The Fragmented Landscape of Fundamental Rights Protection in Europe

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The Role of Judicial and Non-Judicial Actors

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The fragmented nature of fundamental rights protection in Europe: An introduction

Lorenza Violini and Antonia Baraggia

The multiple crises faced by the European Union (EU) and its Member States in the last decade (the economic and refugee crisis and the recent events in Poland and Hungary, just to mention some examples) have unveiled the difficulty in finding a coherent and comprehensive system of fundamental rights protection within the EU.

Indeed, the pluralistic nature of the EU constitutional legal framework and the presence of different (and overlapping) fundamental rights protection actors in the European landscape design a complex and fragmented scenario, still in search of a coherent structure.

This collective volume aims to address the flaws and the challenging overlaps fostered by the fragmented and complex landscape of fundamental rights protection in Europe from a novel perspective: the dualism between judicial and non-judicial bodies in the European fundamental rights architecture.

Although judicial and non-judicial bodies have been extensively studied by legal scholars in all their different features and implications at national, supranational and institutional levels, little attention has been given to their mutual role and interaction for a comprehensive fundamental rights policy, encompassing both the individual dimension of rights protection and the systemic dimension of rights monitoring and advisory.

However, the recent events regarding the constitutional crisis in Poland and Hungary and the European activation of the Art. 7 provision have clearly demonstrated that the role of non-judicial actors (the Fundamental Rights Agency and the Venice Commission, specifically) is essential in order to tackle the *systemic* challenges to fundamental rights protection and to the rule of law, even within the European boundaries.

In order to address such a multifaceted and still changing scenario, the first section of the book joins the recent scholarship on the theoretical challenges and flaws of fundamental rights protection (pluralism, inflation of fundamental rights, the standard of protection), highlighting the complexity of the EU system of fundamental rights. This manifold set of relationships is investigated using the EU multilevel space as the framework of analysis, which is grounded at the same time on the national constitutions of the Member States and on the European treaties (by which we refer to TEU, TFEU, Charter of Fundamental Rights). National constitutions and European treaties recognize each other, therefore self-restraining their original sovereign power and giving rise to a composite constitution. Given this reading of the EU as a composite constitutional order, the contributions of the first part of the book will investigate how the different levels interact in fundamental rights protection.

Federico Fabbrini examines from a theoretical standpoint the European multilevel system for the protection of human rights, analyzing in comparative perspective the challenges triggered by the overlap between the constitutional orders of the Member States, of the EU and of the Council of Europe Convention on Human Rights (ECHR).

Matej Avbelj's contribution challenges the conventional narrative of fundamental rights protection, arguing against the inflationary trend of the human rights discourse in Europe. He argues in favor of a new understanding of fundamental rights protection, focused on the role of the actors committed practically to fundamental rights protection.

Finally, Oreste Pollicino addresses, critically, key issues of the European constitutional law and its future development: the role of common constitutional traditions in the era of rights codification, especially after the entry into force of the Charter of Fundamental Rights of the European Union.

After having defined the theoretical background of the project, the second and the third sections of the book address respectively the judicial and non-judicial side of fundamental rights protection in Europe.

With regard to the courts' role, the chapters explore the role of national constitutional courts acting as "common courts of EU fundamental rights", as well as the role of the ECJ and of the ECHR. In particular, the judicial branch, despite already being at the center of wide and authoritative studies, is considered, looking at the core of its problematic features: the relationship between supranational courts and national judges, the role of the latter as common judges of EU fundamental rights, the problems related to the interpretation of the Charter of Fundamental Rights by the ECJ, and the still open issue of the role of supranational courts in adjudicating social rights.

The second session opens with the contributions of Clara Rauchegger and Šejla Imamović. Rauchegger addresses the interaction between national constitutional courts and the ECJ and in particular she discusses the standards of review deployed by the Bundesverfassungsgericht with regard to the application of the EU law. The contribution is focused on the standard developed in the so called "Solange III" (decision of 15 December 2015), in which the Bundesverfassungsgericht turned the identity condition into a mechanism for the protection of human dignity in case of individual rights violation. Imamović's contribution explores the role of the ECJ as a human rights court, within the overall system of fundamental rights protection, assessing the critical relationship between the ECJ and ECHR, also in light of Opinion 2/13.

Luca Pietro Vanoni's contribution is focused on the practical consequences of the inconsistencies and the flaws of fundamental rights protection. The author debates the case of data protection and the balance between privacy and security, also looking at and comparing the US approach to the topic.

Finally, the third section discusses the role of non-judicial bodies, namely the Fundamental Rights Agency (FRA), the National Human Rights Institutions (NHRI), equality bodies and the Venice Commission, in promoting and complementing the judicial protection of fundamental rights. This analysis sheds new light on the more traditional approach to fundamental rights protection in Europe.

The analysis of the role of agencies and the Venice Commission represents really a unique contribution to the scholarship on fundamental rights protection under a constitutional law perspective.

Whereas court action has been extensively studied both at national and supranational levels, the monitoring functions carried out by agencies and international bodies, although increasingly popular at national, regional and international levels, have obtained scattered attention. Moreover, differently from courts, which have engaged in dialogue, in order to enhance the effectiveness of their actions, agencies and international bodies still act in a discrete and insular way.

The need for a theoretical study of fundamental rights protection through the action of agencies was envisaged in the last decade of the 20th century, exactly when the Venice Commission started its operations, helping countries of Eastern Europe to complete a peaceful constitutional transition. In the same years, legal scholars started to debate over the improvement of the fundamental rights protection system in Europe,

which was "lacking a comprehensive or coherent policy at internal and external level".[1]

The subsequent adoption of the Charter of Fundamental Rights, in turn, was not considered a full solution to this problem; indeed, even after the adoption of the Charter, legal scholarship reiterated the appeal to broaden the horizon of rights promotion, emphasizing that "[the] constitutional commitment to fundamental rights and their application by courts is not sufficient for their full implementation",[2] but needs to be complemented with a political and administrative strategy.

Despite the non-judicial side of fundamental rights encompassing different institutions with different scope and tasks, they share a common original ratio: the need for technical tools to assess fundamental rights violations and to support public institutions that go beyond the inherent "conflictual force" of fundamental rights in divided societies.

The final section of this collection intends to take over again the initial momentum that brought the creation of the FRA. In order to achieve this purpose, the last four contributions give an insight into the complex interaction of different non-judicial actors.

Lorenza Violini addresses the current challenges and the flaws faced by the FRA system. The author, on one hand, highlights the origins and the rationale of the creation of the FRA and, on the other, stresses the discrepancy between the original momentum and the concrete realization of it.

Katrien Meuwissen focuses on the role of the NHRIs, their main features and tasks, in particular with regard to their role beyond individual complaints handling. NHRIs are increasingly established by European governments to promote and protect human rights in an independent manner, as required by the UN Paris Principles. Beyond the handling of individual complaints, NHRIs can address structural human rights problems, prioritise gaps in national human rights implementation and prevent human rights harm from being done.

Maria Elena Gennusa's chapter deals with the role of equality bodies, established by many EU Member States as the implementation of the EU equal treatment legislation. The contribution analyzes the equality-bodies "mosaic", highlighting the main institutional features of such bodies,

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[1] P. Alston, J. Weiler, "An ever closer union in need of a human rights policy" (1998) 9 European Journal of International Law 658–723.

[2] A. von Bogdandy, J. von Bernstoff, "The EU Fundamental Rights Agency within the European and International Human Rights Architecture: The Legal Framework and Some Unsettled Issues in a New Field of Administrative Law", (2009) 46 C.M.L.R., 1036.

their networking and other activities, and their relationship with the EU institutions (particularly the Commission) on one hand, and the domestic ones on the other, with the aim of exploring the role they play in fostering equality within the European system of governance.

The section concludes with Stefania Ninatti and Simona Granata-Menghini's reflection on the development of the role of the Venice Commission in fundamental rights issues through its proper function as an independent advisory body on constitutional matters.

The recent constitutional crisis in Poland and Hungary and the EU activation of Art. 7 procedure have clearly stressed the potential of these advisory bodies, especially in time of crises and of fundamental rights violation by state actors.

Despite the system of fundamental rights protection in Europe still being fragmented and in continuous evolution and adaptation, the on-going crises Europe is facing may represent an invaluable chance for actors involved in fundamental rights protection to better define their role and their mutual relationship in an ever more refined and combined legal framework.

PART I

The theoretical complexity of the fundamental rights protection system in Europe

1. Human rights inflation in the European Union

Matej Avbelj

1. FROM YUGOSLAVIA TO THE EUROPEAN UNION AND BACK?

In my youth, I lived in a country where it was really easy to become a millionaire. Every month, sometimes even every week, new zeroes were added to the banknotes of our national currency. While I was thus, as a child, very proud to hold increasing sums of money in my hands, I did not realize that my family and I were, in fact, getting poorer as time passed. With every zero added, the then Yugoslav dinar could actually buy fewer commodities. The more money I had nominally, the lower the money's purchasing power and, hence, its real value. To live its socialist dream, for years Yugoslavia had to endure hyperinflation. Eventually, as is well known, the dream was over and the country had to wake up to a nasty reality, which everyone then and now wished was just a bad nightmare.

I wish the same does not happen to the *Rechtsgemeinschaft* of the European Union[1] in which we nowadays live together. There are, unfortunately, not few parallels that could be drawn between the then Yugoslavia and the present EU, but for the purpose of this chapter I would like to dwell on a single metaphorical one. As Yugoslavia's price for its socialist dream was monetary hyperinflation, the European Union's price for its desired polity legitimacy appears to be a human rights inflation. It has thus been submitted that:

> Greater emphasis on fundamental rights […] contributes to the consolidation of a set of distinctly European values, thereby reinforcing the sense of identity

[1] The term was coined by Walter Hallstein. For an in-depth discussion: see F.C. Mayer, 'Europa als Rechtsgemeinschaft' [2005] 8 WHI Paper, available at: http://whi-berlin.de/documents/whi-paper0805.pdf.

> and community uniting the peoples of Europe, which in turn strengthens the Union's political legitimacy. By structuring the legal and political discourse around the culture of rights, the EU institutions not only boost their credibility, simultaneously placing themselves closer to citizens, but also contribute to the creation of a European public sphere.[2]

And yet, it appears that the more the EU has formally and symbolically invested in human rights, the lower is the degree of actual human rights protection in the EU and its states. In other words, while the value of the EU human rights currency has grown in nominal terms, its real purchasing power seems to be in decline. This creates a perverse effect that cannot be only likened to my childish impression of getting richer by way of possessing nominally higher sums of money – it is even worse.

With the inflation of human rights in the EU, an individual is encouraged in her belief that she has more rights and additional fora to ensure their better protection. The expectations are thus made high. But, if and when these high expectations do not materialize in practice, in particular individual cases, the disappointment that follows is necessarily grave. When more human rights on paper lead to less protection in practice, the real value of human rights inevitably starts falling. Common people lose faith in human rights, which also and simultaneously leads to a decline of a real commitment of institutional stakeholders to them. Human rights then risk becoming a dead letter, a useful means for window-dressing and a handy ideological tool for justifying political deeds which have very little in common with the properties of a well-ordered society, whose part and parcel human rights protection necessarily is.

Against this backdrop, the chapter will argue that when it comes to human rights protection in the European Union, less might be more. The inflationary trend of investing nominally into human rights poses a risk of being self-defeating and should be stopped. Instead, human rights have to be taken seriously in practice by the competent actors on the level closest to where human rights violations actually occur. This would require theoretical, doctrinal and institutional adjustments across the European constitutional space. Some of those will be presented in the conclusion of this chapter. However, before getting there, it is first necessary to understand how and why the EU embarked on its human rights inflationary route, as well as, secondly, why exactly this inflation causes harm to the value of human rights protection.

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[2] F. Ferraro, J. Carmona, *Fundamental Rights in the European Union* (EPRS, European Parliament, 2015) 24.

2. FIVE STEPS TO HUMAN RIGHTS INFLATION IN THE EUROPEAN UNION

The development of human rights protection in the European Union has travelled through five stages. As was documented in great detail elsewhere, initially human rights protection was not part of the then Community law.[3] Due to their limited material scope and narrow economic objectives, the three European Communities were not expected to engage in human rights violations. There was thus no perceived functional demand for human rights norms to be included in the founding treaties. Moreover, the Council of Europe, tasked with protection of human rights in Europe, had been created before the emerging European Communities. Following the division of labor, this enabled the latter to focus exclusively on their economic prerogatives. Finally, after WWII, human rights were generously inscribed in the national constitutions and were considered a top priority of domestic institutions, in particular of the newly formed constitutional courts.

It was precisely this fact that initiated a transition of human rights protection to the second stage. Following the ECJ's landmark decision inaugurating the principle primacy of EU law,[4] the national law, including national constitutions densely populated with human rights provisions, in case of conflict had to give way to EU law, which contained no reference to human rights protection. Not unsurprisingly, national constitutional courts, with the German Federal Constitutional Court acting as a flag-bearer, resisted that construction of primacy and threatened to put this leading principle of EU law and the latter's overall autonomy in question:

> as long as the integration process has not progressed so far that the Community law would also embody a catalogue of fundamental rights decided on by a parliament and of settled validity which would be adequate in comparison with the catalogue of fundamental rights contained in German Constitution.[5]

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[3] J.H.H. Weiler, 'Methods of Protection: Towards a second and third generation of protection' in Cassese, Clapham, Weiler (eds.), *Human Rights and the European Community: Methods of Protection* (1991) 555.

[4] Case C-6/64, *Costa v. Enel*, [1964] ECR 585, [1964] 3 C.M.L.R. 425.

[5] See Case 2 BvG 52/71, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratstelle für Getreibe und Futtermittel*, [1974] 2 C.M.L.R. 540. German Bundesverfassungsgericht (Federal Constitutional Court) in this case, better known as *Solange I*, reserved for itself the right to determine Community

In the absence of a textual basis for EU human rights protection, the initially reluctant ECJ[6] was pressed to create the EU's own standards of human rights protection literally *ex nihilo*. In a chain of cases[7] the Court developed the unwritten standard of human rights protection in the European Union pursuant to which:

> Fundamental rights form an integral part of the general principles of law, observance of which [the Court] ensures. For that purpose the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. […] The European Convention on Human Rights (ECHR) has special significance in that respect.[8]

Naturally, as expected and required by the national constitutional courts this judge-made EU standard of human rights protection was made binding on the EU institutions, which had previously, unlike their national counterparts, not been bound by the requirements of human rights protection. However, this changed in stage three of the development of EU human rights protection. If stage two marked the invention of EU standard of human rights protection, stage three concerned the extension of its personal scope of application and the entrenchment of the material scope of application.[9]

With regard to the former, the ECJ now held that not only the EU institutions but also states are bound by the EU standard of human rights

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rule which would conflict with a guarantee of basic rights in the German Constitution inapplicable in Germany.

[6] Case C-1/58, *Stork & Co. v. High Authority of the European Coal and Steel Community*, [1959] ECR 17. In this case ECJ refused to engage in judicial review based on fundamental human rights by claiming that it was required only to ensure that the law is observed in the interpretation and application of the treaty and of rules laid down for implementation thereof, and that it was normally not required to rule on provisions of national law. There was namely a contention that High Authority by adopting its decision infringed principles of German constitutional law. It is obvious from the wording of this decision that ECJ understood the protection of human rights to be in the exclusive domain of the member states.

[7] Case C-29/69 *Stauder* [1969] ECR 419; Case C-11/70 *Internationale Handelshesellschaft* [1970] ECR 1125; Case C-4/73, *J. Nold, Kohlen-und Baustoffgrosshandlung v. Commission*, [1974] ECR 491, 507.

[8] Case C-4/73 *J. Nold, Kohlen- und Baustoffgrosshandlung v. Commission of the European Communities,* supra n. 7.

[9] See also Weiler, supra n. 3, 555.

protection when they implement EU law[10] or avail themselves of a derogation provided by the treaties.[11] This case law was subsequently apparently circumscribed by the EU Charter of Fundamental Rights, which was explicitly made binding on the member states only when they implement EU law.[12] However, the ECJ glossed over the language of the Charter and sought to entrench its previous case law, insisting that the Charter and hence the EU standards of human rights protection are binding on the member states whenever they act within the scope of EU law.[13]

The extension of personal scope of application of the EU standard of human rights protection developed in parallel with attempts of entrenching the EU's own standard of material scope of application. The ECJ has consistently claimed that the EU standard of human rights protection, while inspired by the national constitutional traditions and international human rights instruments, is ultimately its own autonomous standard.[14] In the name of unity and effectiveness of EU law, the ECJ rejected the attempts made by the national constitutional courts to claim exemptions from EU law by asserting higher national constitutional standards of human rights protection.[15] Not only did this ignite a largely academic maximum-minimum standard debate,[16] it again agitated the national constitutional courts. While in the 1970s they had, in principle, been made content with the ECJ's approach to human rights protection, the ECJ's later uncompromising stance on primacy and autonomy of EU law came across as a threat to the preservation of the national constitutional

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[10] Case C-5/88, *Wachauf v. Germany*, [1989] ECR 2609.

[11] Case C-260/89, *Elliniki Radiofonia Tileorasi – Anonimi Etairia (ERT-AE) v. Dimotiki Etairia Pliroforissis*, 1991-6 [1993] ECR I-2925.

[12] Charter 51/1.

[13] Case C-617/10, *Åkerberg Fransson*.

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

[15] Case C-399/11 *Melloni*.

[16] L.F.M. Besselink, 'Entrapped by the maximum standard: on fundamental rights, pluralism and subsidiarity in the European Union' (1998) 35 C.M.L.R. 629, 636; *contra* J.H.H. Weiler, 'Fundamental rights and fundamental boundaries: on standards and values in the protection of human rights' in Neuwahl, Rosas (eds.), *The European Union and Human Rights* 51, 52. For an overview see also M. Avbelj, 'European Court of Justice and the question of value choices', (2004) *Jean Monnet Working Paper* 06, available at: http://www.jeanmonnetprogram.org/archive/papers/04/040601.pdf.

identity *lato sensu*.[17] Combined with the fact that the EU standard of human rights protection was judge-made, unwritten, which detracted both from its legitimacy as well as from the expectations of legal certainty and predictability,[18] human rights protection in the European Union came under strain again. It was in need of further mending and improvement.

This took place in stage four that witnessed a set of treaty and institutional developments in the field of EU human rights protection. Starting in the 1970s the then Community institutions attempted to back up the ECJ's nascent human rights jurisprudence by a number of soft-law mechanisms.[19] The first legally binding reference to the EU human rights protection was inserted in the Treaty of Maastricht[20] and the Treaty of Amsterdam later explicitly proclaimed that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the member states.[21] In this way the ECJ's human rights jurisprudence received also the official member states' political endorsement in the form of the treaty change. The momentum was hence built and the road paved to the EU's own fully-fledged written human rights catalogue. A comprehensive EU Charter of Fundamental Rights was solemnly proclaimed in 2000 and made binding in 2009 as a constitutive part of the Treaty of Lisbon. Last but not least, the formal system of human rights protection ensured by the ECJ has been supplemented by an informal one, exercised by the EU Ombudsman, and the EU Fundamental Rights Agency was created in 2007 too. Its task is to offer evidence-based advice to the competent EU institutions and hence contribute to strengthening the EU as a community of values.

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[17] M. Avbelj, 'European Court of Justice and the question of value choices', (2004) *Jean Monnet Working Paper* 06, available at: http://www.jeanmonnetprogram.org/archive/papers/04/040601.pdf.

[18] Ibid.

[19] These included the 1973 Declaration on European Identity; a 1977 Joint Declaration on Fundamental Rights; a 1984 draft European Union Treaty by the European Parliament; a 1989 Resolution on Fundamental Rights and a Declaration of Fundamental Rights and Freedoms. For an overview see Ferraro, Carmona (n. 2) 6–7.

[20] Art. F.2: The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the member states, as general principles of Community law.

[21] Art. 6 TEU Amsterdam.

Eventually the EU thus fully met the *Solange* conditions set by the German Constitutional Court almost 40 years ago. Nevertheless, one brick was still missing in the EU human rights edifice: a full accession to the European Convention of Human Rights. While the latter has been unilaterally incorporated as part and parcel of EU human rights standard, the EU was not formally a member of the Convention. As a result, it was ineligible to stand either as a plaintiff or as a defendant before the ECtHR. The fifth stage of EU human rights development was thus devoted to the accession of the EU to the ECHR. As the first attempt failed due to the lack of EU competence for accession,[22] the Treaty of Lisbon closed that competence gap by mandating the Union to accede to the ECHR. However, the second accession attempt was not successful either. For the lack of sufficient guaranties for the autonomy and primacy of EU law, the ECJ found the long and carefully negotiated Accession Agreement incompatible with the Lisbon Treaty.[23] The legal and political limbo that ensued has been managed through a previously reached, provisional, formal and informal judicial dialogue conducted in the spirit of mutual recognition between the ECJ and the ECtHR.[24]

It follows from this brief overview of the development of EU human rights protection that the EU nowadays boasts of a fully-fledged mechanism for human rights protection. This draws on three sources: the ECJ's jurisprudence, pursuant to which human rights are to be protected as general principles of EU law; the EU Charter of Fundamental Rights which is the EU's written catalogue of rights; and the ECHR, which is another written catalogue of rights, so far, and pending accession to the Convention, only unilaterally borrowed from the Council of Europe. These three sources of human rights protection make up the EU material standard of human rights protection, whose personal scope encompasses not only the acts of EU institutions *lato sensu*, but also the member states whenever their actions fall within the scope of EU law.

From the perspective of the individual this means that she can formally avail herself of at least three systems of human rights protection. There is primarily the national system of human rights protection with the national constitutions and constitutional courts standing at its apex. Its purpose is to protect the individual against her own state. Secondly, there is the just described EU system of human rights protection, which

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[22] ECJ Opinion 2/94 on the Accession of the EC to the ECHR.

[23] ECJ Opinion 2/13 on the Accession of the EU to the ECHR.

[24] S. Morano-Foadi, S. Andreadakis, 'The convergence of the European legal system in the treatment of third country nationals in Europe: The ECJ and ECtHR Jurisprudence' (2011) 4 *European Journal of International Law* 1071.

endows individuals with the rights against the EU institutions, but also, at least indirectly, but sometimes by way of a national incorporation of the Charter,[25] also directly against the national institutions. Finally, as a subsidiary system of human rights protection, there is also the ECHR, which shields individuals against national authorities as well as, albeit still indirectly, against supranational authorities. In material terms the standards of human rights protection are thus national, supranational and international. Their existence is simultaneous and the material scope of application is not clearly delineated between them. While it is clear that the ECHR objective is to ensure the common minimal standard of human rights protection in Europe, which the member states cannot fall below but can always go beyond, the same principle does not underlie the relationship between the national and supranational standards.[26] Finally, as an individual can thus rely on many material sources of human rights protection that diverge in terms of their scope and intensity, she can also argue these standards in many fora. There are national ordinary courts and typically also constitutional courts. There is the Court of Justice of the European Union and finally the European Court of Human Rights (ECtHR). All are to be, at least ideally, human rights courts that ensure the highest level of protection to each and every individual.

