the protection of fundamental rights for individuals.

To bypass this problem, the ECtHR has consistently held that if a serious and substantiated complaint is raised before national courts indicating that the protection of an ECHR right has been manifestly deficient and this situation cannot be remedied by EU law, national courts cannot refrain from examining that complaint simply because they are applying EU law (*Avotiņš v Latvia,* para. 116[19]). Unlike under the CJEU jurisprudence, this individualised approach does not require systemic deficiencies to suspend mutual trust.

This approach has been bolstered in recent cases expounding on the impact of systemic deficiencies on the essence of Article 6 ECHR. In *Ástráðsson v Iceland*[20], the ECtHR assessed the impact of irregularities of judicial appointment procedures on the right to a tribunal established by law. Here, the Court established that fundamental procedural rules for appointing judges constitute the essence of a "tribunal established by law" as a stand-alone right (para. 227) and irregularities in appointment procedures may constitute a violation of the right to a fair trial, without assessing a concrete lack of judicial independence faced by an individual (but subject to a three-step test, discussed by Graver[21] and Leloup[22]).

A number of other cases followed which assess systemic dysfunction in judicial appointments procedures in Poland (see e.g. *Xero Flor*[23], *Advance Pharma*[24], *Reczkowicz*[25], and *Dolińska-Ficek and Ozimek*[26]). Here, the ECtHR applied the Ástráðsson-test to several reformed Polish courts, including several chambers of the Supreme Court and the National Council of the Judiciary, and found those courts not to be "tribunals established by law". Therefore, their decisions constituted a breach of Article 6 ECHR due to inherently deficient judicial appointment procedure which lacked independence from legislature and executive.

It is true that these cases do not concern mutual trust schemes directly. However, the conclusion that the mere existence of systemic deficiencies in judicial appointments is sufficient for a violation of Article 6 ECHR, without demonstrating lack of judicial independence in a concrete case, has implications for the (dis)application of mutual trust. As Graver argued in the immediate aftermath of *Ástráðsson*, these cases imply that decisions made by an unlawfully appointed judge or tribunal not established by law would constitute a violation of Article 6 ECHR.[27] In turn, authorities executing an EAW originating from one of these courts would be under an ECtHR-driven obligation to check whether the appointment of judges complied with Article 6 ECHR. In case of a negative answer, this could result in the non-execution of the EAW even in the absence of an individual assessment. In other words, systemic deficiencies alone may also be sufficient to set aside mutual trust.

In short, bad news for EU accession to the ECHR

While the new accession agreement takes the presumption on convergence in the case law of the two Courts as a starting point, differences persist in how mutual trust is to be applied when the right to a fair trial is at stake. These differences show that we are far from having reached a common understanding of the limits of mutual trust. The statement contained in Article 6 of the new agreement, laying down that mutual trust "shall not be affected by accession", does nothing to change the reality that mutual trust will be affected by accession if Member States are required to adopt an ECHR standard of fundamental rights protection in all cases (as also laid down in this chapter). In creating this illusion that mutual trust is no longer an issue, the new agreement fails to address the

autonomy concerns raised by the CJEU in Opinion 2/13. At the same time, it is not easy to imagine any alternative formulations that would "square the circle" of mutual trust while pleasing both Courts.

The simplest solution would be for the CJEU to adjust its standard of protection to that of the ECtHR and construct a wider scope for permissible derogations from mutual trust, as it already does for other rights. This would be coherent with Article 52 (3) Charter, which states that Charter rights corresponding to those in the ECHR should be applied in line with the Convention. Yet, this solution does not seem realistic given the repeated refusals to move away from the Aranyosi-test. Similarly, it would be surprising if the CJEU decided to backtrack from Opinion 2/13 and the importance of ensuring the autonomy of EU law in its next opinion.

Conversely, the ECtHR could maintain some form of Bosphorus-presumption after accession or guarantee a wide margin of appreciation to the EU Member States when they are applying mutual trust, to account for the specificities of EU law. This is an untenable position for many reasons. Not only does it defy the point of having external fundamental rights supervision by the ECtHR, but it also creates a privileged position for the EU which could lead to tensions within the Convention system vis-à-vis non-EU countries, as it would be in essence claiming a horizontal exemption from the normal ECHR standards (for further analysis, see Imamović[28]).

Given that the resolution of this problem is entirely up to the Courts and the willingness of the CJEU to compromise on the autonomy of EU law, it does not seem like there is much else that the new accession agreement could do to fix this. For now, with its third opinion pending, it is hard to imagine how the CJEU would be able to justify the new agreement as having addressed the tension arising between the ECHR standards of human rights protection

and mutual trust-based schemes without contradicting itself in Opinion 2/13.