While the EU thus undoubtedly made progress in human rights protection, this evolution has never been received with a unanimous approval. From the very beginning the motive behind the emergence of EU human rights protection has been disputed. The mainstream view has held that, like the rest of the ECJ's landmark cases, its human rights jurisprudence was intended to improve the status of an individual in EU law, to genuinely protect her rights, both against the EU institutions as well as against non-complying member states.[27]

Others, on the other hand, disputed that the Court's jurisprudential moves were essentially an attempt at its own self-aggrandizement and continuous encroachment on the residual competences of the member states.[28] Pursuant to this critical view, the individuals and their rights

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[25] Decision of the Austrian Constitutional Court U 466/11–18, U 1836/11–13, 14 March 2012, making the EU Charter of Fundamental Rights a material standard for the review of constitutionality in Austria.

[26] Avbelj supra n. 17.

[27] Weiler supra n. 3.

[28] For an early critical approach, see, R. Hjalte, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Nijhoff, Kluwer, 1986).

have been largely instrumental to the grander institutional, indeed political objectives of the integration. In other words, human rights in the EU have not been developed as a self-standing objective but as a means for the achievement of other ends. The EU human rights protection was thus introduced to save the principles of primacy and autonomy of EU law from the attacks of national courts.[29] Once this has been achieved, human rights in the Union have been relied upon to quell the concerns surrounding the rising democratic deficit. As we have seen, they have been put forward as a source of legitimacy of the Union's institutions and as a catalyst for the European identity of EU citizens.

However, even without siding with these critical views, it needs to be admitted that human rights protection in the Union, while well intended, appears to be a victim of a self-perpetuating human rights rhetoric. This professes that the more there are human rights catalogues and human rights authorities, the better the guarantees for human rights protection. Human rights protection is thus in a positive correlation with the number of human rights documents and authorities. On this account, the inflation of human rights is a positive phenomenon that ought to be welcomed. Under this scenario human rights do not play an instrumental role; they are not a means to some other end. They are an end of itself, but literally so. Human rights protection becomes about the protection of human rights: as a concept, as a rhetoric, perhaps even as an ideology, rather than the protection of individuals as subjects and bearers of human rights.

Which of these views is correct or at least more persuasive? The answer to this question depends, at least in part, on the performance of the EU human rights regime in practice. Has the described material and formal inflation of human rights protection in the European Union in fact contributed to the better human rights protection of individuals in practice? I, for one, would certainly wish that to be the case, but several pieces of empirical evidence point to the opposite.

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[29] J. Coppel, A. O'Neill, 'The European Court of Justice: Taking rights seriously?' [1992] 29 C.M.L.R. 669. For a rebuff, see, J.H.H. Weiler, Nicolas J.S. Lockhart, '"Taking rights seriously" seriously: The European Court and its fundamental rights jurisprudence – part I' [1995] 32 C.M.L.R. 51–94.

3. THREE NEGATIVE EXAMPLES OF EU HUMAN RIGHTS INFLATION IN PRACTICE

3.1 EU Accession to the European Convention on Human Rights

I will focus on three case studies in chronological order. The first concerns the EU accession to the ECHR. Considered as a human rights step of systemic importance, it has been on the agenda for years, but it still has not been completed. A lot of diplomatic, political and legal efforts have been invested in the EU's accession to the ECHR, both on the level of the Council of Europe as well as in the Union itself. A lot of energy has thus been used, so far unproductively, and even more academic ink has been spilt.[30] Yet other than serving the grander objectives of the EU legitimacy, its constitutional and systemic coherence, etc., would the accession of the EU to the ECHR bring any meaningful change in the protection of individual rights in the Union? Admittedly, this effect is hard to foresee. With regard to the ECJ's jurisprudence, nothing will change. The ECHR is already now a constituent part of the EU human rights standard. Its role is fully recognized and the ECJ contributes to its status of a living human rights document by unilaterally following the jurisprudence of the ECtHR.

The accession of the EU to the ECHR would make the Convention formally binding on the Union institutions and, in so doing, put the ECtHR formally in charge of the review of their acts. However, it can be anticipated, also following the language of the Accession Agreement, that the number of such cases would and should be limited. But even if the number was huge, that would be of little avail to the individuals and their rights. The fact is the ECtHR has long been a victim of its own success. The Court has for years drawn many more applications than it has been able to rule upon. In illustration, in 2011, which was probably the most critical year in the Court's history, more than 151 000 cases were pending before the Court, while the latter managed to decide roughly more than

[30] See, for example, T. Lock, 'EU Accession to the ECHR: Implications for the Judicial Review in Strasbourg', (2010) 35 *European Law Review* 777; C. Eckes, 'EU Accession to the ECHR: Between Autonomy and Adaptation', (2013) 76 *Modern Law Review* 254–285; P. Craig, 'EU Accession to the ECHR: Competence, Procedure and Substance' (2013) 36 *Fordham International Law Journal* 1114; D. Halberstam, '"It's the autonomy, stupid!" A Modest Defense of Opinion 2/13 on EU Accession to ECHR, and the Way Forward' (2015) 16 *German Law Journal* 105.

1500 cases on the merits.[31] The Court was thus forced to start a reform process, which was principally aimed at reducing its huge backlog and managing its docket.[32] The effects can be already identified. The number of cases which reach the judicial formation of the Court has decreased drastically[33] thanks to the Court's "high filtering capacity".[34] In 2015 around 73 000 applications were lodged at the Court's registry. Most of them have been dismissed on procedural grounds, of which more than 40 percent have never reached the judges as they failed to meet the administrative requirements. Only 5 percent of the cases have been decided on the merits, and among those only a third were decided in individuals' favor.[35] This means that among thousands of applications that reach the ECtHR every year, only 5 percent are admitted by the Court and the requested remedy is awarded in fewer than 2 percent of the cases.

From the individual's perspective, the ECtHR thus provides only a very distant opportunity for human rights protection. By trying to clear its backlog, this opportunity is inevitably subject to further decline as the Court will have to strengthen its filtering capacity. As a result, the gap between the individuals' human rights expectations, deriving from and being fueled by the culture of rights, and their actual capacity to have their rights defended is growing. If we add to this that the ECtHR's judicial authority has been severely undermined by the states' reluctance to enforce judgments rendered against them,[36] so that even those individuals who have been awarded a remedy ultimately cannot enjoy it, the ECtHR outlook for human rights protection of individuals is even gloomier. Against this backdrop, it is hard to argue persuasively about the crucial, systemic importance of the accession of the EU to the ECHR. For if the latter cannot be expected to contribute meaningfully to human rights protection, then the accession to ECHR is either not necessary or is

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[31] ECHR Statistics 2015, http://www.echr.coe.int/Documents/Stats_analysis_2015_ENG.pdf.

[32] Steering Committee for Human Rights, report on the longer-term future of the system of the European Convention on Human Rights, http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/CDDH(2015)R84_Addendum%20I_EN-Final.pdf.

[33] In 2011 there were still 151 600 cases pending before the judicial formation, in 2015 this number fell to 64 850 applications.

[34] DH-GDR (2015) R9 Addendum, 33.

[35] http://www.echr.coe.int/Documents/Stats_violation_2015_ENG.pdf.

[36] K. de Vries, 'Parliamentary Assembly of Council of Europe: Report: Implementation of judgments of the European Court of Human Rights', http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?fileid=22005.

motivated by other reasons not directly related to individuals' human rights protection.

What has been just described reveals not just the question-begging capacity of the ECtHR to contribute meaningfully to human rights protection of individuals in the EU, but it might be extended to the capacity of the judiciary as a whole. This conclusion, if merited, is all the more disquieting, as the ECtHR's limited or exceptional role in protecting human rights is to a certain extent built into its very nature. After all, the ECtHR system of judicial protection is envisaged as a subsidiary system, which requires that human rights of individuals are first effectively and comprehensively protected on the domestic level. The ECtHR can thus be seized only after all the national remedies have been exhausted.

For a satisfactory functioning of the subsidiary system of judicial protection, the role of the national courts is crucial. However, the very avalanche of cases that the ECtHR is swamped with proves that they have been unable to fulfill this task. The national ordinary courts in many European countries do not conceive of themselves obliged to protect human rights, since they are part of the *materia constitutionis* and hence within the jurisdictional domain of the constitutional courts. But the latter, like the ECtHR, have been similarly overburdened by individual applications and are also working hard on the filtering of cases. This involves shifting the docket problem on the reluctant ordinary courts. In short, while we are indeed deeply permeated by the culture of rights and can pride ourselves with their inflation, when the rights are violated it is hard to find an appropriate remedy in a reasonable time or sometimes even at all. It is submitted that the EU's ambition to join the ECHR has neglected and/or downplayed this point.

3.2 EU Inflation of Human Rights in Transnational Context

The second example which testifies to the negative effects of human rights inflation in the European Union is the notorious *Kadi* case. As a result of the UN mandated anti-terrorist targeted sanctions in 2001, Mr. Kadi's funds in the UK were frozen. This had been done by a judicially confirmed violation of his rights to a fair hearing, of the right to respect for property, and of the right to effective judicial review.[37] All these rights have been formally protected in the legal orders of the member states, the European Union as well as in the ECHR. There was thus an inflation of

[37] Case T-315/01, para. 136.

human rights across legal orders, but they were out of Mr. Kadi's reach for almost a decade. The Member State refrained from protecting Mr. Kadi's rights since they were violated by an EU legal act for whose review it was incompetent. The EU judiciary too initially refused to grant him judicial protection, since the EU act was implementing the allegedly supreme Security Council Resolution. The latter, of course, could neither be challenged within the UN system, as there is no UN court which is competent to rule on the individual complaints. Finally, as the ECJ had finally moved to protect Mr. Kadi's rights by invalidating the contested EU regulation for its violation of EU human rights, the European Commission appealed the ruling and postponed the effectuation of the remedy further. The case was ultimately solved on political rather than legal grounds, proving the merely formal or at best ancillary status of human rights in the EU legal order.[38]

Once again we were faced with a situation in which a huge discrepancy between the EU human rights on the books and those in practice could be observed. This time around the discrepancy has been made patent by the involvement of a transnational context. The EU multilevel system of judicial protection, rife with human rights, appeared hapless when actual human rights of a concrete individual were affected through the mechanisms of international law.[39] The scandalous handling of Mr. Kadi's case is detrimental for EU human rights protection under any scenario quoted above. It demonstrates that human rights are anything but a genuine tool for the protection of an individual. This, necessarily, detracts from the desired and required legitimating power of rights. Mr. Kadi's example engenders exactly the opposite effect. As such it, finally, undermines human rights protection on their own premises. Proliferation of human rights on the books, which is not matched with their better protection in practice, necessarily results in the decline of their value. It is yet another negative example of an inflation of human rights in the European Union.

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[38] See M. Avbelj, F. Fontanelli, G. Martinico (eds.), *Kadi on Trial: A Multifaceted Analysis of the Kadi Trial* (Routledge, 2014); M. Avbelj, D. Roth-Isigkeit, 'The UN, the EU, and the Kadi case: A new appeal for genuine institutional cooperation' (2016) 17 *German Law Journal* 153.

[39] See M. Avbelj, 'The case of Mr Kadi and the modern concept of law' in Avbelj, Fontanelli, Martinico (eds.), *Kadi on Trial: A Multifaceted Analysis of the Kadi Trial* (Routledge, 2014).

3.3 The Inflation of Human Rights and Constitutional Backsliding in the Member State

The last example, which contributes to the conclusion that human rights in the European Union are not better protected despite their omnipresence, is the most recent political phenomenon of constitutional backsliding in several EU member states. The roots of the phenomenon date back to Hungary, where in 2010 Victor Orban achieved a landslide victory which left him with a constitutional majority in the Hungarian parliament.[40] This enabled him to embark on the constitutional reconstruction of the Hungarian state whose symbolical outcome ought to be an illiberal democracy.[41] The latter, however, merely acts as a smokescreen for the total political capture of the state by a single political party in practice. In this overt hijacking of the state, human rights have again been relegated to a secondary status. They are relied upon depending on their utility, to the extent they do not stand in the way of the identified political objectives. Shall they come across as an obstacle, they will be circumvented, twisted to fit the political goals or even infringed upon.

While Hungary was first to set the process of constitutional backsliding in motion, it has since not remained an isolated case. The process, which has various guises, has in a more or less overt manner spread beyond Hungary to other member states in Central Europe.[42] A trend of

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[40] J.-W. Müller, 'The Hungarian tragedy', (2011) *Dissent* 5–10; G. Halmai, K.L. Scheppele (eds.), 'Opinion on Hungary's New Constitutional Order: Amicus Brief for the Venice Commission on the Transitional Provisions of the Fundamental Law and the Key Cardinal Laws', available at: http://lapa.princeton.edu/hosteddocs/hungary/Amicus_Cardinal_Laws_final.pdf; K. L. Scheppele, 'The Unconstitutional Constitution', *New York Times* (2012), available at: http://krugman.blogs.nytimes.com/2012/01/02/the-unconstitutional-constitution/; see also a vibrant debate at Verfassungsblog: Hungary – Taking Action; available at: http://www.verfassungsblog.de/en/category/focus/hungary-taking-action/; B. Bugarič, 'Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge', [2014] LSE *'Europe in Question' Discussion Paper Series* 79: A. von Bogdandy, P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area* (Hart, 2014).

[41] J.-W. Müller, 'The problem with "illiberal democracy"', https://www.project-syndicate.org/commentary/the-problem-with-illiberal-democracy-by-jan-werner-mueller-2016-01?barrier=accesspaylog.

[42] B. Bugarič, 'A crisis of constitutional democracy in Post-Communist Europe: "Lands-in-between" democracy and authoritarianism' (2015) 13 *International Journal of Constitutional Law* 219–245; T. Koncewicz, 'Farewell to the Polish Constitutional Court' (2016) VerfBlog http://verfassungsblog.de/farewell-to-the-polish-constitutional-court/; M. Avbelj, 'Failed Democracy: The Slovenian

reversing the at least formally adhered to constitutional standards of rule of law, democracy and human rights protection across several, mostly new EU member states, can be now identified. Despite the fact that the Union and its member states are all founded on respect for human rights and fundamental freedoms and that the latter is one of the key accession conditions that every candidate country has to meet, the political forces in several member states seized the opportunity for authoritarian entrenchment of their political power and a wholesale undermining of human rights of their more or less immediate political opponents. The EU itself has contributed to this trend by not reacting to the Hungarian developments in a timely manner.

Here too a discrepancy between the human rights on the books and those in practice can be identified. The member states have pushed for a strengthened protection of human rights in the European Union. This has, in return, invested in its own human rights build-up as well as in ensuring that new member states are fully compliant with human rights as they are to be protected in the European constitutional space *lato sensu*. Ten years after the big-bang enlargement and the accession of the post-communist member states to the EU, where human rights figured not just as a part of an emancipatory narrative but as a part of very tangible political battles for self-determination, these very same human rights find themselves under a serious threat of a systemic violation. Neither the domestic opposition forces, human rights actors, nor the European Union have so far been able to counter this trend successfully.

The inaction of the European Union has proven to be especially disappointing. The Treaty of Lisbon provides an explicit legal basis for sanctioning the member states' systemic violation of the EU fundamental values. The mechanisms in place are admittedly subject to burdensome procedural conditions and the sanctioning measures they can result in will not necessarily lead to a wholesale human rights improvement in the rouged member states.[43] Nevertheless, a very cautious approach of the EU institutions to their actual use demonstrates an apparent lack of a political will to take human rights seriously even when rights, the rule of law and democracy are under a systemic threat.[44]

Patria Case – (Non)Law in Context', http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2462613.

[43] M. Avbelj, 'Pluralism and Systemic Defiance in the European Union' in A. Jakab, D. Kochenov (eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (OUP, 2017).

[44] After its hands-free approach to Hungary, the European Commission has addressed the situation in Poland more seriously by starting the rule of law

As a result, the real value of human rights in the Union is again undermined. More and normatively denser human rights regimes in the European constitutional space have not brought about an improvement in actual human rights protection on the ground. To the contrary, the inflation of human rights, the fact that more rights have led to less protection, might have been one of the factors that have facilitated the overall decline in the rule of law in the European Union. If it turns out, paradoxically, that it is easy to get away from human rights violations despite the formal increase in their protection, this will only provide incentives for further violations, ultimately contributing to an inflationary spiral of human rights protection in the Union in which more rights on paper means fewer rights in practice.

4. LOOKING FOR SOLUTIONS TO TAKE THE RIGHTS SERIOUSLY

Provided that the above analysis of the negative consequences of human rights inflation in the European Union strikes you as persuasive, what are the possible ways of improving the situation? There are several of them, but the most important one should take place on the level of an overall attitude to human rights protection in the European Union. A switch in the perspective might be merited. The enthusiasm over multilevel system of human rights protection and related proliferation of human rights standards and institutions ought to be curbed and replaced by a more balanced approach, following which the quality of human rights protection in practice should be preferred to the quantity of human rights protection. The belief that more human rights regimes and instruments lead to better human rights protection should be superseded by an approach to human rights according to which less is more. This "less" could mean fewer human rights regimes, fewer human rights instruments or at least a different and much more precise division of labor among them. The latter conclusion certainly applies to the institutions that ought to be in charge of human rights protection.

Concretely this should lead to strengthening of the principle of subsidiarity in the field of human rights protection. Human rights should be protected as closely as possible to the actual site of their violation. This rationale is already at play in a relationship between states and

framework mechanism, which has so far nevertheless remained without any tangible implications in practice. See http://ec.europa.eu/justice/effective-justice/rule-of-law/index_en.htm.

ECHR, but much less between the EU and its member states. There the EU continues to have inroads into the national systems of human rights protection, not for their own sake, but to protect its constitutive principles. To prevent the competence creep and false impressions that the rights of the individuals against their member states can be in general protected on the supranational, rather than on the national level, a more circumscribed construction of the Charter's application would be welcome. At the moment all national acts, in principle, fall under the jurisdictional scope of the EU institutions, but these lack the capacity for their actual protection.

Also, human rights protection should cease to be viewed as almost an exclusive prerogative of a judicial branch. Most violations of human rights by the public authorities occur in a variety of administrative procedures. The phase of adjudication in the courts is already an ex-post, curative means for remedying the violations that have already occurred. To have fewer cases on the courts and simultaneously rights better protected, more should be invested into the preventive mechanisms. The culture of rights, to stick with a popular term, should be thus spread to the administrative branch *lato sensu*. Authorities of all kinds, public, hybrid and private, which exercise public powers against individuals, should develop awareness that it is them and primarily them, not the courts, which are bound by human rights protection.

Achieving this goal is, of course, anything but easy, given that in many countries not even the so-called ordinary courts, let alone the administrative organs, see themselves as called upon to protect human rights. Pursuant to statutory positivism and the entrenched traditionally limited role of the ordinary courts, human rights as constitutional standards are still seen as belonging almost exclusively to the domain of constitutional courts. However, the latter cannot shoulder the entire burden themselves. A better division of labor – shifting more responsibility for human rights protection to lower instances, closer to the actual life-world human rights occurrences – is therefore not just preferable, it is necessary.

This is not to say that the courts at the peak of judicial hierarchy have no room for improvement. To the contrary, they should strive to decide more cases on the merits, rather than just quashing the rulings of lower instances and ordering a retrial. But more importantly, they should make their case law more predictable, offering more guidance on what it means to have a particular human right. This could be achieved by less ad-hoc balancing of human rights, which produces case-specific solutions only, without painting a broader picture of what the core and the limits of a particular human right are. In more theoretical terms, but consequently also in practice, the European balancing approach could move closer to

the American more categorical protection of human rights. This would, at least to a certain extent, entail the change in the prevalent conception of human rights. The dominant European conception of rights as principles could be replaced by a conception of rights as rules.[45]

Of course, opting for an alternative conception of rights, when rights as principles are so much entrenched in the European constitutional thought, is anything but likely. Nevertheless, some steps in the direction of strengthening legal certainty, legal predictability and the awareness of what one has in virtue of having a human right could be gradually made in the judicial practice. Human rights, irrespective of their exact conception, are extremely important individual and collective goods that have an intrinsic value for the rights bearing individuals and their respective polities. This intrinsic value can be lost if human rights are not taken seriously and especially when they are subject to inflation. Furthermore, the intrinsic value is not just reduced to zero, but turned into a loss for the individuals, whose rights are not meaningfully protected in practice; and for the polity, whose respective legitimacy will be in decline due to the inadequate human rights protection. The European Union and its citizens run precisely the described risk. It must be averted and this chapter's aim has been to contribute to that.

[45] R. Alexy, *A Theory of Constitutional Rights* (OUP, 2002); see also M. Kumm, 'Constitutional rights as principles: On the structure and domain of constitutional justice. A review essay on a theory of constitutional rights by Robert Alexy', (2004) 2 *International Journal of Constitutional Law* 574.

2. Fundamental rights and federalism in the European Union and the United States: Challenges, transformations and normative questions

Federico Fabbrini

1. INTRODUCTION

The federal system of the United States (US) has long served as a comparative model to the study of the European multilevel system for the protection of fundamental rights.[1] Fundamental rights in Europe are simultaneously protected in the constitutions of the states, in the law of the European Union (EU), as well as in the European Convention on Human Rights (ECHR). Moreover, each of these overlapping layers of human rights norms is policed by institutions – particularly courts – which are interconnected but independent. This state of affairs presents analogies with the situation in the US. In the American system, rights are codified in state constitutions as well as in the federal Bill of Rights. Moreover, two connected but separate orders of jurisdictions – state and federal courts – are empowered to enforce the rights enshrined in their respective basic documents. Both the European multilevel human rights architecture and the US federal system, therefore, are structurally characterized by the existence of a plurality of sources and institutions for the

[1] See Jochen Frowein, Stephen Schulhofer and Martin Shapiro, 'The Protection of Fundamental Rights as a Vehicle of Integration', in Mauro Cappelletti, Monica Seccombe and Joseph HH Weiler (eds), *Integration Through Law: Europe and the American Federal Experience. Volume 1, Book 3* (de Gruyter 1986) 231.

protection of fundamental rights, as well as by a plurality of conceptions of what rights ought to be.[2]

Despite these similarities, however, the European and American human rights systems are the result of different constitutional experiences and have evolved over a diverse historical time-span. So, what is the added value of comparing the European multilevel human rights architecture with the US federal rights' regime? Why is it helpful to compare and contrast these two cases? The benefits of a comparative approach in the field of constitutional law are many.[3] But this chapter claims that a comparative study of fundamental rights and federalism in the EU and the US is useful for at least three specific reasons. First, the comparison makes possible the elaboration of an analytical model of the *challenges* that arise in multilayered human rights systems, thus explaining the tensions that are at play both in the European multilevel and the US federal regimes. Second, it helps to contextualize the *transformations* that occur on an ongoing basis in multilayered regimes, shedding light on the cycles of centralization and decentralization that shape both the US and the EU human rights systems. Third, the comparison permits us to question some theoretical assumptions which are ingrained in the European law scholarship about federalism and rights, thus allowing for a deeper conversation on the *normative questions* which are triggered by the need to reconcile states' identity and citizens' equality in a union of states and citizens.

The purpose of this chapter is to discuss these three ways of comparing the European multilevel and the US federal systems. Section 2 explains how a comparison between the EU and the US can provide essential insights to develop a model which conceptualizes the challenges at play in a multilayered regime. Here I identify what I consider the key constitutional dynamics emerging from the overlap between state and suprastate human rights norms, and I provide some evidence to exemplify them. Section 3, then, uses the comparison between the EU and the US systems for the protection of rights to emphasize the dynamic (rather than static) nature of multilayered human rights regimes and to challenge the view that federal regimes tend to develop in a linear fashion. Based on the analysis of the US historical experience I underline how cycles

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[2] See Federico Fabbrini, *Fundamental Rights in Europe: Challenges and Transformations in Comparative Perspective* (OUP 2014).

[3] See Vicki Jackson, 'Narrative of Federalism: Of Continuities and Comparative Constitutional Experience' (2001) 51 Duke Law Journal 223 (explaining the advantages of comparative law).

of centralization – where fundamental rights standards have been mostly set at the center, promoting uniformity – have co-existed with cycles of decentralization – where states have been returned crucial competences, fostering diversity – and I suggest that, in fact, the same kind of dynamics seems to be at play also in the EU: as of late, multiple evidence exist showing that the EU political and judicial institutions have allowed more centrifugal movements in the field of human rights.

Finally, Section 4 draws from the comparison between federalism and rights in the EU and the US to tackle also a normative view which is deeply engrained in European scholarship, namely the idea that EU norms and institutions for the protection of fundamental rights ought *as a rule* to defer to the human rights regime of the member states. As I claim, on the contrary, in multilayered regimes, the decision whether standards of human rights protection should be set at state or suprastate level always requires a normative discussion about the identity and equality arguments at stake: while federalism does not provide a 'default' (much less a 'correct') answer to conflicts between state and suprastate human rights standards, these conflicts are just the epiphany of a deeper clash between arguments based on identity and arguments based on equality. Hence, it belongs to the state defenders to justify the case for a state-based solution of the challenge on the basis of identity arguments, as much as it belongs to the suprastate defenders to make the case for a suprastate-based solution to the same challenge on the basis of equality arguments. And these arguments ought to be weighted in every specific case – rather than in abstract terms – and without any presumption in favor of a state-based solution.

2. CHALLENGES

A first advantage of the comparison between the EU and the US human rights systems is that it makes possible the identification of the constitutional challenges at play in a multilayered regime. The US and the EU are characterized by the overlap between several layers of human rights norms and institutions. Contrary to unitary systems where a single standard of human rights protection applies throughout the polity, in multilevel and federal systems a plurality of standards can exist for the protection of the same given fundamental right (x). Diversity may occur horizontally, in the sense that the same fundamental right (x) can be more protected in some vanguard member states rather than in others, which

are lagging behind.[4] But diversity also occurs vertically, in the sense that the suprastate standard for a fundamental right (x) may be more or less protective than the state standard for the same right. When state standards for the protection of a fundamental right (x) differ horizontally, it is impossible for the suprastate standard of protection for that same right to simultaneously equate all state standards. While there may be exceptional cases where state and suprastate standards of protection for a given right (x) correspond in all layers of government, the room for horizontal/vertical divergence in the protection of rights inevitably creates tensions in the functioning of multilayered regimes.

The comparison between the EU and the US helps to analytically classify the synchronic challenges that arise in a multilayered system by clarifying the nature of the suprastate standard. In several circumstances the standard set at the suprastate level, and binding on the states, operates as a *floor* of protection – that is as a minimum: as long as states respect that floor, they are free to go above it extending an even more advanced protection to that right. This state of affairs has been recurrently acknowledged by the US Supreme Court,[5] and is formally recognized also by Article 53 ECHR as well as Article 53 of the EU Charter of Fundamental Rights (EUCFR). However, in other circumstances the emergence of a suprastate standard of protection may also work as a *ceiling* of protection – that is as a maximum: in this situation, states can provide less protection to the specific right (x) than the federal maximum, but cannot go beyond it. Although the potential of suprastate law to work as a ceiling of human rights protection is not codified in the EU,

[4] Ann Althouse, 'Vanguard States and Laggard States: Federalism and Constitutional Rights' (2004) 152 University of Pennsylvania Law Review 1745. See also *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis J. dissenting, defining as "one of the happy incidents of the federal system [the fact] that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.")

[5] William Brennan, 'State Constitutions and the Protection of Individual Rights' (1977) 90 Harvard Law Review 489, 495. See also *Prunyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980) (US Supreme Court affirming "the authority of the State to exercise its police power [and] its sovereign right to adopt in its own Constitution individual liberties more expansive that those conferred by the Federal Constitution.")

the point is acknowledged in the US:[6] in fact, this is an inevitable consequence of the fact that fundamental rights are often in a balance, so that the protection of a given right (z), or a public interest (y) may imply the restriction of another conflicting right (x).[7]

In two judgments both delivered on 26 February 2013, the EU Court of Justice (ECJ) confirmed that EU human rights standards may sometimes serve as floor and sometimes as ceiling of protection. In *Fransson*,[8] the ECJ ruled that the principle of *ne bis in idem* enshrined in the EUCFR did not prohibit state authorities from imposing criminal sanctions for tax fraud against an individual who had already been subject to administrative sanction for the same offence. However, the ECJ left open to the referring court the possibility to apply a more protective standard. In *Melloni*,[9] instead, the ECJ ruled that Spain could not apply a more protective national standard in the field of due process rights with the effect of impeding the execution of a European arrest warrant issued by Italy because in the latter the convicted person had been tried in absentia – a practice considered in breach of fair trial under Spanish constitutional law. As the ECJ pointed out, the EU standard of protection in this case trumped the more advanced state standard, since otherwise the interest in the effective and uniform application of the European arrest warrant legislation throughout the EU would have been impaired.

Based on these comparative insights, in my book I have endeavored to design a model that explains the constitutional tensions at play in a multilayered human rights regime.[10] The graph below seeks to offer in a graphical form a snapshot of the synchronic dynamics that arise from the overlap between diverging human rights standards. The graph isolates a hypothetical right (x) reporting along the vertical axis the degree of protection that (x) receives at state level, aligning states from the vanguard (C = most protective of right x) to the laggard (A = least

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[6] On the difficulty of detecting federal floors and federal ceilings in US law see William Buzbee, 'Asymmetrical Regulation: Risk, Preemption and the Floor/Ceiling Distinction' (2007) 82 NYU Law Review 1547.

[7] See also Lorenzo Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the United States* (OUP 2007) (explaining how conflicts of rights are unavoidable and "adjudication in these matters necessarily imposes sacrifices and losses on the part of one or both right-holders, or the state as the party to the conflict.")

[8] Case C-617/10, *Åkerberg Fransson* [2013].

[9] Case C-399/11, *Stefano Melloni* [2013].

[10] See Fabbrini (n. 2).

protective of right x). The horizontal line indicates the standard of protection of right (x) set by suprastate law – which is here drawn for practical reasons midway between A and C. However, the left side of the graph identifies a scenario when suprastate law works as a floor of protection, whereas the right side of the graph reflects the scenario at play when suprastate law works as a ceiling of protection. This illuminates the two key challenges emerging in a multilevel system of human rights protection: what I call the challenge of inconsistency and the challenge of ineffectiveness.

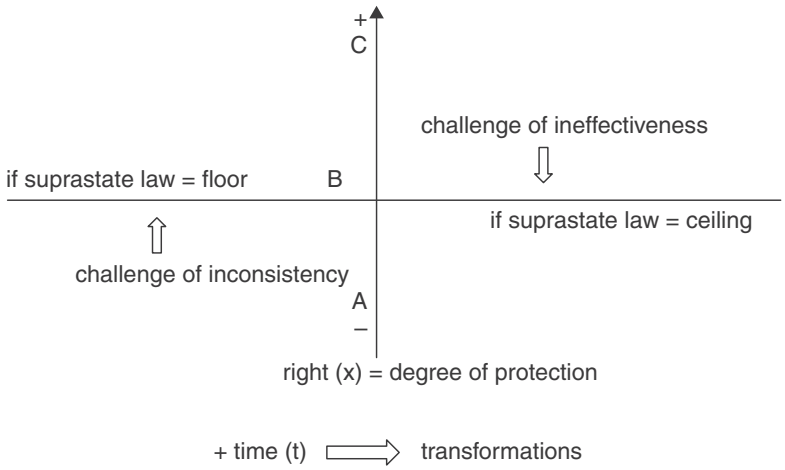

Figure 2.1 Model of challenges and transformations

A *challenge of inconsistency* emerges in the case of interaction between different state laws and suprastate law, when the latter operates as a floor of protection. The left side of the graph depicts a situation where a given right (x) is protected to different degrees at the state level, and where suprastate law comes into play by setting a floor of protection. By introducing a minimum standard for the protection of a specific human right, suprastate law challenges the less protective standards existing in some laggard states and pressures them to enhance their levels of protection at least up to the degree provided by suprastate law. At the same time, by drawing only a minimum standard of protection, suprastate law leaves free other vanguard states to go above the suprastate floor by providing more advanced protection to the right de quo.

A *challenge of ineffectiveness* emerges instead in the case of interaction between different state laws and suprastate law, when the latter

operates as a ceiling of protection. The right side of the graph depicts a situation where a given right (x) is protected to different degrees at the state level, and where suprastate law comes into play by setting a ceiling of protection. By setting up a maximum standard for the protection of a specific human right, suprastate law challenges the effectiveness of the more protective standards existing in the vanguard states, pressuring them towards the bottom-level protection provided by suprastate law. At the same time, as long as it defines a maximum standard of protection, suprastate law leaves unaffected the other pre-existing state standards that do not exceed the suprastate ceiling.

As the graph points out, the implications of a multilayered human rights regime are complex. In the European multilevel human rights architecture, as well as in the US federal system, the emergence of a suprastate standard may have relative and variable consequences. When suprastate law sets a new *minimum* standard for a specific fundamental right (x), this may create significant tensions in states which do not meet this standard – while leaving simultaneously wholly untouched the domestic human rights situation in states which are already more advanced in the protection of that right. Conversely, when suprastate law introduces a new *maximum* standard for a specific right (x) this may produce problems for states which are above that ceiling, while at the same time the situation in states which have a lower standard for the protection is left unchanged.

This state of affairs explains, for instance, why in the European context a judgment like *Viking* (setting a maximum protection for the right to strike in transnational labor-management disputes)[11] have caused outrage in those EU states which had a higher standard of protection, while being well received in those which had a lower standard; or why several abortion rulings by the European Court of Human Rights (ECtHR) extending women's reproductive rights[12] have put under pressure EU states which fell below the suprastate minimum, while being hardly

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[11] Case C-438/05, *Viking* [2007], ECR I-10779.

[12] *A., B. & C. v. Ireland*, ECHR [2010], Application No. 25579/05 (GC). See also *Open Door Counselling v. Ireland,* ECHR [1992], Applications Nos. 14234/88 & 14235/88 (Plenary) (Irish prohibition to circulate information about abortion providers in other EU countries to be in violation of ECHR); *Tysiac v. Poland*, ECHR [2007], Application No. 5410/03 (Poland to be in violation of Article 8 ECHR for not having provided an effective legal framework by which a woman suffering from a serious health disease could obtain an abortion as provided by the Polish legislation).

noticed in those already providing discrete protection to a woman's right to choose. Similarly, this is why in the US, for instance, rage against *Roe* (recognizing a constitutional right to abortion)[13] has come from laggard states – not from vanguard ones;[14] or why action by the federal law enforcement authorities in the post-9/11 world has been resisted by states which abided by municipal standards of due process and fair trial higher than the federal one.[15]

3. TRANSFORMATIONS

A second benefit of comparing the EU and the US human rights system derives from the attention being placed on the dynamic nature of multilayered human rights regimes. While the previous section has explored the synchronic dynamics at play in the European multilevel architecture and the US federal system, exposing the challenges of ineffectiveness and inconsistencies, multilayered human rights regimes are also subject to important diachronic transformations. As a comparative approach emphasizes, because of the multiple sites in which, and authorities by which, rights are protected, multilayered regimes are subject to continuous readjustment and adaptation. The result of this is that challenges such as ineffectiveness and inconsistencies may evolve over time: while old challenges may be overcome – due to pressure towards convergence, or harmonization – others may actually worsen, and still new challenges may emerge. In other words, when examining the development of a multilayered human rights regime, it is crucial to feature the time factor (t) and thus avoid considering the system as a static construct – rather a dynamic one.

The history of the protection of fundamental rights in the US federal system and the European multilevel architecture, in fact, highlights how multilayered regimes are subject to continuous diachronic transformations. As is well known, the US system was originally endowed with

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[13] *Roe v. Wade*, 410 U.S. 113 (1973).

[14] See Robert Post and Reva Sigel, 'Roe Rage: Democratic Constitutionalism and Backlash' (2007) Harvard Civil Rights – Civil Liberties Law Review 373.

[15] William J. Stuntz, 'Terrorism, Federalism and Police Misconducts' (2001–2002) 25 Harvard Journal of Law and Public Policy 665.

two strictly separate mechanisms for the protection of fundamental rights.[16] Every state in the federation had its own constitutional text codifying fundamental rights and entrusting the state's judiciary to enforce it. A federal Bill of Rights – drafted in 1791 and attached as the first ten amendments to the 1787 Constitution – then bound the action of the federal government in its spheres of competence. The federal Bill of Rights was, however, inapplicable in the states[17] – some of which, in fact, even allowed slavery[18] – although state courts sometimes referred to it as a source of inspiration for general principles.[19]

After the Civil War, a major constitutional transformation occurred in the US with the adoption in 1868 of a new amendment to the federal Constitution.[20] The Fourteenth Amendment extended the application of the federal Bill of Rights to the states, empowering the federal government to ascertain and remedy possible violations by the states of the fundamental rights recognized in the federal Constitution.[21] The so-called "incorporation" of the federal standards of fundamental rights protection within the legal orders of the states was, however, a gradual and contested process[22] that took more than a century and was mainly

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[16] Jean Yarbrough, 'Federalism and Rights in the American Founding', in Ellis Katz and Alan Tarr (eds), *Federalism and Rights* (Rowman and Littlefield 1996) 57.

[17] See the decision of the US Supreme Court in *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833) and Akhil Reed Amar, 'Of Sovereignty and Federalism' (1987) 96 Yale Law Journal 1425.

[18] On the problem of slavery and for an account of the infamous decision of the US Supreme Court in *Dred Scott v. Sandford*, 19 U.S. (How.) 393 (1857) see Paul Finkelman, *Dred Scott v. Sandford: A Brief History with Documents* (Bedford/St.Martin's 1997).

[19] See Jason Mazzone, 'The Bill of Rights in the Early State Courts' (2008) 92 Minnesota Law Review 1.

[20] Compare William Nelson, *The Fourteenth Amendment: From Political Principle to Judicial Doctrine* (Harvard UP 1988) with Bruce Ackerman, *We the People, Volume 2: Transformations* (Harvard UP 1998).

[21] See John Paul Stevens, 'The Bill of Rights: A Century of Progress' in Geoffrey Stone et al. (eds), *The Bill of Rights in the Modern State* (Chicago UP 1992) 13.

[22] Three major doctrines of incorporation faced each other in the last century. A first one – the so-called doctrine of selective incorporation (mainly advocated by US Supreme Court Justice Brennan) – favored the incorporation in the law of the states (only) of specific rights contained in the federal Bill of Rights. A second one – the so-called doctrine of total incorporation (mainly advocated by US Supreme Court Justice Black) – supported the incorporation of all the federal Bill of Rights in the law of the states. A third doctrine (advocate by US Supreme

achieved, after World War II (WWII), through the jurisprudence of the US Supreme Court.[23] Congress then played a crucial role in enforcing the mandate of the Reconstruction Amendments.[24] Nonetheless, despite the increasing role played by the federal standard of protection of fundamental rights, the states maintained their own systems for the protection of fundamental rights,[25] and in a number of areas these are still the main sources of protection of human rights.

Relevant historical transformations have also occurred in Europe. While the role of supranational institutions in the protection of fundamental rights also vis-à-vis the states were arguably more central since the beginning of the European integration project[26] – especially considering that the EU and the ECHR were the result of the post-WWII effort to restore peace and human rights in a war-devastated continent[27] – it is only after a series of historical events that suprastate human rights norms and institutions have acquired a more central function within the European multilevel human rights system. In particular, the end of the Cold

Court Justice Frankfurter), finally, was essentially against the incorporation of the federal Bill of Rights, except in extraordinary circumstances for reasons of fundamental fairness. On this debate cf. Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (Yale UP 2000) 218 ff.

[23] See Richard Cortner, *The Supreme Court and the Second Bill of Rights: The Fourteenth Amendment and the Incorporation of Civil Liberties* (Wisconsin UP 1981).

[24] On the role of Congress in enforcing the mandate of the Fourteenth Amendment through appropriate legislation, see Steven Calabresi and Nicolas Stabile, 'On Section 5 of the Fourteenth Amendment' (2009) Pennsylvania Journal of Constitutional Law 1431.

[25] See John Dinan, 'State Constitutions and American Political Development', in Michael Burgess and Alan Tarr (eds), *Constitutional Dynamics in Federal Systems: Subnational Perspectives* (McGill-Queen's UP 2012) 43.

[26] See Gráinne de Búrca, 'The Road Not Taken: The European Union as a Global Human Rights Actor' (2011) 105 American Journal of International Law 649 (explaining that human rights represented a fundamental pillar of the project for the establishment of a European Political Community discussed during 1952–1953 but that, after the rejection of the European Defence Community Treaty by France in 1954, the founding member states decided to pursue a path toward integration focused on economic issues, in which human rights were not specifically considered).

[27] See Andrew Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54 International Organization 217.

War and the enlargement of the EU to the east triggered a strengthening of the supranational machinery of human rights protection[28] – as witnessed in the EU by the acknowledgment of human rights in the 1992 Maastricht Treaty and the 1993 Copenhagen European Council conclusions, and then by the adoption of the EU Charter of Fundamental Rights in 2000;[29] and in the ECHR by the enactment of Protocol No. 8 in 1998, transforming the ECtHR into a last instance court for human rights.[30]

These institutional developments, in turn, have fostered a judicial expansion in the case law of the ECJ and the ECtHR – as evidenced by key rulings delivered by the European courts during the last two decades on crucial issues such as human dignity,[31] non-discriminations on the basis of gender[32] or sexual orientation,[33] freedom of expression,[34] social

[28] See Wojciech Sadurski, 'Adding Bite to Bark: The Story of Article 7, E.U. Enlargement, and Jörg Haider' (2010) 16 Columbia Journal of European Law 385.

[29] See Armin von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights at the Core of the European Union' (2000) 37 Common Market Law Review 1307.

[30] See Alec Stone Sweet, 'Sur la constitutionnalisation de la Convention européenne des droits de l'homme' (2009) 80 Revue trimestrielle des droits de l'homme 923.

[31] Cfr. Case C-36/2002, *Omega* [2004] ECR I-9609 (recognizing a fundamental right to dignity as a justification for the limitation of the freedom of movement of goods).

[32] Cfr. e.g. Case C-285/1998, *Kreil* [2000] ECR I-69 (declaring incompatible with EU law a provision of the German Constitution prohibiting women from serving in the military); Case C-46/07, *Commission v. Italy* [2008] ECR I-151 (declaring incompatible with EU law a provision of the Italian social security legislation setting up a different retirement age for men and women).

[33] Cfr. e.g. Case C-117/2001, *K.B.* [2004] ECR (recognizing the right of transsexuals); Case C-423/2004, *Richards* [2006] ECR II-3585 (idem).

[34] Cfr. e.g. Case C-112/2000, *Schmidberger* [2003] ECR I-5659 (recognizing the right to freedom of expression as a justification for the restriction of the freedom of movement); Case C-380/05, *Centro Europa 7* [2008] ECR I-349 (declaring incompatible with EU law a provision of the Italian media law which did not ensure pluralism in the broadcasting system).

rights,[35] political entitlements,[36] as well as privacy and data protection.[37] In the area of national security, in particular, the ECJ has turned out to be a bastion for the protection of human rights – despite the pressures emerging from the EU political branches of government for judicial deference and accommodation of counter-terrorism concerns[38] – and the ECtHR has largely followed suit.[39]

The transformations occurring in multilayered human rights regimes have, however, prompted academic concerns about harmonization. Notably, European scholars looking at the US experience have interpreted the rise in importance of the federal standard of protection as a linear development toward centralization, and have vowed to prevent the same evolution in the EU. Nevertheless, precisely a comparison between the European and the American human rights system helps to dispel this concern. While the federal standard of protection has certainly grown in importance in the US, the US states remained – and still are largely today – relevant loci in which the protection of fundamental rights takes place.[40] In fact, cycles of centralization – in which the federal standards has progressively displaced states' standards of protection, favoring

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[35] Cfr. e.g. Case C-184/99, *Grzelczyk* [2001] ECR I-6193 (recognizing the right of migrant students to obtain social security benefits in the host state); Case C-438/05, *Viking* [2007] ECR I-10779 (recognizing a fundamental right to strike).

[36] Cfr. e.g. Case C-300/04, *Eman & Sevinger (Aruba)* [2006] ECR I-8055 (holding a Dutch law restricting the franchise to the EU Parliament of Dutch citizens residing in Aruba incompatible with EU law).

[37] Cfr. e.g. Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland* [2014] (striking down the EU Data Retention Directive of 2006, which allowed the retention of meta-data for national security purposes) as in violation of the right to privacy) and C-362/14 *Schrems* [2015] (striking down the European Commission Decision on Safe Harbour, which allowed the free flow of data from the EU to the US, because the level of privacy protection in the US is not adequate and thus fails to respect EU data protection laws).

[38] Cfr. Joined Cases C-402/05 P and C-415/05 P, *Kadi & Al Barakaat International Foundation v. EU Council and Commission* [2008] ECR I-6351 (on due process in the field of counter-terrorism). Now see also Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission, Council and United Kingdom v. Kadi* [2013] nyr.

[39] Cfr. *Nada v. Switzerland*, ECHR [2012] Application No. 10593/08 (GC) and *Al Jedda v. United Kingdom*, ECHR [2011] Application No. 27021/08 (GC).

[40] See Alan Tarr, 'State Supreme Courts in American Federalism', in Hans Peter Schneider et al. (eds), *Judge Made Federalism? The Role of Courts in Federal Systems* (Nomos Verlag 2009) 192.

harmonization – have historically co-existed in the US with cycles of decentralization, when the federal institutions stepped back and returned to the states the autonomy to set for themselves the relevant human rights norms applying with regard to a plurality of fundamental rights.