References

1. ECJ, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (Opinion 2/13), Opinion of 18 December 2014.
2. ECJ, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* (Opinion 2/94), Opinion of 28 March 1996.
3. Council of Europe, '18th Meeting of the CDDH Ad Hoc Negotiation Group ("46+1") on the Accession of the European Union to the European Convention on Human Rights - Meeting Report' (46+1(2023)R18), 17 March 2023. https://rm.coe.int/meeting-report-18th-meeting/1680aa9807.
4. Online Symposium - Verfassungsblog, 'Union Meets Convention: How to Move On With Accession After CJEU Opinion 2/13' (2015) *Verfassungsblog*.
5. Steve Peers, 'The CJEU and the EU's Accession to the ECHR: A Clear and Present Danger to Human Rights Protection' (2014) *EU Law Analysis*.
6. Council of Europe, 'EU Accession to the ECHR ("46+1" Group)' (17 March 2023), https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/accession-of-the-european-union-to-the-european-convention-on-human-rights.
7. Council of Europe, 'Final Consolidated Version of the Draft Accession Instruments', 17 March 2023. https://rm.coe.int/final-consolidated-version-of-the-draft-accession-instruments/1680aaaecd.
8. Council of Europe, 'Final Consolidated Version of the Draft Accession Instruments', 17 March 2023. https://rm.coe.int/final-consolidated-version-of-the-draft-accession-instruments/1680aaaecd.
9. Eleonora Di Franco and Mateus Correia de Carvalho, 'Mutual Trust and EU Accession to the ECHR: Are We Over the Opinion 2/13 Hurdle?' (2024) 8:3 *European Papers - A Journal on Law and Integration*.
10. Council of Europe, '8th Meeting of the CDDH Ad Hoc Negotiation Group ("47+1") on the Accession of the European Union to the European Convention on Human Rights - Revised Compilation of Cases in the Area of Basket 3 ("The Principle of Mutual Trust Between the EU Member States")', 15 January 2021. https://rm.coe.int/revised-compilation-of-cases-in-the-area-of-basket-3-47-1-2020-4rev-en/1680a17a59.
11. Council of Europe, '8th Meeting of the CDDH Ad Hoc Negotiation Group ("47+1") on the Accession of the European Union to the European Convention on Human Rights - Revised Compilation of Cases in the Area of Basket 3 ("The Principle of Mutual Trust Between the EU Member States")', 15 January 2021. https://rm.coe.int/revised-compilation-of-cases-in-the-area-of-basket-3-47-1-2020-4rev-en/1680a17a59.

12. Online Symposium - Verfassungblog, 'The CJEU's Deficiencies Judgment' (2018) *Verfassungsblog*.

13. Petra Bárd and Wouter Van Ballegooij, 'Judicial Independence as a Precondition for Mutual Trust? The CJEU in *Minister for Justice and Equality v. LM*' (2018) 9:3 *New Journal of European Criminal Law*.

14. Johan Calleweart, 'General Test Made Autonomous for the Assessment of Risks Involved in the Execution of a EAW: Judgment of the CJEU in the Case of *Puig Gordi and Others*' (25 February 2023), https://johan-callewaert.eu/general-test-made-autonomous-for-the-assessment-of-risks-involved-in-the-execution-of-a-eaw-judgment-of-the-cjeu-in-the-case-of-puig-gordi-and-others/.

15. Febe Inghelbrecht, 'Avoiding the Elephant in the Room Once Again' (2022) *Verfassungsblog*.

16. Ena Gotovuša, 'The Principle of Mutual Trust in Judicial Cooperation: A Reality or an Unattainable Ideal in Criminal Matters Between EU Member States?' (2024) 8 *EU and Comparative Law Issues and Challenges Series (ECLIC)*.

17. Eirik Holmøyvik, 'No Surrender to Poland' (2021) *Verfassungsblog*.

18. ECJ, Opinion of Advocate General Saugmandsgaard, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* (C-64/16), Opinion of 18 May 2017.

19. ECtHR, *Avotiņš v. Latvia* (Appl. no. 17502/07), Judgment of 23 May 2016.

20. ECtHR, *Guðmundur Andri Ástráðsson v. Iceland* (Appl. no. 26374/18), Judgment of 1 December 2020.

21. Hans Petter Graver, 'A New Nail in the Coffin for the 2017 Polish Judicial Reform' (2020) *Verfassungsblog*.

22. Mathieu Leloup, '*Guðmundur Andri Ástráðsson*: The Right to a Tribunal Established by Law Expanded to the Appointment of Judges' (2020) *Strasbourg Observers*.

23. ECtHR, *Xero Flor w Polsce sp. z o.o. v. Poland* (Appl. no. 4907/18), Judgment of 7 May 2021.

24. ECtHR, *Advance Pharma sp. z o.o v. Poland* (Appl. no. 1469/20), Judgment of 3 May 2022.

25. ECtHR, *Reczkowicz v. Poland* (Appl. no. 43447/19), Judgment of 22 November 2021.

26. ECtHR, *Dolińska-Ficek and Ozimek v. Poland* (Appl. no. 49868/19), Judgment of 08 November 2021.

27. Hans Petter Graver, 'A New Nail in the Coffin for the 2017 Polish Judicial Reform' (2020) *Verfassungsblog*.

28. Šejla Imamović, 'Post-EU Accession to the ECHR: The Argument for Why the ECtHR Should Abandon the Bosphorus Doctrine' (2024) 39:1 *Utrecht Journal of International and European Law*.

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