The most explicit – and more striking (from a European perspective)[41] – example of this state of affairs is offered by the case of the death penalty and the right to life: The decision whether to ban the death penalty was traditionally a matter for the states.[42] In 1972, the US Supreme Court held that capital punishment was unconstitutional, arguing that the imposition of the death penalty violated the prohibition on "cruel and unusual punishment" of the federal Bill of Rights, and it imposed a moratorium on state capital punishments.[43] In 1976, however, the power to set the relevant right to life standard was handed back to the states, most of which have now reinstated the death sentence.[44] Other examples, however, abound. In the field of social rights, the New Deal federalized the standards of protection of the right to strike – notably through the Wagner Act.[45] Yet, ever since, political efforts have worked to weaken these mechanisms of centralized enforcement.[46] Similarly, in the area of voting rights, while the two Reconstructions placed important limits on the ability of the states to regulate the ballot box,[47] recent US Supreme Court case law has contentiously struck down the centrepiece of the federal Voting Rights Act returning to the states the power to set conditions on voting.[48]

Similar centralizing and decentralizing cycles are at play in the EU. Contrary to the concern voiced by many, a dynamic analysis of the European multilevel architecture for the protection of fundamental rights does not reveal a clear linear tendency toward more supranational human

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[41] See Article 2 ECHR (right to life) and Article 1, 13th additional Protocol to the ECHR (total abolition of the death penalty); Article 2 EUCFR (right to life and prohibition of the death penalty) as well as Andrea Pugiotto, 'L'abolizione costituzionale della pena di morte e le sue conseguenze ordinamentali' [2011] Quaderni Costituzionali 573.

[42] See David Garland, *Peculiar Institution: America's Death Penalty in the Age of Abolition* (Harvard UP 2010).

[43] *Furman v. Georgia*, 408 U.S. 238 (1972).

[44] *Gregg v. Georgia*, 428 U.S. 153 (1976).

[45] National Labor Relations Act (Wagner Act), 49 Stat. 452 (1937), codified as amended at 29 U.S.C. paras 151–169.

[46] See Cass Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More than Ever* (Basic Books 2004).

[47] See Alexander Keyssar, *The Right to Vote* (Basic Books 2000).

[48] *Shelby County v. Holder*, 570 U.S. (2013) at 10 (of the slip opinion).

rights protection. Recent developments, rather, point toward the opposite. In a number of crucial judgments in the field of civil and political rights, both the ECJ and the ECtHR have turned down the invitation to harmonize states' human rights standards, refusing for example to recognize the existence of a ECHR right to same sex marriage,[49] or an EU right for felons to vote.[50] At the same time, the broader political climate in Europe has exposed increasing divergence in the interpretation of key principles such as democracy and the rule of law – notably as a result of the rise of illiberal democracies in Hungary and Poland[51] – and so far the EU institutions have arguably reacted to this only with a light touch.[52] All in all, therefore, after a few decades of integration, with clear centralizing dynamics, the European human rights system may be today facing an opposite movement, with pressure pulling toward greater heterogeneity in the protection of fundamental right at the level of the member states.

4. NORMATIVE QUESTIONS

A third way in which a comparison between the European and American human rights systems is helpful occurs at the normative level. The previous sections have explained that multilayered human rights regimes such as the European architecture and the US federal system face constitutional challenges – due to the tensions between state and supra-state human rights standards – and are subject to constant transformations. However, a different question is how multilayered human rights regimes ought to develop de jure condendo: How should these regimes solve conflicts between state and suprastate human rights standards? The normative question of how a multilayered human rights regime should work is different from the empirical question of how they do work. But theoretical reflection on this issue in the US can inform, and question, normative assumptions in the EU. In this regard, in fact, it is interesting to notice a difference between American and European scholarship on

[49] See *Oliari*, ECHR [2015], Application Nos. 18766/11 and 36030/11.
[50] Case C-650/13, *Delvigne* ECLI:EU:C:2015:648.
[51] See Kim Lane Scheppele, 'Hungary and the End of Politics', The Nation, 6 May 2014.
[52] See Dimitry Kochenov and Laurent Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) 11 European Constitutional Law Review 512.

federalism and fundamental rights. While American scholars tend to be more pragmatic – debating the normative values of centralization and decentralization in every specific case[53] – Europeans tend to embrace more categorical rules. In particular, a common refrain in European scholarship is that supranational authorities entrusted with the protection of fundamental rights should defer as much as possible to the states.

This academic view is articulated in different forms and degrees. At one extreme, scholars trained in the tradition of sovereignty complain of supranational engagement with the states' human rights practice as an interference in a reserved domain of national self-governing communities[54] – and are usually able to find a supportive audience in (some) national high courts.[55] But also those scholars who reject the sovereigntist idea and rather endorse a pluralist view, which praises the interaction between multiple national and supranational human rights sources, often envision only a limited role for suprastate human rights norms.[56] As argued by Aida Torres Pérez, "the ECJ should defer to state courts for interpreting fundamental rights."[57]

In my view, however, the debate about federalism and rights in Europe tends to rush too quickly toward a final normative conclusion about which level of government ought to be entitled to take a decision on the protection of fundamental rights. However, this underestimates the importance of federalism as a framework in which deeper normative discussions about rights and obligations take place. In fact behind the federal debate whether the states – or rather the Union – should set the relevant fundamental rights norms lays a more profound clash between arguments in favor of identity and arguments in favor of equality. Leaving decisions on human rights to the states maximizes the capacity of local authorities to express their *identity*. Shifting decisions on human rights to the Union, instead, promotes transnational *equality*. Yet both identity and equality are important normative values worth protecting. If it is plausible to claim that states as unities of self-governance ought to be able to make decisions about rights, it is equally plausible to maintain

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[53] See Ellis Katz and Allan Tarr, 'Introduction', in Ellis Katz and Alan Tarr (eds), *Federalism and Rights* (Rowman and Littlefield 1996).

[54] See Daniel Halberstam and Christoph Möllers, 'The German Constitutional Court says "Ja zu Deutschland!"' (2009) 10 German Law Journal 1241.

[55] See BVerfGE 123, 267 (2009) (*Lissabon Urteil*) par 334.

[56] Nico Krisch, 'The Open Architecture of European Human Rights Law' (2008) 71 Modern Law Review 184.

[57] Aida Torres Pérez, *Conflicts of Rights in the European Union* (OUP 2009) 92.

that human rights ought to be secured as much as possible to all individuals living in the same territory without discrimination. Because of this, it is not possible to define a categorical order between identity and equality which systematically privileges one by default on the other.

In other words, recurrent scholarly claims that European supranational authorities should defer to national human rights determination stands on the – unjustified – assumption that identity ought to prevail by default on equality. But what is the normative justification for claiming this? Why for example should the EU defer to the policy choices taken by the Orban government in Hungary? Why should the ECHR leave to Italy to decide whether homosexual couples are entitled to marry or not? Or, ceteris paribus, why should EU law or US law defer to state decisions on access to the ballot box? These are difficult questions and I don't have a clear answer to them. But my point is that the answers to these questions are less straightforward than what many think – a conclusion which is only strengthened by a comparison between federalism and rights in the EU and the US. Federalism offers an ideal framework in which debates about identity and equality are articulated, but it does not exonerate us for making the case for why identity or equality should prevail *in every specific case*. Deference toward the state – as much as action by the suprastate authorities – cannot be a default position. It rather has to be the result of a reasoned and motivated assessment, justified on the basis of deeper normative values which are relevant in the specific circumstance.

My argument is thus that normative questions in a federal, multilevel human rights regime defy easy, one-size-fits-all solutions, and rather require constant engagement and public justification. There may be good reasons why in some cases suprastate authorities should step back and defer to the states, but there may be other circumstances when instead the justification for deferring to the states are razor-thin and where action by suprastate authorities is therefore normatively very appropriate. Federalism frames this normative discussion by establishing the principle of supremacy. This principle, which is an indispensable feature of unions of states,[58] imposes acceptance by all interested parties on a decision, once taken.[59] But federalism does not prevent old decisions from being

[58] See further Federico Fabbrini, 'After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality Between the Member States' (2015) 16 German Law Journal 1003.

[59] Joseph HH Weiler, 'Prologue: Global and Pluralist Constitutionalism – Some Doubts', in Gráinne de Búrca and Joseph HH Weiler (eds), *The Worlds of European Constitutionalism* (CUP 2011) 8.

reconsidered overtime, when the balance between conflicting normative claims may change. In fact, binding decisions of how to reconcile concerns for identity with concerns for equality are – as all human decisions – subject to adaptation and can be reconsidered when necessary.[60] Identity may prevail on some occasions, while equality triumphs in others – the bottom line being that federalism only provides the broader framework to debate human rights in the US and Europe, but does not exonerate debaters from engaging with the deeper normative questions at play.

[60] Judith Resnik, 'Federalism(s)' Forms and Norms: Contesting Rights, De-Essentializing Jurisdictional Divides, and Temporizing Accommodations' in James Flemming and Jacob Levy (eds), *Nomos LV: Federalism and Subsidiarity* (NYU Press 2014).

3. Common constitutional traditions in the age of the European bill(s) of rights: Chronicle of a (somewhat prematurely) death foretold

Oreste Pollicino

1. INTRODUCTION

What is the role of common constitutional traditions today in the era of the codification of rights in Europe? Or indeed, following the entry into force of the Charter of Fundamental Rights of the European Union (hereafter the Charter), does it still make sense at all to consider such a notion to be relevant or even useful? This paper will attempt to provide a response to these questions.

The questions appear to be legitimate given that, according to many commentators, one of the most obvious consequences of the codification of rights in Europe has been a progressive marginalisation, or even the side-lining, of common constitutional traditions, and more importantly of the general principles of EU law. In fact, such traditions and principles have ended up playing an exclusively supplementary and ancillary role vis-à-vis a Charter with constitutional status and binding force, which it is argued has (finally) vested the Union with self-sufficiency in the area of fundamental rights, thereby significantly reducing (if not eliminating) the need to have recourse both to traditions and to principles. In attempting to articulate a complete response to these initial questions it will be necessary to focus – albeit, inevitably, without the necessary detailed discussion – on the role played by common constitutional traditions in the European integration process prior to the codification of fundamental rights in Europe.

2. THE PAST

At the initial foundational stage, domestic constitutional law (which was not necessarily common) constituted a privileged source of inspiration for the nascent European Economic Community. It is sufficient to note that it was precisely in the Conference of Messina, between 1 and 3 June 1955, that the Italian delegation proposed an instrument that could replicate also on supranational level the connection between the ordinary courts and the constitutional court which characterised (although at that time still only on paper) the system of constitutional justice by interlocutory reference in Italy. As is apparent from the preparatory works, this was the genesis for the institutional channel for dialogue between the Luxembourg Court and the national courts: the preliminary reference mechanism. On the other hand, the principles of proportionality and legal certainty were incorporated into European law from German law, whilst the action for annulment is French in origin. Similarly, the Court of Justice of European Union (hereafter CJEU) also drew on French law to flesh out the concept of general principles of Community law. This concept is rooted in the development by the Conseil d'Etat of a system of case law for French administrative law over the last two centuries. However, this notion became essential when, given the absence of a specific list of rights in the 1958 Constitution – the only mention being contained in the Preamble to the Constitution, which refers to the 1789 Declaration of the Rights of Man and the Citizen – the Conseil d'Etat decided that this gap could be filled by stipulating as a source of law with the aim of protecting fundamental rights precisely the general principles of law created through the case law referred to above. During an initial stage, the indifference or impermeability[1] of Community law towards the constitutional laws of the Member States *de facto* enabled the common

[1] This was the case in particular for the years immediately before and after 1960. It is sufficient to note in this regard that when a question concerning respect for the constitutional tradition of a Member State arose for the first time in 1958, albeit with reference to the ECSC Treaty, the Court ruled that it could not conclude that there had been any violation of the fundamental principles of the German *Grundgesetz* by Community acts (or even give consideration to such a possibility). This actually has a paradoxical element if one tries to reflect on the fact that, the first time the CJEU actually put on its constitutional court hat, it did so in order to negate the relevance on Community level of the constitutional traditions of a Member State. The reference is obviously to the CJEU judgment of 4 February 1959 in Case C-1/58, *Stork v. High Authority*.

constitutional traditions to play an essential role within a quantitative analysis of comparative law by the CJEU.

In addition, it is no coincidence that this period of European impermeability to domestic constitutional law corresponds to the period within the history of the process of European integration in which the Luxembourg Court showed itself to be more inclined to make specific and detailed reference to the legal systems of the Member States, which it would no longer do in future. Let us consider for example the reasoning in the *Algera*[2] case of 1957 in which, after an introduction that referred to the possibility of annulling unlawful administrative acts, and having specified that it was a problem "which is familiar in the case-law and learned writing of all the countries of the Community, but for the solution of which the Treaty does not contain any rules", the Court concluded that "unless the Court is to deny justice it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case-law of the member countries".

Whereas prior to *Costa*[3] it was in fact highly risky for the Luxembourg Court to make any reference to the existence of a requirement for Community institutions to adopt acts that did not violate the provisions of the national constitutions, given the absence of any binding rules between the legal systems, it was on the other hand quite indifferent to indicating clearly the common constitutional factor underpinning a certain legal system within the reasons for its judgments. On the contrary, once it has established the principle of the supremacy of Community law over the laws (including the constitutional laws) of the Member States, it became essential for those courts to become suddenly interested in the protection of fundamental rights and to demonstrate the common domestic structure for such protection, even where, as a matter of fact, no such structure existed, or quite simply it was not common to the legal systems of the Member States.

This reversal of argumentative priorities within the case law of the CJEU had two immediate consequences in terms of the role played by the common constitutional traditions within the case law of the Court prior to the "act of codification".

In the first place, a detailed comparative law analysis of the constitutional experiences of the Member States would from that moment onwards risk working against the new argumentative priorities of the Court as it was likely to make it clear that there was no such common

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[2] Cases C-7/56, C-3/57 and C-7/57, *Algera Dineke* [1957].
[3] Case C-6/64, *Costa v. Enel* [1964].

experience (on the domestic constitutional level), whereas the Luxembourg Court desperately needed to make it apparent. It is thus no coincidence that the Court would no longer base its rulings, except on extremely rare occasions, on the almost arithmetic foundational characteristic of its reasoning in *Algera*. One of the few other occasions in which such an operation was carried out was in *Hauer,* thus clearly stressing (as if there were any need) once again the limited influence, in terms of the theory of sources of law, played by the common constitutional traditions in the development of the jurisprudential conception of fundamental rights.

Secondly, and on a more general level, far from playing a role on the formal normative level of sources of law in a strict sense, as this would have resulted in the national constitutional provisions becoming *de facto* binding within balancing operations carried out by the ECJ (which would *de facto* have allowed each individual Member State to be able to influence Community law by altering its own provisions on fundamental rights, thereby enabling them to encroach significantly on the autonomy of the Community legal order), during the golden age of Community case law the common constitutional traditions turned into a fundamental rhetorical instrument with persuasive effect on the Member States (and first and foremost on their respective constitutional courts) in seeking to establish an apparent continuity, which however often concealed a substantive discontinuity, between the judicial activism of the ECJ and the common constitutional foundation on which it asserted that this activity was based.

In other words, a message in a bottle from Luxembourg with a precise addressee – the constitutional courts of the Member States – stated along the following lines: far from being exclusively economically oriented, the Community legal order has a high degree of homogeneity with the legal systems of the Member States in the area of constitutional language, especially that of rights, as rooted within common constitutional traditions.

Even greater emphasis was placed on this reassuring and almost consolatory arrangement of the common constitutional traditions in the wake of the entry into force of the Maastricht Treaty, due to the attendant deep-seated change in the balance between the respective legal systems. Here it is sufficient to refer to the fact that, due to the "shocks" between legal systems resulting from the entry into force of the Maastricht Treaty, in line with the resurgent aggressiveness of the Member States (which, *inter alia*, with the codification of the principle of subsidiarity, re-appropriated their role as the masters of the treaties), the relevant scenario changed radically, thereby inevitably affecting the stance of the

CJEU, which has always been aware of the political and institutional context within which it operates. The tolerance enthusiastically "displayed" by the Member States throughout the first decades of the process of European integration started to falter, and it fell to the Court to find a way of "reigniting" the flame of "voluntary obedience" which was visibly (and worryingly) fading.

Within this new context, the common constitutional traditions effectively became an intra-systemic thermometer as being capable of providing precious support to the constitutional tolerance of Member States towards the strategy of *the majoritarian activism approach*, which characterised the interpretative leitmotif of Community case law during this period.

This was an argumentative technique according to which, out of the various alternatives that could potentially be pursued in order to resolve "constitutional" questions, the ECJ leant towards which appeared to be most broadly endorsed within the national legal systems, having a shared constitutional framework and thus being capable of attracting the highest level of consent within a majority of Member States.

3. THE PRESENT

In the light of the summary sketched out above pointing out first what the common constitutional traditions never were authentic sources of law throughout that (long) period of European integration prior to the launch of the process of codifying fundamental rights, and second the role which they actually played prior to the adoption of the Charter (that is an instrument with a strong rhetorical element, offering support for constitutional tolerance), it is now necessary to consider how the act of codification of fundamental rights in Europe has affected the status quo.

A distinction may be drawn between two phases. The first starts with the proclamation of the Charter in 2001 through to its achievement of binding status following the entry into force of the Lisbon Treaty in 2009, whilst the second starts on the day after the Charter entered into force and is obviously still ongoing.

As regards the first period, which may be defined as one of "limbo", just one observation will be made.

During this period common constitutional traditions (CCT), and even more so the general principles of Community law, which, as mentioned above, in some sense constitute the supranational sublimation of those traditions, provided the interpretative leverage which the Court of Justice was able to exploit (as mentioned above ambivalently) in order to take

steps forward which placed the constitutional tolerance of the Member States under serious strain.

This occurred for example in the *Mangold* judgment in 2005[4] which, in a creative interpretation (bordering even on manipulation) of the general principle of non-discrimination on the grounds of age, allowed the CJEU to assert its direct applicability, and consequently to expand immensely the scope of EU law, in relation moreover to a directive of which the deadline for transposing had not yet expired. The very strongly-worded editorial in which Roman Herzog commented on the Court's decision in the heat of the moment was emblematic on the one hand of the inseparable connection between the application of the general principle and the identification of the common constitutional traditions underlying that principle, and on the other hand of the reaction which the Court's interpretative activism, which was based precisely on that connection, engendered amongst the Member States. The title of the editorial was eloquent in its simplicity: "Stop the European Court of Justice".[5]

According to the former President of the Convention responsible for drafting the Charter of Fundamental Rights, the reference in this case to the principle of non-discrimination on the grounds of age as a general principle of EU law should have been reflected by, if not drawn inspiration from, the common constitutional traditions of the Member States. By contrast, Herzog continued, "this 'general principle of community law' was a fabrication. In only two of the then 25 Member States – namely Finland and Portugal – is there any reference to a ban on age discrimination, and in not one international treaty is there any mention at all of there being such a ban, contrary to the terse allegation of the ECJ. Consequently, it is not difficult to see why the ECJ dispensed with any degree of specification or any proof of its allegation. To put it bluntly, with this construction which the ECJ more or less pulled out of a hat, they were acting not as part of the judicial power but as the legislature".[6]

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[4] Case C-144/04, *Mangold* [2005].

[5] R. Herzog and L. Gerken, 'Stop the European Court of Justice', 2008, in http://euobserver.com.

[6] Based on these arguments, it is likely that the same Herzog did not share the conclusions of the most recent decision of Case C-555/07, *Seda Kücükdeveci v. Swedex GmbH & Co. KG* [2010] in which the Luxembourg judges have stated that, "In those circumstances, it is mandatory for the national court, hearing a dispute involving the principle of non-discrimination on grounds of age as given expression in Directive 2000/78, to provide, within the limits of its jurisdiction, the legal protection which individuals derive from European Union law and to

Against this background, in light of the highly transformative evolutionary process which appears to have been characteristic of CCT since the entry into force of the Charter (from 1 December 2009 onwards), do they (i.e. the traditions) come to an end after this crucial moment? Have CCT effectively exhausted their task in the age of bill(s) of rights? It should be pointed out that a certain haste in answering these questions in the affirmative appears to have resulted from an excessive simplification of the tension, which is in itself highly complex, between written and unwritten constitutional law.

It cannot in fact be denied that when considering the issue of the utility of common constitutional traditions one cannot gloss over the tension between on the one hand a positivist framework of inquiry (which however too often ends up coinciding with an apology for legal formalism) and on the other hand an anti-formalist and realist methodological approach. Under the latter approach the role of unwritten constitutional law is evidently enhanced, and in particular the role of constitutional tradition is stressed, since constitutional tradition could be considered as the most emblematic expression of the decline of legal positivism.

The mistake has been probably to radicalise to an excessive extent the conflict between the abovementioned mythological alternative approaches.

Unfortunately, such radicalisation occurred and supported the narrative of the chronicle of a death foretold (to tell the truth, somewhat prematurely) of constitutional traditions due to the codification of the European bill of rights, which would have marginalised those traditions and deprived them of any utility. There has also been speculation that this marginalising effect has been ultimately symptomatic on a more general level of the definitive victory of legal formalism in the new millennium over the attempt to rely on unwritten constitutional law on the supranational level, and that this decline was exclusively transitory.

However, as mentioned above, such a speculative exercise proves to be excessively simplistic in identifying a zero-sum relationship between the emergence of written constitutional law and the enduring relevance of unwritten law, whilst by contrast that relationship could on some occasions (and the process of codification of rights in Europe appears to be one of these occasions) be complementary and entail mutual enrichment. This could suggest (and it is hoped that this can be proven) that, with specific reference to our issue, far from having had the effect (by

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ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle".

virtue of its very occurrence) of pushing back common constitutional traditions, the entry into force of the Charter has by contrast led (at least potentially and for sure paradoxically) to the opposite result, that is by enabling those traditions to be upgraded from their past status. This promotion has finally been able to vest them with a status on a formal normative level which they had never previously had prior to the codification launched at Nice. This is due to a normative potential[7]

[7] If the relevant normative scope is considered, with the exception of Article 6(3) TEU ("Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law"), the relevant provisions are without doubt Article 52(4) of the EU Charter of Fundamental Rights ("In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions"), and Article 4(2) TEU ("The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State"). See also Article 53 of the Charter, which provides that "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions". See the *Explanations relating to the Charter of Fundamental Rights,* 207/C 303/2 concerning Article 52(4) of the Charter: "The rule of interpretation contained in paragraph 4 has been based on the wording of Article 6(3) of the Treaty on European Union and takes due account of the approach to common constitutional traditions followed by the CJEU (e.g., Case C-44/79, *Hauer* [1979] ECR 3727; Case C-155/79, *AM&S* [1982] ECR 1575). Under that rule, rather than following a rigid approach of 'a lowest common denominator', the Charter rights concerned should be interpreted in a way offering a high standard of protection which is adequate for the law of the Union and in harmony with the common constitutional traditions". It has also been asserted by A. Lòpez-Pina, 'The Spanish Constitutional Court, European Law and the Constitutional Traditions Common to the Member States (Art. 6.3 TUE). Lisbon and Beyond', [2011] 42 Instituto Universitario de Estudios Europeos – Serie Unión Europea, 8: "That means for those putting law into practice that the central problems going to consist of connecting the Charter with the constitutional traditions of Member States". See also Case C-571/10, *Kamberaj* [2012]; Case C-617/10, *Åkerberg Fransson* [2013].

inherent within the Charter, which theoretically operated as a precious support for the CJEU, allowing it to exploit common constitutional traditions to the full, also on the level of normative efficacy.

However, all of this was conditional upon the CJEU finalising such support (which, as will be seen below, has not happened). In fact the exact opposite occurred, and that post-Lisbon normative potential was so to speak "defused" by an extremely conservative interpretation of the CJEU. This occurred both with reference to the notion of constitutional traditions contained within Article 52(4) of the Charter and also in relation to the impact of the "domestic constitutional factor", as manifested (albeit in a different manner) in Article 53 of the Charter and Article 4(2) of the Treaty on European Union.

The analysis may start from the provisions of Article 52(4) of the Charter, which features the only explicit reference to common constitutional traditions (if one disregards the preamble which states slightly hypocritically that the Charter "reaffirms" *inter alia* "the rights as they result … from the constitutional traditions", whereas by contrast, as will be seen below, also providing for "new" rights that do not have a solid rooting in the shared constitutional heritage of the Member States).

How should the reference made by that provision to the interpretation of the Charter *in line with common constitutional traditions* be interpreted for those rights that result from the recognition of those traditions? Is there any obligation, even indirect, for the CJEU to comply with these traditions? In spite of the openness within the literature regarding this matter[8] and leaving aside the *Explanations* relating to the Charter, which effectively appear to suggest a negative response,[9] a year before the Charter came into force Miguel Poiares Maduro asserted even more clearly that this provision would not have given any forward impetus to the constitutional traditions in terms of the theory of sources of law, and that, *de facto*, nothing would change in this regard.

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[8] See F. Ekardt and D. Kornack, 'Of Unity', in *Diversity and Inherent Tensions*: *Interpreting the European Union's New Architecture of Fundamental Rights*, [2010] 16 Columbia J of Eur L 92.

[9] The *Explanations*, cited above, stifle at birth most illusions in stipulating, as mentioned above, that "The rule of interpretation contained in paragraph 4 has been based on the wording of Article 6(3) of the Treaty on European Union and takes due account of the approach to common constitutional traditions followed by the CJEU". The reference is evidently to the rulings, mentioned above, in which it was made clear that the Court's worst nightmare is that the significant scope of the constitutional provisions of the Member State might in some way turn out to be formally binding, as an interposed legal parameter, on its creative interpretations in the area of fundamental rights.

Speaking as a prophet of constitutional pluralism,[10] and hence immune to any suspicions of supporting a hierarchical view of relations between EU law and the Member State legal systems, in the opinion written in relation to a preliminary reference from the Conseil d'Etat (in which the Conseil d'Etat in fact asserted that the fundamental values of the French Constitution were identical to those of the Community legal order), he argued that the French administrative supreme court was correct in taking that view. However, Maduro continued, "structural congruence can be guaranteed only organically and only at the Community level, through the mechanisms provided for by the Treaty. It is that organic identity which is referred to in Article 6 TEU and which ensures that national constitutions are not undermined, even though they can no longer be used as points of reference for the purpose of reviewing the lawfulness of Community acts. If they could, in so far as the content of the national constitutions and the instruments for protecting them vary considerably, the application of Community acts could be subject to derogations in one Member State but not in another". In other words, and this reaches to the heart of Maduro's argument, "the effect of being able to rely on national constitutions to require the selective and discriminatory application of Community provisions in the territory of the Union would, paradoxically, be to distort the conformity of the Community legal order with the constitutional traditions common to the Member States".[11]

The picture does not seem any better if it is considered how the CJEU has defused the potential inherent within the scope of Article 53 of the Charter. Here too, it has failed to take advantage of the support provided to it by the Charter in exploiting – again on the formal level of the theory of sources of law – this time the domestic constitutional scope (in the area of fundamental rights) which, according to a literal interpretation of that provision, would constitute an insurmountable limit on the inter-systemic intrusiveness of the Charter, and more generally of EU law.

As mentioned above, *Omega* raised hopes and appeared to support the viewpoint of those who considered that the inter-systemic interpretative limit which Article 53 appeared to impose on the interpretation of the Charter was capable of limiting the theory of the absolute primary of EU

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[10] M. Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N. Walker (ed.), *Sovereignty in Transition,* (Hart Publishing, Oxford, 2003), 502 et seq.

[11] Opinion of Advocate General Maduro, Case C-127/07, *Arcelor SA et al.* [2008].

law, in some way subjecting it to the constitutional law of the Member States, having regard to the level of protection provided for under the Charter.

The response provided by *Melloni* in 2013 is well-known and effectively excluded this possibility. Perhaps it is more useful to revisit a passage from the opinion of Advocate General Bot which clearly proposes the *majoritarian activism approach*[12] that characterised the relevant case law of the CJEU in the post-Maastricht period, where the Advocate General concluded in particular that "the Court of Justice cannot rely on the constitutional traditions common to the Member States in order to apply a higher level of protection. Indeed, the fact that Framework Decision 2009/299 is the result of an initiative by seven Member States and that it has been adopted by all the Member States allows us to presume, with sufficient certainty, that a large majority of the Member States do not share the view taken by the Tribunal Constitucional in its case-law".

One could refer to this as the "*majoritarian activism approach reloaded*".

Whilst during the post-Lisbon period there have been a series of lost opportunities in terms of the theory of sources of law for enhancing the normative force of common constitutional traditions over and above the potential in this direction that appears to be apparent from the scope of some of the provisions of the Charter, it is also necessary to consider the cultural influence on the interpretative level exerted by the common constitutional traditions over the same period of time. Is this, as mentioned above, simply a chronicle of a death foretold also on the level of the theory of interpretation? It appears that the answer to this must be negative.

It is first necessary to provide a quantitative figure. As has been noted in recent publications concerning this issue, the reference to common constitutional traditions has arisen more frequently within the case law of the Court than it did during the pre-Charter period. Moreover, although it is difficult to establish with precision the bounds to this increase, the

[12] The CJEU had defined this majoritarian activist approach several years before, with a variation on the theme (Case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. European Commission* [2010]), as a "predominant trend", finding in paragraph 74 that "no predominant trend towards protection under legal professional privilege of communications within a company or group with in-house lawyers may be discerned in the legal systems of the 27 Member States of the European Union".

figures referring to its usage have increased exponentially over the last ten years.[13] How specifically has this CCT second drawing manifested itself?

One might reply that this has occurred in at least two ways. The first is significant on the rhetorical plane, almost as an optical illusion, and appears to be inherent to the argumentative use by the CJEU of the concept of common constitutional tradition. The second on the other hand concerns a new role which, precisely thanks to the entry into force of the Charter, now appears to be capable of characterising the post-Lisbon CCT life.

As far as the first aspect is concerned, the decision made in the spring of 2015[14] in which the Luxembourg Court for the first time annulled an entire act of secondary EU law on the grounds that it contrasted with the Charter appears to be emblematic. In Digital Ireland, in fact, is clearly emerging the CJEU's attitude in continuing to rely on the settlement previously defined as reassuring (and deceiving) national political and judicial interlocutors.

The Court's decision specifically struck down Directive 2006/24/EC on the grounds that the provisions laid down by it in the area of data

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[13] See regarding this issue S. Ninatti, *op. cit.,* 545.

[14] Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources, Minister for Justice, Equality and Law Reform, Commissioner of the Garda Síochána, Ireland, The Attorney General and Kärntner Landesregierung v. Michael Seitlinger, Christof Tschohl and others* [2014]. By preliminary reference, the Irish High Court asked whether the provisions of the Directive on the retention of traffic data by e-communications operators were compatible with the proportionality principle laid down by Article 52(1) of the Charter and whether they violated the right to privacy, the right to the protection of personal data, the right to freedom of expression and the right to good administration laid down respectively in Articles 7, 8 and 11 of the Charter. Secondly, the Austrian Constitutional Court, which had been apprised of numerous constitutional actions filed directly by private individuals seeking the annulment of the national law implementing the Directive, sent a preliminary reference asking whether the procedures for collecting data provided for under the Directive were compatible with the right to privacy, the right to the protection of personal data and the right to freedom of expression protected by the Charter of Fundamental Rights. In addition, the Austrian Constitutional Court also asked whether the European legislative framework respected the essence of the right to protection of personal data and whether the retention of data was compatible with common constitutional traditions and with Article 8 of the European Convention.

retention, which were intended to pursue the general interest in combating terrorism, were found to violate Articles 7[15] and 8[16] of the Charter, concerning respectively respect for private and family life and the protection of personal data. This decision also provided an opportunity to reflect on how the supposed recovery of common constitutional traditions by the CJEU is at times more apparent, and rhetorically functional, than effective. In particular, in the decision in question the CJEU tried to give the impression that it had taken on the task of representing on a European level the common constitutional traditions in the area of data protection. These traditions were supposedly merely recognised by the Article 8 of the Charter, which has just the task to *europeanise* the common constitutional traditions connected to data protection.

In other words, the Court sought to give the impression, through an artful optical illusion[17] that the Charter itself is, to use the language of Lawrence Lessig,[18] exclusively a *codifying constitution*, that is a document of constitutional status that deals only with cataloguing and schematising existing rules, i.e. "codifying" at European level evolutionary developments (in this case relating to the common constitutional traditions) that were already present within the legal environment out of which the new bill of rights was created.

Actually the Charter has an ambivalent nature. It is undoubtedly a *codifying constitution*, but it is not limited to this. It also incorporates much of the second category identified by Lessig, namely what he

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[15] According to Article 7: "Everyone has the right to respect for his or her private and family life, home and communications".

[16] According to Article 8: "1. Everyone has the right to the protection of personal data concerning him or her. 2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. 3. Compliance with these rules shall be subject to control by an independent authority".

[17] In this regard the preamble to the Charter provided it with excellent support in referring to the Charter as a simple reaffirmation of the rights originating from the common constitutional traditions. See the Preamble: "This Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, *the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States*".

[18] L. Lessig, *Code and Other Laws of Cyberspace*, (Basic Books, New York, 1999).

defines as a *transformative constitution*,[19] and which is characterised by the Charter's tendency to alter the status quo, innovating in relation to essential aspects of legal culture which is characteristic of the reference context within which it takes shape, and thus reaching beyond existing common constitutional traditions.

The tendency to be (also) a *transformative constitution* emerges in relation to Article 8 of the Charter which, in fact, does not amount to the projection onto European law of a shared constitutional principle, as by contrast the CJEU seeks to have us believe in an attempt to legitimise its annulment of the data retention directive. In fact, only the Netherlands (following the 1983 constitutional amendment), Spain (in Article 18.4 of its constitution) and a few constitutions from Central Eastern Europe provide an express constitutional framework for data protection.

As to the second issue highlighted above, related to the new role potentially played by the CCT thanks to the entry into force of the Charter, an important element should be pointed out. The choice (which according to the darkest prophecies would have led to the gradual weakening of the utility of constitutional traditions) to codify on para-constitutional level the protection of rights that had previously only been protected through case law, thanks in particular to the vehicle of general principles of Union law, has, almost paradoxically, favoured the emerging of a new role for CCT. More specifically, common constitutional traditions now appear to have found a new creative lease on life in the case law of the Court thanks to the minor interpretative gaps between the scope of a right as provided for under the Charter and when by contrast construed as a general principle, the source of which may be found precisely in the common constitutional traditions of the Member States.

More precisely, as will be seen below, it is in particular thanks to these minor interpretative gaps that the CJEU has had an easy time in its most recent case law in carrying out highly creative interpretative operations in which traditions play an essential role on the level of interpretation. As mentioned above, these gaps result from the fact that, as far as the scope of protection for the rights in play is concerned, the moment of writing[20] has not always ensured that these rights maintain the same scope following the shift from the unwritten domain (general principles and constitutional traditions) to the written domain of the Charter. This means that a general principle, as inspired by common constitutional traditions,

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[19] Id, 313.

[20] See again C. Pinelli, *Il momento della scrittura: Contributo al dibattito sulla Costituzione Europea* (Il Mulino, 2002).

is capable of having a scope or an expansive potential that is broader than the codified version of the right in the Charter.[21]

In other words, the argumentative reference within the Court's reasoning to the general principle, such as for example in relation to the principle of good administration,[22] is potentially capable of being used – precisely due to a greater expansive scope compared to the formulation of the same right within the Charter – as a Trojan horse in order to circumvent the limit provided for under Article 51 with regard to its application within EU law. To put it in highly simplistic terms, general principles can reach to places that fall beyond the scope of the corresponding rights contained in the Charter.

It must also be noted that on some occasions the Court has "forgotten" to cite the Charter at all and has referred exclusively to the corresponding general principle and to the common constitutional traditions out of which it results. An emblematic case in this regard is *El Dridi*,[23] in which the Luxembourg Court invited the referring court – when resolving the dispute pending before it – to take due account of the principle of the retroactive application of more lenient penalty, "which forms part of the constitutional traditions common to the Member States" (paragraph 61), without in any way referring to Article 49(1) of the Charter, which codifies that principle and which would have been applicable in this specific case alongside the corresponding general principle.

It is thus no coincidence that the CJEU has tailored its reasoning and adjusted its argumentative instruments to this goal and, when it is necessary, to protect a right for which there is no overlap between the scope of the general principle and the provision contained in the Charter,

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[21] The consideration as to whether there is a potential hiatus (with reference obviously to the scope of protection for a particular right) between the expansive scope of the Charter and the corresponding general principle also has significant implications in terms of concrete application. The British and Polish opt outs, which besides are marginal in their extent, are focused exclusively on the scope of the Charter and could not, by contrast, be applied to the general principles distilled out of the common constitutional traditions unless those principles are attributed, as must be hoped, with conceptual and "operational" autonomy. See also L.F.M. Besselink, *The Protection of Fundamental Rights post-Lisbon: The Interaction Between the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and National Constitutions*, cit.

[22] H. Hofmann and C. Mihaescu, 'The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case', [2013] 1 European Constitutional Law Review 73 et seq.

[23] Case C-61/11, *Hassen El Dridi* [2011].

as a rhetorical contrivance by referring to the general principle, thereby setting the (broad) extent of the principle that is to be protected, whilst subsequently referring to the right as provided for under the Charter, almost as if it merely catalogued an existing right, whereas there has by contrast been a step forward thanks to the broader expansive scope of the former compared to the latter.[24]

This is an argumentative exercise which, if considered within its proper context, becomes even more interesting in that it lays bare a CJEU that is almost a "two-faced Janus". On the one hand, the Court has an extremely cautious if not restrictive approach within the case law that deals specifically with Article 51 of the Charter in order to reassure the Member States, and in particular their constitutional courts, that the Charter will not be applied broadly beyond the scope of EU law, whilst on the other hand using the highly effective *passepartout* of general principles and common constitutional traditions, pushing in precisely the opposite direction.

Confirmation of this new role of the common constitutional traditions as a trump card that is capable of expanding the scope of the Charter beyond the boundaries laid down by Article 51 may be found in the *DEB* case[25] along with the fairly creative application by the Court in that case of Article 47 of the Charter on the right to an effective remedy.[26]

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[24] This argumentative approach appears to characterise also the case law of the CJEU in which there is no immediate aim to reach beyond the limit laid down by Article 51 of the Charter. In the wake of the entry into force of the Charter, one might have expected a reversal of this argumentative process in which the reference to general principles followed and did not pre-empt the reference to the corresponding provisions of the Charter. It is likely that the failure for this reversal to apply, is due to the fact that in this way it presumably feels (at least formally) less bound by the literal wording of the law and perhaps more free to embrace functionalist interpretative options.

[25] Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH DEB v. Federal Republic of Germany* [2010].

[26] According to Article 47: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice".

This is an interesting factual question because it is capable of showing that, when the CJEU *lacks* common constitutional traditions, it is able to follow an alternative path compared to the rhetorical contrivance of revealing the "never never land" of the tradition, as occurred in the *Digital Rights Ireland* case. This argumentative path involves the recourse on a supplementary basis to the recognition by the European Court of Human Rights of the level of consensus between states in relation to the way in which a certain right is protected, in this case the right of a legal person to free legal aid.

The problem which arose in this case concerned the contrast between EU law and German law, which did not allow a legal person, other than in exceptional cases, to receive free legal aid in order to bring legal actions in the event that it did not dispose of its own resources, since under the relevant German legislation that right was reserved to natural persons. This meant that the applicant company was unable to bring a damages action against the German state on the grounds that it had not transposed a EU directive within the prescribed time limit.

The question put by the national judge was simple: Is the principle of an effective judicial remedy as expressed also by Article 47 of the Charter, capable of precluding a national provision that, in failing to provide financial assistance for bringing legal actions to legal persons, *de facto* does not allow such persons to benefit from the principle of effective judicial relief?

In the light of the above, it will come as no surprise that, although the national court expressly referred to Article 47 of the Charter, the CJEU started by referring to the corresponding general principle, and in particular by asserting that the requirement to protect the principle of effective judicial relief amounts to "a general principle of EU law stemming from the constitutional traditions common to the Member States" (para. 29).

This opening statement positioned the principal question within a broader perimeter than the scope of the Charter, whilst however it did not (yet) resolve three interpretative obstacles of not minor importance which impaired the ability to answer the national court's question in the affirmative.

First, it was necessary to avert an outcome that risked resulting in a literal interpretation of Article 47 of the Charter, which refers again to "everyone" (except in the third paragraph, which refers less specifically to "those"), and appears to exclude the possibility that the right recognised thereunder may be recognised for a legal person. The Court acknowledged in relation to this matter that "no indication is given as to whether such aid must be granted to a legal person or of the nature of the

costs covered by that aid" but added – and as has been asserted elsewhere[27] the reference to context-based interpretation is always a fairly clear indication that the court is engaging in judicial activism – that "that provision must be interpreted *in its context*, in the light of other provisions of EU law, the law of the Member States and the case law of the European Court of Human Rights" (para. 39). It will come as no surprise that the Community courts reached the conclusion that legal persons cannot by principle be precluded from the scope of Article 47 of the Charter, pointing out *inter alia* that on the one hand the Commission had stressed in its intervention that the term "everyone" used in the first two paragraphs of Article 47 of the Charter can refer to individuals but that from a purely linguistic point of view it does not exclude legal persons, whilst on the other hand stressing that, although the explanations relating to the Charter are not clear in this regard, confirmation of such an interpretative approach may be found from the use of the term "Person" in the German language version of Article 47, as opposed to the term "Mensch" used in numerous other provisions of the Charter where the intention is to refer exclusively to natural persons.

Having thereby overcome the first obstacle consisting in the literal wording of Article 47 of the Charter through this creative exercise, which in many senses smacks of judicial activism, a second equally problematic issue remained. Even if, as seen in the previous cases, the small interpretative gaps resulting from the broader scope of general principles compared to the corresponding rights provided for under the Charter are used, the problem that arose for the Court was to identify in this specific case the common constitutional traditions that could be used as fuel by it to propel the construction of a general principle concerning the grant of free legal aid to legal persons. Whilst, as was moreover indicated at the outset by the Court, there was no doubt that there was a common constitutional basis for the principle of an effective judicial remedy, with regard to the more specific principle concerning the broadest scope to free legal aid that also included legal persons, the Court could not fail to admit that in this case it was short on constitutional "fuel". No optical illusion is capable of concealing what was made clear by the Advocate General in his opinion (para. 76–80), that is that, as was stated by the Court itself, "examination of the law of the Member States brings to light

[27] O. Pollicino, 'Legal Reasoning of the CJEU in the Context of Principle of Equality Between Judicial Activism and self-restraint', (2004) German Law Journal 283–317.

the absence of a truly common principle which is shared by all those States as regards the award of legal aid to legal persons".

It is precisely the need to rectify this shortcoming that forced the CJEU to look to the relevant case law of the European Court of Human Rights. In particular, following a careful analysis of that case law, the Luxembourg Court held that it was clear from it that, having regard to the relevant legal traditions of the members of the Council of Europe, the Strasbourg Court does not as a matter of principle exclude the possibility of extending the grant of free legal aid to legal persons, but that this possibility "must be assessed in the light of the applicable rules and the situation of the company concerned".

This amounts in actual fact to a rather interesting exercise in judicial creativity, which in this instance involves the notion of an expanded common constitutional tradition, which looks towards the "greater" Europe. It is evident that, depending on the judicial body that acknowledges the relevant legal traditions, and especially the relevant geographical area on which it focuses, this may or may not result in the emergence of a shared constitutional factor.

And in this case, the logic implicit within the reasoning of the CJEU is that, absent an internal source of common constitutional traditions, it may be useful – and in fact decisive – to link up with the (much more extensive) external source which the Strasbourg Court could not avoid drawing on in concluding that the extension of entitlement to free legal aid also to legal persons could be considered to fall within the scope of Article 6(1) of the Convention.

There remained one final "insignificant" detail which prevented the CJEU from achieving the objective of ruling that the fact that it was impossible under German law to grant free legal aid also to legal persons except under special circumstances violated EU law. This was the fact that this area of the law, as has been noted,[28] has not been subject to harmonisation on an EU level and in particular that the relevant German

[28] The sphere of European law impact was in this case defined by the principle of effectiveness, in this case broadly interpreted. As it seems, the principle of effectiveness may also play the role of a special "gear" between the national and European system, used in order to extend the field of application of fundamental rights' guarantees. M. Safjan, 'Areas of Application of the Charter of Application of the European Union: Fields of Conflicts?', [2012] 22 EUI working paper EUI LAW.

law prohibiting it had by no means been adopted as part of any form of transposition of EU law. This area lay outside the scope of EU law and it would have been very difficult to apply the *Wacauff* case law[29] here as there was no connecting factor whatsoever that could give rise to any requirement to transpose EU law in this case into national law.

As has been clarified in this regard, the sphere of European law impact was in this case defined by the principle of effectiveness, in this case broadly interpreted. As it seems, the principle of effectiveness may also play the role of a special "gear" between the national and European system, used in order to extend the field of application of fundamental rights' guarantees.[30]

In other words, the general principle of an effective judicial remedy, construed in such a broad and almost all-embracing manner, is capable of reaching beyond the scope of the corresponding right provided for under the Charter and turning into a "special gear" available to the Court enabling it, as mentioned above, *de facto* to extend the scope of the guarantees laid down in the European bill of rights beyond the scope of EU law.

The outcome is not beyond doubt, in view of this manipulation carried out over three stages, as described above: the CJEU resolved the question by declaring that the principle of an effective judicial remedy as enshrined in Article 47 of the Charter must be interpreted to the effect that the possibility cannot be precluded of legal persons invoking it and that legal aid granted thereunder may include specifically an exemption from the payment of an advance on court costs and/or legal representation.

Against this background, it is quite clear common constitutional traditions far from becoming subject to a process of marginalisation and progressive side-lining within the case law of the Court following the proclamation and subsequent entry into force of the Charter of Fundamental Rights of the Union, in terms of the theory of interpretation,[31] play an essential role within the reasoning of the CJEU in spite of (and in some cases, as has been argued above, precisely thanks to) that which should have dictated their disappearance, namely the codification of a

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[29] Case C-5/88, *Wachauf* [1989] ECR I-2609.

[30] M. Safjan, supra n. 28.

[31] Nevertheless, as has been noted, the Court has not taken the lead from the Charter in order to promote traditions in terms of the normative aspect of the theory of sources of law.

European bill of rights. More specifically, this has been thanks to the absence of any overlap between the scope of some of the rights provided for under the Charter and that of the corresponding general principles. The minor interpretative gaps that emerge from that lack of an overlap have proved to be fertile ground for the creative operations of the CJEU, which have sought to expand the boundaries connected to the scope of application of EU law. And it is within this scenario that constitutional traditions play an essential role, not only as domestic fuel in the construction of general principles, but also in particular as a Trojan horse on which the interpretative, or rather manipulative, activity of the CJEU focuses in order to circumvent the limit laid down by Article 51 of the Charter.

4. RELEVANCE OF THE COMMON CONSTITUTIONAL TRADITIONS IN THE (NEXT) FUTURE

Finally, regarding possible further development, in the future, of the language of (common) constitutional tradition, such language seems very useful to represent a valid option to go beyond the alternative language of constitutional identity as the main ingredient in the judicial conversation between CJEU and constitutional courts in Europe. In order to present this argument, it is necessary to take a step back.

As it is well known, in 2004, in *Omega*,[32] CJEU did a move from the "plural" to the "singular" in the interpretative stance towards the common constitutional traditions. The shift from determining those common traditions for the purposes of the application of the *majoritarian activism approach*, to the consideration by the Court of Justice of the individual constitutional identity of the single Member State raised hopes in a possible shift from absolute to relative primacy in the CJEU case law. Those hopes were further fostered by the adoption of the clause on respect for national identity contained in Article 4(2) of the EU Treaty.

In a way, the abovementioned provision has been taken too seriously by some reading according to which, despite the original intents of the

[32] Case C-36/02, *Omega* [2004].

drafters[33] and the relevant case law of the CJEU,[34] the concept of "national identity" is identified with the concept of "constitutional identity" and framed within the discourse of CJEU and national constitutional courts' different claims to sovereign authority.[35]

This reading represented a crucial fuel for the already existing new identity control season in the case law of the German Constitutional Court.[36] The request of a preliminary ruling in *Gauweiler*, far to be an

[33] If the preparatory works as part of the European Convention which drafted this Charter are considered, this clause is in actual fact more relevant to a question of competence than a question of appreciating the value of the internal constitutional experience. The reasons why the constitutional identity clause was introduced, in fact, relate to the safeguarding of the fundamental political and constitutional structures. As noted by Barbara Guastaferro, the assumption that the purpose of the clause is that of applying in exceptional cases of conflicts between EU law and domestic constitutional law – in an attempt to narrow the scope of application of the supremacy doctrine – has to be challenged; while the potential for a use of the clause in governing the ordinary functioning of EU law should be, on the contrary, highlighted. See B. Guastaferro, 'Beyond the Exceptionalism of Constitutional Conflicts: The Ordinary Functions of the Identity Clause', (2012) 01 Jean Monnet Working Paper NYU School of Law.

[34] It is sufficient to consider the Case C-208/09, *Sayn Wittgestein* [2010]. Indeed, the ECJ has never identified the constitutional identity clause enshrined in Article 4(2) TEU as the privileged arena to deal the multilevel protection fundamental rights in its case law.

[35] A. Von Bogdandy and S. Schill, 'Overcoming Absolute Supremacy: Respect for National Identity Under the Lisbon Treaty', [2011] 48 Common Market Law Review 1419.

[36] Lisbon Urteil. BVertG, 2 BvE 2/08, 30-5-2009. My argument here is not that in the *Solange* case law was completely absent the "identity argument" (as it substantially it was – and it is – in the ICC case) but that the said argument is ancillary to the main one related to the protection of fundamental rights. More generally, the BVerfG case law related to the constitutional reservation to the EU law primacy could be divided, or better unpacked, in three main seasons. The first, fundamental rights based, is mainly represented by the *Solange* saga; the second, ultra vires based, is concretised in the BVerfG Maastricht judgment. The third stage, identity control based, inaugurated by the Lisbon judgment, seems to be the actual season, as the preliminary reference in *Gauweiler* confirms it (in which clearly also the ultra vires component is present). At a closer look, the same assumption seems to be shared by the BVerfG, which, in *Solange 1*, in 1974, made explicit reference, through an original exercise *ante litteram* of judicial cross fertilisation, to the ICC *Frontini* judgment before mentioned. It is a little bit less obvious and convincing the reference to the same ICC judgment done by the BVerfG in its preliminary request for a preliminary ruling in *Gauweiler*. In the said judgment, the BVerfG – quite surprisingly for the German Constitutional Tribunal, more used be quoted than to quote – made

expression of cooperative constitutionalism, represented the apex of polemic constitutional patriotism in which the language of constitutional identity played an absolute protagonist role. A language which was not constrained by any set of essentials are themselves compliant in general outline with the basic values of Article 2 TEU. The absence of the guiding star in the constitutional identity conversation between the German Constitutional Court and the CJEU has involuntary supported the wind of populism which is blowing across Europe and from which courts (including constitutional and supreme courts) are not immune. The language of constitutional identity has been in fact manipulatively borrowed, as the Hungarian case is showing very well, by non-independent constitutional courts[37] in order to totally distort the original meaning of constitutional identity and make it overlap, substantially, with the will of the government.[38]

Against this background, the language of common constitutional traditions could be, in the future of judicial conversations in Europe, a much more cooperative constitutionalism-based alternative to the conflict-based language of constitutional identity.

A pioneer speaker of this new language, as the very recent *Taricco* ruling seems to confirm,[39] is the Italian Constitutional Court (hereafter ICC). Strangely enough, the case in which has emerged the new attitude to the common constitutional traditions' language is the one in which the same Court, used, for the first time ever,[40] in the context of the relationship between the domestic and the EU legal orders, the term

reference inter alia, also to the above mentioned *Frontini* judgment, in order to show that the identity control review was shared by other Constitutional Courts in Europe. In this case, however, the reference to *Frontini* seems to be misleading since in that judgment the ICC did not make any express or implicit reference to the notion of constitutional identity.

37 See G. Halmai, 'The Hungarian Constitutional Court and Constitutional Identity', in *Verfassungsblog,* 10 January 2017.

38 In the case of the Hungarian Constitutional Court decision, "The will of the government not to have any refugees" as Gabor Halmai astutely noted.

39 Italian Constitutional Court n. 24/2017.

40 In fact, before the recent *Taricco* judgment, the words "constitutional identity" or national identity never appear from a quantitative point of view in the case law of the CC. Contrary to the BVerfG, which has over time developed constitutional identity review on top of fundamental rights- and democracy-based judicial review of EU acts, the ICC has focused its counter-limit doctrines exclusively to the field of the protection of fundamental rights. This approach is evident in the other relevant ICC decisions dealing with the relation between the national and the EU legal order, including *Frontini*, and *Granital.*

"constitutional identity".[41] In this major case the ICC referred a preliminary question to the CJEU asking it to clarify whether its previous judgment in *Taricco*[42] – which required Italian criminal courts to set aside domestic statute of limitations rules whose effect was to undermine the prosecution of tax crimes against the financial interests of the EU – ought to be applied even if this conflicted with the constitutional principle of legality in criminal law. In its reference, the ICC underlined how this constituted a fundamental principle of the Italian constitutional system,[43] and flagged its concern for the practical application of the previous CJEU ruling.[44]

However, the ICC recognised the importance of the primacy of EU law,[45] and endeavored to prod the CJEU to revisit its previous ruling by underlining the fact that the principle of legal certainty constitutes "a common requirement to the constitutional traditions of the member states, is present in the system of protection of the ECHR, and as such it enshrines a general principle of EU law".[46] Hence, while the ICC kept open the possibility to invoke the counter-limits doctrine against the future ruling of the CJEU, it did not embrace a confrontational position premised on the idea that the constitutional identity of Italy was undermined by the EU: rather, the ICC stressed the correspondence between the constitutional tradition of Italy and the values underpinning the project of European integration and asked the CJEU to recognise the common constitutional heritage linking the EU and its Member States. It is true, the ICC has specified that the principles that came into question in *Taricco* deal with the constitutional identity of Member States. However, the ICC particularly emphasises the importance of the constitutional traditions, including both the national and the European ones. In the view of the ICC, the existence of a common constitutional tradition does not deprive each Member State to adopt a specific understanding of the same principle, most notably where the relevant area of law has not been subject to harmonisation. In other words, the ICC, even without neglecting the relevance (also) of the constitutional identity, focused more on the notion of constitutional tradition(s).

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41 Ibid §6.
42 See Case C-105/14, *Taricco* [2015] ECLI:EU:C:2015:555.
43 Italian Constitutional Court n. 24/2017 §5.
44 Ibid.
45 Id §8.
46 Id §9.

That is, ICC seems to propose, with regard the constitutional conflict, an alternative language, with regard the protection of the untouchable core of the constitutional legal order, in comparison with identity-based language spoken by the German Constitutional Tribunal in, for instance, *Gauweiler*. It is the language of the necessary protection of constitutional tradition, which turns out to be *by design* a European law concept and for sure is more in line with the actual season of cooperative constitutionalism in Europe.

It is not only a formal linguistic difference, but a substantial one. The constitutional tradition is by definition pluralistic in nature, whereas the reference to the constitutional identity, by design, is not. As it has been pointed out, the ICC's reasoning shifts from the national constitutional tradition to the European one, seeking to prod the CJEU to reconsider its previous judgment in light of values which are part of the European constitutional heritage.

Even if the conclusions of the Advocate General Bot[47] were not promising in this respect,[48] the CJEU took benefit from the ICC cooperative assist. More precisely, with this judgment[49] the Court revisited its previous stance by taking seriously the request to disapply the domestic provisions affording broader protection to fundamental rights, in order to make the protection of the financial interests of the EU conditional upon the respect of the rights of individuals. The ECJ thus proclaims the existence of inherently pluralistic constitutional traditions of Member States: this way, Article 6(3) TEU, even if not explicitly mentioned, is definitely preferred to Article 4(2) with a view to providing a more elaborated understanding of the principle of legality than that adopted in *Taricco I*.

The CJEU thus explored three different and equally relevant profiles of the principle of legality, namely the foreseeability, precision and non-retroactivity of the applicable criminal law. All these profiles, in the view of the CJEU, are given importance in both the EU legal order and in national legal systems and are then applicable, in the Italian legal order, also to the limitation rules for criminal offences relating to VAT. In fact,

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[47] Opinion of Advocate General Bot delivered on 18 July 2017, Case C-42/17, *Criminal proceedings against M.A.S., M.B.*

[48] O. Pollicino, M. Bassini, *The Opinion of Advocate General Bot in Taricco II: Seven "Deadly" Sins and a Modest Proposal,* in *Verfassungsblog*, 2017.

[49] CJEU, 5-12-2017, Case C-42/17.

the Italian Republic, before the adoption of Directive 2017/1371 (on the fight against fraud to the Union's financial interests by means of criminal law), was free to provide in its legal system rules, like the ones on the definition of offences and the determination of penalties, as part of substantive criminal law, thereby subject to the principle that offences and penalties must be defined by law (para. 45).

First of all, as to the foreseeability, the CJEU deduces from the case law of the European Court of Human Rights on Article 7(1) of the ECHR that "provisions of criminal law must comply with certain requirements of accessibility and foreseeability, as regards both the definition of the offence and the determination of the penalty".

Second, the CJEU points out that the requirement that the applicable law must be precise means that "the law must clearly define offences and the penalties which they attract. That condition is met where the individual is in a position, on the basis of the wording of the relevant provision and if necessary with the help of the interpretation made by the courts, to know which acts or omissions will make him criminally liable".

Last, the principle of non-retroactivity of the criminal law prevents courts, in the course of criminal proceedings, from imposing "a criminal penalty for a conduct which is not prohibited by a national rule adopted before the commission of the alleged offence or aggravate the rules on criminal liability of those against whom such proceedings are brought".

As a result, the CJEU attaches a broader significance to the principle of legality as part of the CCTs of Member States and enshrined in Article 49 of the Charter. The consequences of this more convincing construction of the principle of legality are very important if one compares the outcome of *Taricco II* to the ruling in *Taricco I*.

In other words, the principle of legality is provided with enhanced strength not merely by virtue of the protection guaranteed by the Charter and the European Convention of Human Rights, but mostly as a result of its configuration as a CCT.

The CJEU "specified" in *M.A.S. and M.B.*, that the *Taricco* rule is not applicable before the publication of the same judgment and is thus not applicable in the proceedings pending before the referring judges. Indeed, in both cases, the facts occurred prior to 8 September 2015, so that the applicability of Articles 160(3) and 161(2) of the Criminal Code, and the consequent time barring of the relevant crimes, was admitted pursuant to the *M.A.S. and M.B.* judgment.

Since the CJEU totally changed its approach in the two *Taricco* judgments, and was much more cooperative and open to the reasoning of the ICC in the *Taricco II* decision (*M.A.S. and M.B.*), it might have been tempting to predict that such decision would have been welcomed and

promptly enforced by the ICC. Yet, this would have been a wrong prediction. More precisely, in its latest judgment (No 115/2018; see the press release in English)[50] the ICC, in light of the clarification provided by *M.A.S. and M.B*., considered that all questions raised by the referring courts were unfounded, because the "*Taricco* rule" was to be held inapplicable in the cases pending before the Court.

But the judgment did not end here. It has been stressed above that in the *M.A.S. and M.B*. judgment the reasoning of the CJEU reveals a new season of cooperative constitutionalism in Europe, according to which the language of constitutional traditions, pluralistic and tolerant by design, was going to definitely take the place, thanks also to the assist of the ICC with its request of primary ruling (with Order No 24/2017), of the much more constitutional-patriotic-based language of constitutional identity.

Surprisingly enough, it is difficult (or impossible) to find traces of the same language of CCTs in the ICC decision No 115/2018 which followed the *M.A.S. and M.B*. judgment. It seems, by contrast, that the ICC decision under review is drenched in what appears to be an emerging post-Lisbon constitutional identity narrative. It may be a formalistic statement but the reference to constitutional identity is present twice in the judgment (paras 5 and 11) whereas the reference to constitutional traditions is nowhere to be found.

Based on the premise that it enjoys a monopoly in upholding the fundamental rights, the ICC does not limit itself to considering the questions put forward by the referring judges inadmissible (para. 10). Accordingly, the ICC opts for a more drastic solution and independently of whether the crimes were committed before or after 8 September 2015, considers that the degree of precision postulated by Article 25(2) of the Italian Constitution precludes the application of the *Taricco* rule, as clarified in *M.A.S. and M.B*.

The *Taricco* rule is thus not applicable to facts before the publication of the *Taricco I* ruling and, as a result, does not apply to the proceedings pending before the referring judges.

More precisely, despite acknowledging the power of the CJEU to interpret EU law uniformly, the Italian Court still argued that Article 325 TFEU does not comply with the requirements of specificity and clarity under domestic law.

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[50] Italian Constitutional Court 115/2018 and https://www.cortecostituzionale.it/documenti/comunicatistampa/CC_CS_20180601103714.pdf.

Although the Court did not trigger its counter-limits explicitly, because it claimed that its ruling is perfectly in line with both domestic law and EU law (thus reserving to itself the power to review EU law in certain circumstances), this judgment still reflects the conflictual side of the security meta-constitutional rationale, and confirms its ambiguity.

5. FINAL REMARKS

In conclusion: to answer the question posed at the outset, it certainly still makes sense today to reflect on the topicality and utility of common constitutional traditions. In fact, despite the darkest forecasts, they have still "survived" at the time of writing. Indeed, as this paper has attempted to demonstrate, they are still in excellent health.

Rather than of a death (foretold), the chronicle concerned should by contrast tell the story of a transfiguration of the role and nature of the concept of constitutional tradition. This cannot come as any surprise if it is considered that one of its essential characteristics lies in its incessant process of becoming and transformation, as a kind of *constitutional working in progress* which is never equal to itself.

Besides, a consideration of the role and nature of constitutional traditions that brings out the dynamic dimension as their privileged, or rather natural, habitat will enable us to stress a second aspect that is closely related to this first aspect: the temporal interconnection binding together past, present and future in relation to common constitutional tradition.

Also in this case the outcome could have been no different, if one reflects on the etymology of the term tradition, which inevitably evokes the *traditio* as a form of transmission and *tradere* as a composite of *trans* and *dare*.

At this juncture it appears to be more relevant to focus on the prefix rather than the verb because the reference to "trans" enables one to appreciate the idea of transmission *through* time, whilst it can also mean going *beyond* a specific temporal dimension, and hence updating the nature and scope of traditions as bearers of new grounds for protection, including where there is discontinuity with the past. This is precisely what has occurred in relation to the new role played by constitutional traditions in the wake of the entry into force of the Nice Charter.

Besides, Martin Krygier was already ahead of his time in skilfully arguing in relation to the need to rediscover the current relevance of traditions, and more generally on the bridge they build between the past and present, stressing that "we use the language of a (legal) tradition

when we attempt to describe how legal past is relevant to the legal present. It is about the power of the past-in-the-present".[51]

Actually, the transformative tension of constitutional traditions does not make it possible to exclusively make apparent a link between the present and the past, but to extend also the scope of that *traditio* to a future dimension.

How can this be done? To do this, we must consider what elements may constitute the characteristic generic code of a tradition, starting from the presence of a necessary minimum of temporal continuity in order for the period of sedimentation of the domestic constitutional principle to be completed and for it to be able to be "promoted" to the status of tradition. The relevant issue within this context is to understand whether the impact on legal categories pre-existing the new wave of transnational law, also as a consequence of the process of (post-)globalisation, could have caused a reduction in the period of time required for an emerging constitutional tradition to crystallise and, in the event that it is actually or is presumed to be common, for it to be drawn up as a source for the elaboration by the CJEU of common general principles. This is not a mere theoretical quirk but is rather a question which, if it is answered in the affirmative, could have direct repercussions on the capacity of constitutional traditions and general principles of EU law to have an even more innovative impact on the status quo.

Specifically, is the fact that provision has recently been made in many Member States of the European Union on the constitutional or legislative level for the right to broadband capable of raising that legal interest, which is fairly broadly endorsed, to a common constitutional tradition? The answer would appear to be no, as technological development may modify but not overturn the process of formation of constitutional tradition, *de facto* negating the temporal element.

A slightly different argument could be made in relation to the recognition of same-sex unions which have been accepted within the legal systems of seventeen Member States, and in some of these now for a quite significant period of time, and perhaps, also as a result of the support of some constitutional courts and the Strasbourg Court, may now be capable of being promoted to a common constitutional tradition. This could mean that the CJEU would have access to additional fuel in order to create a new general principle that is capable of acting as a reference parameter for interpreting, and perhaps manipulating the meaning of,

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[51] M. Krygier, 'Law as Tradition', [1986] 5 2 Law and Philosophy 237 et seq.

Article 9 of the Charter which, in enshrining the right to marry and to found a family, provides that these "shall be guaranteed in accordance with the national laws governing the exercise of these rights".

Such an interpretative operation could have a not insignificant impact as, once established as a general principle thanks to the identification of "new" common constitutional traditions in this area, the recognition of marriage or in any civil unions *pleno iure* between persons of the same sex could prevail, as has been keenly stressed, also in those few states that have not enacted state legislation to guarantee its exercise pursuant to Article 9 of the Charter.

The problem in this case does not appear to be quantitative in nature, as the CJEU, as we have seen above, has manipulatively inferred common constitutional traditions from situations that are much less widespread than in this particular case, but rather temporal, i.e. as mentioned above concerning the minimum period of time required in order to create a constitutional tradition, in spite of the acceleration before the crossroads of, and often the crash against, the classical categories of constitutional law and the innovative scope of transnational or global law.

In fact, whilst on the one hand (as has been recalled above), the essence of tradition is "the power of the past in the present", post-globalisation law is undoubtedly a "law for the present"[52] and *traditio* by definition (etymologically) is also projected towards the future. On the other hand it must not be forgotten that a certain qualified past is an indispensable ingredient in the emergence and consolidation of a constitutional tradition.

[52] M.R. Ferrarese, *Il diritto al presente: La Globalizzazione al tempo delle istituzioni*, (Il Mulino, 2002).

PART II

Courts interacting in fundamental rights protection

4. The role of the Court of Justice in the fragmented European fundamental rights landscape

Šejla Imamović*

1. INTRODUCTION

For a long time, the role of the Court of Justice of the European Union (hereinafter CJEU or the Court) in the field of European fundamental rights has been relatively modest.[1] The Court achieved important results over the years by recognising fundamental rights as general principles of EU law and reviewing the compatibility of European and national measures against those principles, but the number of cases involving substantive human rights claims remained low in the first decades.[2]

In recent years, however, the role of the CJEU in the human rights sphere has expanded significantly. There are two main reasons for this development. First, the CJEU has been increasingly dealing with human rights cases as a consequence of the continued expansion of the scope of EU law and policy in areas which are very important from a human rights perspective, such as asylum and immigration law, criminal law and data protection. Secondly, the available tools have changed: where in the early days the Court had to operate on the basis of general principles, constitutional traditions and indirectly the ECHR, the heart of EU

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[1] See, for instance, Bruno De Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights', in Philip Alston, Mara Bustelo and James Heenan (eds), *The EU and Human Rights* (OUP 1999).

[2] The exceptions are, *inter alia*, in the field of non-discrimination and equal treatment law.

fundamental rights law today is the Charter, the EU's own bill of rights, which however is closely tied with the ECHR and national constitutions. The Court has picked up on the increased human rights salience of EU law and has placed the Charter at the heart of its fundamental rights adjudication. As a result, it has asserted a primary role for itself in interpreting the Charter and in determining the appropriate level of fundamental rights protection in the EU.[3] Most recently, it has done so in Opinion 2/13,[4] firmly rejecting the draft Accession Agreement and thus ultimately the EU's accession to the ECHR.

Yet the Court has not yet established its credentials as a human rights court. While the Court has made important achievements in the post-Lisbon period in the field of human rights protection,[5] and the criticism does not apply to all areas of EU law, some of its recent decisions in the Area of Freedom Security and Justice (AFSJ) have raised substantial criticism and show inconsistencies with the case law of the European Court of Human Rights (hereinafter ECtHR or Strasbourg Court). The most topical illustration of the tension is the case law concerning the application of the principle of mutual trust and recognition, which is also explicitly addressed in Opinion 2/13.

This chapter takes a closer look at some of the Court's most recent decisions in this human rights sensitive area, including *Radu*, *Melloni*, *Aranyosi and Căldăraru*, *N.S.*, *Abdullahi* and *C.K. and Others*[6] and

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[3] See e.g. Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107 and C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:280.

[4] Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms ECLI:EU:C:2014:2454.

[5] A recent example, and one in which the Court has even been criticised for providing too much protection, is data privacy rights. See Joined Cases C-293/12 and 594/12 *Digital Rights Ireland ltd and Seitlinger and others* [2014] ECLI:EU:C:2014:238, and C-131/12 *Google Spain* [2014] ECLI:EU:C:2014:317. For a discussion on the achievements and challenges in the CJEU's protection of data privacy rights, see Federico Fabbrini, 'The EU Charter of Fundamental Rights and the Rights to Data Privacy: The Court of Justice as a Human Rights Court', in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Hart Publishing 2015).

[6] Case C-396/11 *Radu* [2013] EU:C:2013:39; Case C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] EU:C:2013:107; Joined Cases C-404/15 and C-659/15 PPU, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECLI:EU:C:2016:198; Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department* [2011] EU:C:2011:865; Case C-394/12 *Shamso Abdullahi v Bundesasylamt* [2013] EU:C:2013:813; Case

draws comparisons with the case law of the ECtHR. More specifically, it examines how the Court performs in the context of fundamental rights protection and questions its role as the EU's core human rights adjudicator.

2. THE COURT OF JUSTICE AS A FUNDAMENTAL RIGHTS COURT

The CJEU has evolved from being a court concerned primarily with economic matters to one with a much broader range of jurisdiction, which now also includes protecting fundamental rights in wide-ranging policy fields. For many years the Court has referred to other international treaties and bodies when dealing with human rights cases, most notably the ECHR, which over the years acquired 'special significance'.[7] This however started to change once the Charter became legally binding in late 2009. The Court very quickly adopted a new approach in its human rights case law, interpreting provisions of the Charter in isolation from the jurisprudence emerging from the ECtHR, but also from other human rights instruments.[8]

According to De Búrca,[9] who conducted a study on the number of references to the Charter of Fundamental Rights by the Court of Justice since it gained binding legal force in late 2009 until the end of 2012, there has been a notable lack of reference on the part of the Court to other relevant sources of human rights law in that period, including to the ECHR and the ECtHR case law. She determined that out of 27 cases in which the Court engaged with the Charter substantively, the CJEU referred to a Convention provision in 20, with only 10 judgments

C-578/16 PPU *C.K. and Others v Republika Slovenija* [2017] ECLI:EU:C:2017:127.

[7] See e.g. Cases C-29/69 *Stauder* [1969] ECLI:EU:C:1969:57 para 7; C-274/99 *Connolly v European Commission* [2001] ECLI:EU:C:2001:127 para 37; C-283/05 *ASML* [2006] ECLI:EU:C:2006:787 para 26; C-305/05 *Orde des barreaux francophones et germanophone and Others* [2007] ECLI:EU:C:2007:383 para 29.

[8] On this point, see Sionaidh Douglas-Scott, 'The European Union and Human Rights After the Treaty of Lisbon' [2011] 11 HRLRev 4; Gráinne de Búrca, 'The EU, the European Court of Justice and the International Legal Order after Kadi' [2009] 1 HarvIntlLJ 51.

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

'involving some mention or discussion of ECtHR case law'.[10] Moreover, any references to other international human rights treaties and to the common constitutional traditions of the Member States have been practically absent from the CJEU's case law.[11] The trend seems to have continued in the period after 2012.[12]

This is quite remarkable considering that a study on the number of references by the CJEU to the ECHR before the Charter became legally binding (from 1998 to 2005) revealed that the references to the ECHR have been increasing constantly throughout those years, and that the ECHR had in fact become the main rights instrument in the CJEU's jurisprudence.[13]

While the strong focus on the Charter by the Court is not problematic in itself, such a sharp decline in references to the ECHR is quite striking. After all, the two catalogues of human rights can hardly be seen in isolation from each other since Article 52(3) of the Charter establishes a close link between the two documents in providing that Charter rights which 'correspond' to rights guaranteed by the Convention should be given 'the same meaning and scope' as the relevant Convention rights. This provision gives a special status to (at least part of) the ECHR in EU law, as a matter of EU law.[14] Since the ECtHR determines the meaning and scope of the ECHR rights pursuant to Article 32 ECHR, it must be

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[10] Ibid, 168, 175.

[11] An exception is the Geneva Convention Relating to the status of Refugees of 1951 which has been cited quite often and the Convention on the Rights of the Child in cases dealing with expulsion for child sexual offences. See also Allan Rosas, 'Five Years of Charter Case Law: Some Observations', in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Hart Publishing 2015).

[12] For discussion and further references, see Sarah Lambrecht and Clara Rauchegger, 'European Union: The EU's Attitude to the ECHR', in Patricia Popelier, Sarah Lambrecht and Koen Lemmens (eds), *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level* (Intersentia 2016); Lize Glas and Jasper Krommendijk, 'From Opinion 2/13 to Avoti'nš: Recent Developments in the Relationship between the Luxembourg and Strasbourg Court' [2017] 17 HRLRev 2.

[13] Laurent Scheeck, 'Competition, Conflict and Cooperation between European Courts and the Diplomacy of Supranational Judicial Networks' (2007) Garnet Working Paper 23/07, http://www2.warwick.ac.uk/fac/soc/pais/research/researchcentres/csgr/garnet/workingpapers/2307.pdf accessed 27 January 2017.

[14] See e.g. Koen Lenaerts and Eddy de Smijter, 'The Charter and the Role of the European Courts' (2001) 8 MJ 1, 90; Wolfgang Weiss, 'Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights after

assumed that Article 52(3) of the Charter intends to give the same status to the case law of the Strasbourg Court in EU law, where it functions as a minimum standard. The assumption is not unwarranted; Article 52(3) is only meaningful if it commits the CJEU to take account of the Strasbourg case law. Moreover, the Explanation on Article 52(3)[15] explicitly refers to the case law of the ECtHR stating that the meaning and scope of the ECHR rights are determined not only by the text of those instruments, but also by the case law of the ECtHR. While the Explanations relating to the Charter do not have the same legal status as the Charter they are an interpretive tool and, in accordance with Article 52(7) of the Charter, 'shall be given due regard by the Courts of the Union and the Member States when interpreting the Charter'.

The aim of the drafters of the Treaties and the Charter was thus to promote legal certainty in the multilayered European fundamental rights context and to bring the two systems, i.e. the EU and the ECHR, closer together. The CJEU, however, has interpreted Article 52(3) of the Charter differently.[16] It held that whilst Article 52(3) of the Charter indeed provides that the rights contained in the Charter which correspond to rights guaranteed by the ECHR are to have the same meaning and scope, the ECHR does not constitute a legal instrument which has been formally incorporated into EU law as long as the EU has not acceded to it. An examination of the validity of EU law must therefore be undertaken 'solely in the light of the fundamental rights guaranteed by the Charter'.[17] As for the Explanations, the Court acknowledged that the Explanations relating to Article 52 of the Charter indicate that paragraph 3 is intended to ensure the necessary consistency between the Charter and the ECHR, but insisted that the consistency should be achieved 'without thereby adversely affecting the autonomy of Union law and […] that of

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Lisbon' [2011] 7 EUConst 64, 81. For a different perspective see Tobias Lock, *The European Court of Justice and International Courts* (OUP 2015) 180–184.

[15] Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/20.

[16] One of the few cases where the CJEU explicitly addressed and interpreted Article 52(3) of the Charter and the Explanations to the Charter is Case C-601/15 PPU *J.N. v Staatssecretaris voor Veiligheid en Justitie* [2016] ECLI:EU:C:2016:84.

[17] Case C-601/15 PPU *J.N. v Staatssecretaris voor Veiligheid en Justitie* [2016] ECLI:EU:C:2016:84, para 45. For earlier cases see C-571/10 *Kamberaj* [2012] ECLI:EU:C:2012:233 and C-617/10 *Åkerberg Fransson* [2013] ECLI:EU:C:2013:105.

the Court of Justice of the European Union'.[18] This growing insistence in Luxembourg on the isolation and self-sufficiency of EU law is problematic as it creates a false impression that EU law and the ECHR are not intertwined.[19] It also creates a certain level of competition between the two European courts.[20] While one would thus expect the cross-referencing to increase after Lisbon, we are witnessing the opposite.[21]

It is true that the fact that the CJEU is not referring to the ECHR or the ECtHR's case law does not necessarily mean the Court does not take it into account. At the same time, however, the CJEU has a particular responsibility in this regard. It is one of the two European courts that sets standards of human rights protection at European level, and the effects of its case law (and its approach therein) goes far beyond the Court itself.[22] It would be important for both the Member States and their courts, as well as for individuals and legal certainty in general, to see that the Court strives for coherence.

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[18] Case C-601/15 PPU *J.N. v Staatssecretaris voor Veiligheid en Justitie* [2016] ECLI:EU:C:2016:84, para 47.

[19] On this point, see Jorg Polakiewicz, 'The EU's Accession to the European Convention on Human Rights – A Matter of Coherence and Consistency', in Sonia Morano-Foadi and Lucy Vickers (eds), *Fundamental Rights in the EU: A Matter for Two Courts* (Hart Publishing 2015). See also Sionaidh Douglas-Scott, 'The Relationship between the EU and the ECHR Five Years on from the Treaty of Lisbon', in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Hart Publishing 2015).

[20] Janneke Gerards, 'Who Decides on Fundamental Rights Issues in Europe? Towards a Mechanism to Coordinate the Roles and the National Courts, the ECJ and the ECtHR', in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds), *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Hart Publishing 2015).

[21] This has been generally the trend in the case law of the CJEU. Note, however, that there are some very recent exceptions. For a different take on Article 52(3) of the Charter and the case law of the ECtHR see Case C-578/16 PPU *C.K. and Others v Republika Slovenija* [2017] ECLI:EU:C:2017:127, paras 67–68.

[22] Johan Callewaert, *The Accession of the European Union to the European Convention on Human Rights* (Council of Europe Publishing 2014).

3. OPINION 2/13

The CJEU's Opinion 2/13 is possibly the most extreme example of the new autonomous approach adopted by the Court in recent years.[23] In the Opinion, the Court firmly rejects the draft Accession Agreement for five main reasons. Some of them are rather technical and others more substantial.[24] Opinion 2/13 is not only problematic for its outcome but also for its language and underlying tone. In the Opinion, the CJEU depicts the EU legal order as normatively self-sufficient and does not give any recognition to the ECHR legal system.[25] Article 6(2) of the Treaty on the European Union (TEU), which makes accession to the ECHR a legal obligation and which should have been the starting point of the Court's assessment, is barely mentioned. Article 52(3) of the Charter – the key provision explaining the relationship between the Charter and the Convention – is completely absent. This section is limited to a brief discussion on the Court's view on the notion of autonomy of EU law and the importance of the principle of mutual trust, both of which are explicitly addressed in the first objection.

The Court commenced by stating that fundamental rights are at the heart of the EU constitutional structure. However, the Court then states,

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[23] Most authors have been very critical of the CJEU's approach in Opinion 2/13. See, to name a few, Eleanor Spaventa, 'A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13' [2015] 22 MJ 35; Steve Peers, 'The EU's Accession to the ECHR: The Dream Becomes a Nightmare' [2015] 16 GLJ 213; Bruno De Witte and Šejla Imamović, 'Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court' [2015] 40 ELR 5, 683; Paul Gragl, 'The Reasonableness of Jealousy: Opinion 2/13 and EU Accession to the ECHR', in Wolfgang Benedek, Florence Benoît-Rohmer, Matthias Kettemann, Benjamin Kneihs and Manfred Nowak (eds), *European Yearbook on Human Rights 2015* (Neuer Wissenschaftlicher Verlag 2015).

[24] For extensive analysis of Opinion 2/13 and different arguments, see Šejla Imamović, Monica Claes and Bruno De Witte (eds), 'The EU Fundamental Rights Landscape After Opinion 2/13' (2016) Maastricht Faculty of Law Working Paper 2016/3, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2799100 accessed 20 April 2017.

[25] Louise Halleskov Storgaard, 'EU Law Autonomy versus European Fundamental Rights Protection – On Opinion 2/13 on EU Accession to the ECHR' [2015] 15 HRLRev 485, 521.

referring to *Internationale Handelsgesellschaft*[26] and *Kadi*,[27] that the autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of those fundamental rights is ensured 'within the framework of the structure and objectives of the EU'.[28]

The Court did not really explain what is meant by 'interpreting fundamental rights within the framework of the structure and objectives of the EU'. Does it mean that EU fundamental rights should be interpreted and protected to the extent its constitutional structure and objectives allow for? This seems to be the case indeed since the Court, after having listed what it considers to be essential elements of the EU constitutional framework, notably the principle of primacy, uniformity, effectiveness and mutual trust, clearly stated that 'Fundamental rights, as recognised in particular by the Charter, must therefore be interpreted and applied within the EU in accordance with the constitutional framework referred to in paragraphs 155 to 176 above'.[29]

The principle of mutual trust, being one of those essential elements of the EU constitutional structure, is also addressed under the same heading 'The specific characteristics and the autonomy of EU law'.[30] The Court granted this principle a constitutional rank, observing that it is of 'fundamental importance' for the EU as it allows for the creation and maintenance of an area without internal borders. Drawing on its previous rulings in the *N.S.* and *Abdullahi* cases,[31] the Court reiterated that the principle of mutual trust requires EU Member States to presume that fundamental rights have been observed by other Member States, save for 'exceptional circumstances'.[32]

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[26] Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] EU:C:1970:114.

[27] Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union* [2008] EU:C:2008:461.

[28] Opinion 2/13, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] EU:C:2014:2454, para 170.

[29] Id, para 177.

[30] Id, paras 191–195.

[31] Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department* [2011] ECLI:EU:C:2011:865; Case C-394/12 *Shamso Abdullahi v Bundesasylamt* [2011] ECLI:EU:C:2011:865.

[32] Opinion 2/13, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] EU:C:2014:2454, paras 191–192.

The Court then continued:

> In so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law.[33]

Consequently therefore, national authorities, in order to preserve the autonomy of EU law and the principle of mutual trust, may be under a duty not to perform a fundamental rights scrutiny, or to limit such scrutiny to the most extreme of violations. This kind of mutual trust is highly problematic, not only because it will be very difficult to accommodate it in the new accession agreement but also because it seeks to remove the minimum standard of fundamental rights protection provided for in the ECHR in areas which are prone to fundamental rights violations such as common asylum system and the area of criminal law.[34]

While the Opinion contains several objections that will be difficult to overcome, the mutual trust objection is particularly challenging because it goes to the heart of the Convention system. One has to wonder if it would even be possible to accommodate the principle of mutual trust and recognition as interpreted and applied by the CJEU in the ECHR system, without affecting the core of the Convention system. Such a one-sided interpretation of this principle is in fact problematic from an EU law perspective too, but not for the reasons indicated by the CJEU. The respect for fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy.[35] It is also a core principle of national legal systems. Mutual trust and recognition, on the other hand, is merely a principle used to facilitate judicial cooperation among the Member States. This is not to say that fundamental rights are absolute or cannot be balanced, but the way the Court has done it in

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[33] Id, para 194.

[34] Eleanor Spaventa, 'A Very Fearful Court? The Protection of Fundamental Rights in the European Union after Opinion 2/13' [2015] 22 MJ 35, 19; Bruno De Witte and Šejla Imamović, 'Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order against a Foreign Human Rights Court' [2015] 40 ELR 5, 683.

[35] As emphasised during Cologne European Council (1999), Presidency Conclusions, Annex IV.

Opinion 2/13 and in some of its fundamental rights cases points to the Court's misunderstanding and misconception of the role and place of fundamental rights in the EU.

4. MUTUAL TRUST AND RECOGNITION IN THE CJEU'S CASE LAW

The principle of mutual recognition has its roots in the EU internal market law[36] but it has gained major importance more recently in the Area of Freedoms, Security and Justice (AFSJ).

The Treaty of Lisbon explicitly acknowledges the principle of mutual recognition,[37] but it does not mention mutual trust. Nevertheless, already in the Hague Program, adopted in 2005, the European Council noted that in order for the principle of mutual recognition to become effective, mutual trust must first be strengthened 'by progressively developing a European judicial culture based on the diversity of legal systems and unity through European law'.[38]

In recent years, the CJEU began to speak of 'mutual trust' rather than 'mutual recognition' in its judgments, giving it a rank of a constitutional principle and extending its effects beyond the field of judicial cooperation in the AFSJ.[39] The two concepts are sometimes used interchangeably,[40] but mostly the former is indeed seen as a precondition

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[36] See e.g. Case C-120/78 *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* [1979] ECLI:EU:C:1979:42 (on the free movement of goods, also known as *Cassis de Dijon* case) which was the first explicit expression of a duty of mutual recognition in which the Court of Justice stated that 'there is no valid reason why, provided that they have been lawfully produced and marketed in one of the Member States, alcoholic beverages should not be introduced into any other Member State' (Case C-120/78 [1979] ECLI:EU:C:1979:42 para 14). See also COM (1985) 310 White Paper from the Commission to the European Council – Completing the Internal Market, p 17.

[37] It is expressly mentioned in Arts 67 TFEU, 70 TFEU, 81 TFEU, and 82 TFEU.

[38] The Hague Programme: Strengthening Freedom, Security, and Justice in the EU [2005] OJ C53/01, 3.2.

[39] See e.g. Case C-195/08 *Rinau* [2008] EU:C:2008:406 relating to the interpretation of the Brussels II *bis* Regulation.

[40] Case C-467/04 *Gasparini and Others* [2006] ECLI:EU:C:2006:610, Opinion of AG Sharpston, fn. 87.

(for the effective operation) of the latter.[41] According to the Court, mutual trust requires Member States to trust each other's compliance with EU law and, in particular, with EU fundamental rights. That trust is grounded on and justified by their shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law, as provided in Article 2 TEU.[42]

4.1 The Dublin System

The Dublin system[43] was designed in order to coordinate asylum applications and allocate responsibility for asylum seekers in the Member States.[44] Its main purpose is to create a mechanism that swiftly assigns responsibility for processing an individual asylum application to a single Member State. The most commonly used criterion by states is the 'first point of entry' – the Member State responsible for examining an individual's asylum application is the one that he or she first entered.[45]

The Dublin system is not a mutual recognition instrument but it does operate on the principle of mutual trust. In the context of the Dublin Regulation, mutual trust relates to the examination of the request for asylum by the responsible Member State as well as the treatment of the asylum seeker during this examination. Mutual trust is also based on the

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[41] Koen Lenaerts, 'The Principle of Mutual Recognition in the Area of Freedom, Security and Justice', The Fourth Annual Sir Jeremy Lever Lecture, All Souls College, University of Oxford (2015) https://www.law.ox.ac.uk/sites/files/oxlaw/the_principle_of_mutual_recognition_in_the_area_of_freedom_judge_lenaerts.pdf accessed 28 January 2017.

[42] Opinion 2/13, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms [2014] EU:C:2014:2454, para 168.

[43] The Dublin system was initially based on the Dublin Convention, negotiated by the (then) European Community in 1990. The Dublin Regulation (known as Dublin II) replaced the Convention in 2003 and remained in force until 2013. After the revisions, the new Dublin Regulation 604/2013 came into force in January 2014 and is known as Dublin III Regulation.

[44] The Regulation applies to all 28 EU member states and 4 non-EU countries (Norway, Iceland, Switzerland and Liechtenstein), bound by its provisions on the basis of bilateral agreements.

[45] For a detailed and critical report on the Dublin System, see Susan Fratzke, *Not Adding Up: The Fading Promise of Europe's Dublin System* (Migration Policy Institute Europe 2015).

presumption that all Member States respect the principle of *non-refoulement* and can thus be considered as safe countries for third-country nationals.[46] Recently, however, the presumption of fundamental rights compliance has come under strain through the intervention of the ECtHR.

The first time the ECtHR ruled on the matter was in *M.S.S. v Belgium and Greece*,[47] delivered by the Grand Chamber in January 2011. The case concerned expulsion of an Afghan asylum seeker to Greece by Belgium in application of the Dublin II Regulation.

The Strasbourg Court reiterated that Dublin transfers are subject to its review and that the *Bosphorus* presumption of equivalent protection[48] is not applicable in this type of case, since the transfers are never mandated. This means that Member States may refrain from transferring an asylum seeker to the Member State responsible for examining the application and examine the application themselves, but that discretion is limited in the case law of the CJEU.[49] The ECtHR acknowledged, in principle, that the presumption of fundamental rights compliance is embedded in the principle of mutual trust, but it determined that its application is not unconditional. The presumption could be rebutted if there were substantial grounds for believing that a person whose return is being ordered would face a real risk of treatment contrary to the Convention in the receiving country.[50]

The ECtHR found Greece to be in breach of Article 3 ECHR both in terms of the risk of return to Afghanistan and the poor detention and living conditions. The evidence of these violations was found in numerous reports by NGOs and other international bodies, such as the UN High Commissioner for Refugees (UNHCR). In addition, the Court ruled that Belgium, by transferring the applicant asylum seeker to Greece, had violated the *non-refoulement* principle in Article 3 of the ECHR because of the poor living conditions in Greece. In the Court's view, the Belgian

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[46] Preamble Dublin II Regulation, recital 2. Preamble Dublin III Regulation, recital 3.

[47] *M.S.S. v Belgium and Greece* App no 30696/09 (ECHR, 21 January 2011).

[48] *Bosphorus v Ireland* App no 45036/98 (ECHR, 30 June 2005).

[49] So far, the possibility is given when (1) there are substantial grounds for believing that there are systemic flaws in the asylum procedure of the Member State responsible for examining the application (*N.S.*, *Abduallahi*) and when (2) there are substantial grounds for believing that the transfer itself would result in a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter (*C.K. and Others*). These cases are discussed further below.

[50] *M.S.S. v Belgium and Greece* App no 30696/09 (ECHR, 21 January 2011), paras 344–369.

authorities at the time of the transfer 'knew or ought to have known' the deficiencies of the asylum procedure in Greece.[51]

The CJEU seemingly followed the direction of the Strasbourg Court in its *N.S.* ruling,[52] which also involved return of asylum seekers in the application of the Dublin II Regulation. N.S. was an Afghan national who lodged an asylum application in the UK but was going to be returned to Greece, the Member State responsible for examining his application pursuant to the Regulation. Subsequently, N.S. requested the Secretary of State to exercise his discretion under Article 3(2) of Dublin II and accept responsibility for his asylum application on the ground that there was a risk that his fundamental rights under EU law, the ECHR and the Geneva Convention would be breached if he was returned to Greece.[53] Following an appeal, the UK Court of Appeal referred a number of questions for preliminary ruling to the Court of Justice. The proceedings in the *N.S.* case were joined with the case of *M.E. and Others* concerning the proposed transfer of asylum seekers to Greece from the Republic of Ireland. The central issue for the Court of Justice was to determine whether a Member State (be it the UK, Ireland or otherwise) is obliged to exercise its discretion under Article 3(2) of the Dublin II Regulation and take responsibility for an asylum claim, if the transfer to the responsible state would involve a risk of human rights violations.

The CJEU ruled that although the Common European Asylum System (CEAS) is based on mutual trust and the presumption of compliance by other Member States with Union law and in particular fundamental rights, such a presumption is not conclusive.[54] The Court acknowledged that 'it is not […] inconceivable that that system may, in practice, experience major operational problems in a given Member State, meaning that there is a substantial risk that asylum seekers may, when transferred to that Member State, be treated in a manner incompatible with their fundamental rights'. However, the Court further added '[…] it cannot be concluded from the above that any infringement of a fundamental right by the Member State responsible will affect the obligations of the other Member States to comply with the provisions of Regulation No 343/2003'.[55] Consequently, Member States may be required not only to presume compliance, but also to avoid checking in certain cases

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[51] Id, para 358.

[52] Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department* [2011] EU:C:2011:865.

[53] Id, para 40.

[54] Id, para 104.

[55] Id, para 82.

whether fundamental rights guaranteed by the EU have actually been observed, and carry on with the transfer.[56]

The CJEU did recognise, reiterating the wording of the ECtHR in the *M.S.S.* judgment, that if there are 'substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision'.[57] Nevertheless, the CJEU was careful not to condemn the Dublin system as a whole and made it clear that this should remain an exceptional case – making the threshold of incompatibility with fundamental rights very high.

The CJEU further clarified its position in the *Puid* and *Abdullahi* judgments,[58] both delivered late in 2013. The Court determined that an asylum seeker could *only* challenge that decision by 'pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum […] which provide substantial grounds for believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter'.[59] This leaves the interpretation of the term 'systemic deficiencies' open as it remains unclear if it is a synonym for the 'Greek' systemic deficiencies, or if other (less grave) deficiencies in the asylum systems of Member States can be considered 'systemic'. While the CJEU refrained from stating explicitly that *only* risks stemming from systemic deficiencies could preclude a transfer in its *N.S.* judgment, it clearly did so in the *Abdullahi* decision.[60]

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[56] See e.g. Jean-Pierre Gauci, Mariagiulia Giuffré and Lilian Tsourdi, *Exploring the Boundaries of Refugee Law: Current Protection Challenges* (Brill Nijhoff 2015).

[57] Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department* [2011] EU:C:2011:865, para 86.

[58] Case C-4/11 *Bundesrepublik Deutschland v Kaveh Puid* [2013] EU:C:2013:740; Case C-394/12 *Shamso Abdullahi v Bundesasylamt* [2013] ECLI:EU:C:2013:813.

[59] Case C-394/12 *Shamso Abdullahi v Bundesasylamt* [2013] ECLI:EU:C:2013:813, para 60. See also Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department* [2011] EU:C:2011:865, paras 94 and 106.

[60] Case C-394/12 *Shamso Abdullahi v Bundesasylamt* [2013] ECLI:EU:C:2013:813, para 60.

In November 2014, the ECtHR increased its standard of protection in the *Tarakhel* judgment, requiring countries to undertake a 'thorough and individualised examination of the situation of the person concerned' in the context of transfers under the Dublin II Regulation.[61] It held that a real risk of ill-treatment in the receiving state precludes removal of the individual, irrespective of the source of risk being systemic or individualised. In future Dublin cases therefore, the national authorities will have to carefully examine all the facts of the case, including any individual characteristics that might make an asylum seeker more vulnerable.

After much perseverance, the CJEU decided to follow suit. In *C.K. and Others*,[62] the Court ruled that pleading systemic deficiencies was not the only ground that could be invoked by the applicants in order to challenge their transfer and demonstrate that the transfer would expose them to a real risk of inhuman or degrading treatment. The Court argued that the change in its approach stems from the increased standard of fundamental rights protection in the Dublin III Regulation in comparison to Dublin II.[63] Nevertheless, the Court also clarified that this is applicable in very exceptional situations 'such as that at issue in the main proceedings' and, moreover, that this interpretation fully respects the principle of mutual trust 'since it ensures that the exceptional situations are duly taken into account by the Member State'.[64] Therefore, the ruling seems to be 'case specific' and it remains to be seen whether it will prove a significant step forward in finding a better balance between mutual trust and fundamental rights, and ensuring consistency with the ECHR.[65]

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[61] *Tarakhel v Switzerland* App no 29217/12 (ECHR, 4 November 2014), para 104.

[62] Case C-578/16 PPU *C.K. and Others v Republika Slovenija* [2017] ECLI:EU:C:2017:127. In addition, the Court also adopted a more fundamental rights-friendly approach in a number of cases concerning procedural rights of asylum seekers by giving them a wider right to challenge errors in carrying out of the Dublin III procedures or in the application of its criteria. See e.g. C-63/15 *Ghezelbash v Staatssecretaris van Veiligheid en Justitie* [2016] ECLI:EU:C:2016:409 and C-155/15 *Karim v Migrationsverket* [2016] ECLI:EU:C:2016:410.

[63] Case C-578/16 PPU *C.K. and Others v Republika Slovenija* [2017] ECLI:EU:C:2017:127, paras 62–63 and 94.

[64] Id, paras 88 and 95.

[65] On this point, see Šejla Imamović and Elise Muir, 'The Dublin III System: More Derogations to the Duty to Transfer Individual Asylum Seekers?' (2017) European Papers, Insight of 9 September 2017, http://www.europeanpapers.eu/en/europeanforum/dublin-iii-system-more-derogations-to-duty-to-transfer-individual-asylum-seekers accessed 15 September 2017.

4.2 European Arrest Warrant

A similar development can be tracked in the application of other instruments based on the principle of mutual trust in the AFSJ, such as the European Arrest Warrant Framework Decision (EAW FD). In essence, the EAW FD provides a simple and speedy procedure designed to surrender people between EU states for the purpose of conducting a criminal prosecution or executing a custodial sentence. In the *Radu* case,[66] the CJEU was asked, *inter alia*, to clarify whether the executing judicial authority can refuse to execute the EAW if the execution would lead to infringements of the requested person's fundamental rights. The Court reformulated the questions posed by the Romanian court and limited its decision to answering whether issuing a EAW obliges Member State authorities to give the suspect the opportunity to be heard.

The Court held that such an obligation 'would inevitably lead to the failure of the very system of surrender provided for by Framework Decision 2002/584 and, consequently, prevent the achievement of the area of freedom, security and justice' and that 'the European legislature has ensured that the right to be heard will be observed in the executing Member State in such a way as not to compromise the effectiveness of the European arrest warrant system'.[67] Accordingly, the executing judicial authorities cannot refuse to execute an EAW on the ground that the requested person was not heard in the issuing Member States before that arrest warrant was issued.

It is notable that the Court provided very limited answers in order to avoid addressing the general tension between the effectiveness of the EAW mechanism and the protection of fundamental rights.[68] Once again, the Court placed great emphasis on the efficiency of the mechanism without a reference to Article 1(3) of the EAW FD, which specifically

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[66] Case C-396/11 *Radu* [2013] EU:C:2013:39.

[67] Id, para 41.

[68] See, generally, Meijers Committee, *The Principle of Mutual Trust in European Asylum, Immigration and Criminal Law: Reconciling Trust and Fundamental Rights* (2011) http://dare.ubvu.vu.nl/bitstream/handle/1871/49623/PrincipleMutualTrust.pdf;jsessionid=DFD321E1D2A49B1BB8A03CD24C3810A1?sequence=1 accessed 30 March 2017.

provides that the decision is not to have the effect of modifying the obligation to respect fundamental rights.[69]

The CJEU maintained the same line of reasoning in its *Melloni* judgment,[70] which was rendered a few weeks later. Once again, the grounds for refusal of an EAW listed in Articles 3 and 4 of the Framework Decision were regarded as exhaustive.[71] Furthermore, the Court stressed that a Member State cannot make use of Article 53 of the Charter[72] to refuse the surrender of a person for the reason that the standard of protection of the right to a fair trial in its national constitution is higher than the one established in the national legislation of the issuing Member States. According to the Court, the possibility of invoking Article 53 in order to refuse the execution of an EAW would undermine 'the principle of primacy of EU law' and 'the principles of mutual trust and recognition' guaranteed by the uniform level of fundamental rights protection defined in the EAW FD.[73]

While the outcomes in *Radu* and *Melloni* may not be wrong as such, the Court's reasoning in both cases is deficient and lacks proper engagement with legitimate fundamental rights concerns of the national courts. The analysis of both Dublin and EAW cases suggests that the Court is willing to limit, time and again, the effects of fundamental rights

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[69] 'This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty on European Union'.

[70] Case C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] EU:C:2013:107. For a critical assessment of the case see, among others, Aida Torres Pérez, '*Melloni* in Three Acts: From Dialogue to Monologue' [2014] 10 EUConst 2; Nik De Boer, 'Addressing Rights Divergences under the Charter: Melloni' [2013] 50 CMLRev 4.

[71] Article 3 FD lists the circumstances under which a Member State must refuse a surrender and Article 4 under which it may do so.

[72] Article 53 of the Charter entitled 'Level of protection' states as follows: 'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions'.

[73] Case C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] EU:C:2013:107, paras 58 and 63.

protection for the sake of preserving the efficiency of (certain mechanisms of) EU law.[74]

In the most recent joined cases of *Aranyosi* and *Căldăraru*,[75] the Court was faced again with the same critical question. This time the referring German court asked whether, in the light of the provisions of Article 1(3) of the Framework Decision, the judicial authority executing an EAW is required to surrender the person requested for the purposes of criminal prosecution or the execution of a custodial sentence where that person is likely to be detained, in the issuing Member States, in physical conditions which infringe his fundamental rights and, if so, on what terms and in accordance with what procedural requirements.[76]

In its judgment from 5 April 2015, the CJEU started off as it did in the previous EAW cases, providing that the EAW system is based on the principle of mutual recognition, which itself is founded on the mutual trust between the Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised at EU level, and particularly in the Charter. Furthermore, referring to its Opinion 2/13, the Court stated that both the principle of mutual trust between the Member States and the principle of mutual recognition are, in EU law, of fundamental importance given that they allow for an area without internal borders to be created and maintained.[77]

However, the Court then did something it had not done before. It continued its assessment referring to Recital 10 and Article 1(3) of the FD which provide, respectively, that the implementation of the mechanism of the EAW as such may be suspended in the event of serious and persistent breach of the principles referred to in Article 2 TEU, and that the FD is not to have the effect of modifying the obligation to respect fundamental rights.[78]

Furthermore, the Court focused specifically on Article 4 of the Charter stating that the absolute prohibition of inhuman or degrading treatment or punishment is part of the fundamental rights protected by EU law. Accordingly, where the authority responsible for the execution of a

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[74] On this point see Johan Callewaert, 'To Accede or Not to Accede: European Protection of Fundamental Rights at the Crossroads' [2014] EJHR 2014/4.

[75] Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] ECLI:EU:C:2016:198.

[76] Id, para 74.

[77] Id, paras 77–78.

[78] Id, paras 81–84.

warrant has in its possession evidence of a real risk of inhuman or degrading treatment of persons detained in the Member States where the warrant was issued, that authority must assess that risk before deciding on the surrender of the individual concerned.

This statement, however, is immediately qualified by the following one where the Court explained that if a risk derives from the general detention conditions in the Member States concerned, the identification of that risk cannot, in itself, lead to the execution of the warrant being refused. It is thus necessary to demonstrate that there are substantial grounds for believing that the individual concerned will in fact be exposed to such a risk because of the conditions in which it is envisaged that he or she will be detained.[79]

In order to be able to assess the existence of that risk in relation to the individual concerned, the authority responsible for the execution of the warrant must ask the issuing authority to provide, as a matter of urgency, all the information necessary on the conditions of detention, which the issuing judicial authority is obliged to provide. If, in the light of the information provided or any other information available to it, the authority responsible for the execution of the warrant finds that there is, for the individual who is the subject of the warrant, a real risk of inhuman or degrading treatment, the execution of the warrant must be deferred until additional information is obtained on the basis of which that risk can be discounted. If the existence of that risk cannot be discounted within a reasonable period of time, that authority must decide whether the surrender procedure should be brought to an end.[80]

It is interesting to refer back to Opinion 2/13 in the context of the discussion on *Aranyosi* and *Căldăraru*, and consider whether this decision is compatible with Opinion 2/13. In the Opinion, the Court insisted that EU Member States should not second-guess what other states are doing 'save for exceptional circumstances', and now the Court states that they actually should check if other states observe fundamental rights and request additional information. It is puzzling, to say the least, to have a Grand Chamber judgment not so long after a Full Court Opinion, and have the two documents contradict each other on this very important point.

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[79] Id, paras 91–94.
[80] Id, paras 95–104.

While the CJEU's decision in *Aranyosi* and *Căldăraru* is generally perceived as a welcome development,[81] and is indeed a step in the right direction, the Court did not fully address – or resolve – the inherent clash between the efficiency of the EAW mechanism and fundamental rights, and many open questions remain.

First of all, the Court did not overrule its previous case law. This case is inherently different as it deals with a separate and specific human rights issue, which is also something that is not dealt with in the EAW FD itself. The question that comes to mind is whether the exception only applies to infringements of Article 4 of the Charter, and if so, how national courts should deal with other – less fundamental – fundamental rights claims. Secondly, finding that there is a real risk of inhuman and degrading treatment for the person concerned does not in itself mean that they can refuse execution of a warrant. Rather, it means that the national court should request additional information from the authorities of the issuing state and make further assessment. This, however, is a very difficult task and one that different national courts may fulfil in very different ways. It is hard to know when the assurances provided by the authorities of the issuing state are sufficient without any indication or criteria on the basis of which national courts can ultimately make such a decision. It is thus not surprising that the same German court decided to request a second preliminary ruling in *Aranyosi II*,[82] asking further clarification.

5. CONCLUSION

The Court of Justice has developed its human rights jurisprudence significantly in recent years. In doing so, the Court has used almost exclusively the Charter of Fundamental Rights as the reference text for its assessment. This development is not problematic in itself, but certain trends that are apparent in the Court's case law ever since, coupled with the exclusive focus on the Charter, seem to be cause for concern.

One of those trends is the sharp decline in references to the ECHR and the ECtHR's case law over the past few years. While compliance with the ECHR is not measured by the number of references to it, it is important to prevent that such development leads to a perception of fragmented and divided fundamental rights protection in Europe. This is exactly what the

[81] See, for instance, Fair Trials blog post, https://www.fairtrials.org/node/965, accessed 29 June 2017.

[82] Case C-496/16 *Aranyosi* n.y.r.

Treaty of Lisbon aimed to prevent by introducing Article 52(3) in the Charter as well as Article 6(2) in the TEU. Moreover, by disregarding other human rights mechanisms, the CJEU is missing the opportunity to develop further its expertise in the field of fundamental rights, and to strengthen the legitimacy and integrity of its decisions.

Another worrying trend in the case law of the CJEU is unpredictability in its judgments, particularly relating to the level of protection afforded under EU law. While the Court has made significant advancements in human rights protection in some areas, and the criticism does not apply to the whole of EU law, other areas are much less protected. Particularly problematic are the cases in the human rights-sensitive AFSJ, where the principles of mutual trust and recognition come into play.

The analysis of the Dublin and the EAW cases, and the brief reflection on Opinion 2/13, have shown that the Court does not always engage with fundamental rights arguments sufficiently or adequately, and that it is inconsistent in its approach. Moreover, the comparisons with the relevant decisions of the Strasbourg Court point to some structural differences in the approaches of the two European Courts, which ultimately may result in conflicting jurisprudence.

All this does not do much to commend the Court of Justice in its role of a human rights adjudicator, which has become part of its function in the EU legal system. While the Court has made steps in the right direction, further steps are needed in order to achieve better balance between the autonomy and the effectiveness of EU law and the protection of fundamental rights. Allowing for fundamental rights exceptions and in this way undermining effectiveness of EU law mechanisms may, paradoxically, result in strengthening it in the long run.

5. The Bundesverfassungsgericht's human dignity review: *Solange III* and its application in subsequent case law

Clara Rauchegger

1. INTRODUCTION

The Bundesverfassungsgericht, the Federal Constitutional Court of Germany, has given effect to the primacy of EU law over national constitutional law for more than 30 years. In its *Solange II* judgment of 1986, it decided to refrain from reviewing EU measures in light of the fundamental right of the Basic Law, so long as the EU standard of fundamental rights protection remained, in essence, comparable to that of the Basic Law.[1] As fundamental rights protection at the EU level has improved over the past 30 years, the *Solange II* condition does not have much practical significance nowadays. Therefore, EU measures and national measures – insofar as they are determined by EU law – are generally not measured against German fundamental rights.

However, in a judgment delivered on 15 December 2015 – known as *Solange III* – the Bundesverfassungsgericht developed a new condition for the application of the principle of primacy.[2] It turned the constitutional identity review that it had introduced in its *Lisbon* judgment into a safeguard mechanism for the protection of human dignity in individual cases. It confirmed that the primacy of EU law was limited by German constitutional principles that are beyond the reach of European integration, notably the guarantee of human dignity. Human dignity, as it is enshrined in the Basic Law, must be upheld in each individual case, even when applying national legal provisions that are determined by EU law.

[1] BVerfG, 22 October 1986, 2 BvR 197/83 *Solange II*, BVerfGE 73, 339.
[2] BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III.*

This chapter examines the advent of this new condition for the application of the principle of primacy in *Solange III* and the subsequent case law of the Bundesverfassungsgericht. It argues that the condition can help to improve fundamental rights protection in Germany and in the EU more generally without posing a substantial threat to the primacy of EU law. In particular, recent case law shows that the Bundesverfassungsgericht gives a narrow meaning to the essence of German constitutional rights that corresponds to human dignity, thereby limiting the new human dignity review to extreme cases.

Section 2 of this chapter illustrates the basic features of the Bundesverfassungsgericht's approach to EU law as they were defined in *Solange II* and confirmed in *Solange III*. Section 3 sets out three conditions for the primacy of EU law that were developed by the Bundesverfassungsgericht prior to *Solange III*, namely the *Solange II*, the *ultra vires* and the constitutional identity condition. Section 4 examines the *Solange III* judgment in depth, and Section 5 considers the application of the condition that was developed in this judgment in subsequent case law.

2. CONSTITUTIONAL REVIEW OF EU LAW: *SOLANGE I* TO *III*

The Bundesverfassungsgericht developed its basic approach to EU law in the famous *Solange I* and *Solange II* judgments. In the *Solange I* judgment of 1974, it stated that it would exercise constitutional review of EU acts so long as [*solange*] fundamental rights protection at the EU level was less adequate than that offered by the Basic Law.[3]

In the *Solange II* judgment of 1986, the Bundesverfassungsgericht reversed its approach. It recognised that EU fundamental rights protection had improved so that fundamental rights were now adequately protected at the EU level. Consequently, it decided that it would no longer review EU acts for their compliance with the Basic Law, so long as the EU standard of fundamental rights protection remained substantially equivalent to the inalienable minimum protection of fundamental rights in the Basic Law.[4] The *Solange II* ruling related to EU regulations, but it was later extended to directives.[5] It was reaffirmed by the

[3] BVerfG, 29 May 1974, BvL 52/71 *Solange I*, BVerfGE 37, 271, 285.

[4] BVerfG, 22 October 1986, 2 BvR 197/83 *Solange II*, BVerfGE 73, 339, 387.

[5] BVerfG, 13 March 2007, 1 BvF 1/05 *Emission Allowances*, BVerfGE 118, 79, paras 69–70; D Thym, 'Separation Versus Fusion: How to Accommodate

fundamental rights section of the 1993 *Maastricht* judgment and the 2000 *Banana* judgment.[6]

The Bundesverfassungsgericht still adheres to the *Solange II* rule.[7] In the *Solange III* judgment of 15 December 2015, it confirmed that:

> In general, sovereign acts of the European Union and acts of German public authority – to the extent that they are determined by Union law – are, due to the precedence of application of European Union Law [*Anwendungsvorrang des Unionsrechts*], not to be measured against the standard of the fundamental rights enshrined in the Basic Law.[8]

In *Solange III*, the Bundesverfassungsgericht distinguished between the EU provisions that do leave implementing discretion [*Gestaltungsspielraum*] to the Member States and those that do not. If EU law leaves a degree of implementing discretion, the Basic Law remains relevant. National measures that are not fully determined by EU law [*nicht vollständig determiniert*] are scrutinised in light of the Basic Law. On the other hand, national measures that are fully determined by EU law are not reviewed for their compliance with the Basic Law.[9] This distinction according to the degree of implementing discretion left to the Member States has been applied by the Bundesverfassungsgericht for many years.[10] It also seems to have influenced the ECJ, which drew a similar

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National Autonomy and the Charter? Diverging Visions of the German Constitutional Court and the European Court of Justice' [2013] European Constitutional Law Review 391, 402.

[6] FC Mayer, 'Multilevel Constitutional Jurisdiction', in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Hart Publishing 2010) 411. See BVerfG, 12 October 1993, 2 BvR 2134, 2159/92 *Treaty of Maastricht*, BVerfGE 89, 155; BVerfG, 7 June 2000, 2 BvL 1/97 *Bananas*, BVerfGE 102, 147.

[7] D Thym, 'Vereinigt die Grundrechte!' [2015] Juristenzeitung 53, 55. See also J Masing, 'Einheit und Vielfalt des Europäischen Grundrechtsschutzes' [2015] Juristenzeitung 477, 480.

[8] Official English translation of BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III,* para 36.

[9] BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III,* para 39.

[10] See e.g. BVerfG, 13 March 2007, 1 BvF 1/05 *Emission Allowances*, BVerfGE 118, 79, para 69; BVerfG, 14 October 2008, 1 BvF 4/05, BVerfGE 122, 1, paras 84–85; BVerfG, 19 July 2011, 1 BvR 1916/09 *Le Corbusier*, BVerfGE 129, 78, paras 53–54. See also BVerfG, 'National Report' (2014) XVI Congress of the Conference of European Constitutional Courts, http://www.confeuconstco.org/reports, 3.

distinction in its seminal *Åkerberg Fransson* and *Melloni* judgments of 2013.[11]

The Bundesverfassungsgericht refrains from scrutinising national measures that are completely determined by EU law in light of the Basic Law in order to give effect to the primacy of EU law.[12] In *Solange III*, it referred to the *Costa/ENEL* judgment of the ECJ and noted that the uniform application of EU law was crucial for the success of the EU.[13] A community of 28 Member States could not survive if the uniform application of its law was not guaranteed.[14] The Bundesverfassungsgericht explicitly recognised that the primacy of EU law over national law also applied with regard to national constitutional law.[15] The transfer of competences to the EU released German authorities from their general obligation to respect the fundamental rights in the Basic Law.[16]

3. THREE CONSTITUTIONAL LIMITS TO PRIMACY

The Bundesverfassungsgericht refrains from scrutinising national measures that are completely determined by EU law in light of the Basic Law in order to give effect to the primacy of EU law. However, it does not accept any 'blanket precedence of Union law over national constitutional law'.[17] From its perspective, the respect for the primacy principle is grounded ultimately in German constitutional law and not in EU law.[18] The Bundesverfassungsgericht accepts only precedence in application [*Anwendungsvorrang*] of EU law, not the genuine supremacy of EU

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[11] Case C-617/10, *Åkerberg Fransson,* EU:C:2013:105, para 29; Case C-399/11, *Melloni,* EU:C:2013:107, para 60.

[12] BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III,* para 36.

[13] Case 6/64, *Costa/ENEL,* EU:C:1964:66; BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III,* para 37.

[14] BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III,* para 37.

[15] Id., para 38.

[16] Id., para 39.

[17] BVerfG supra n.10, 9.

[18] See M Bäcker, 'Das Grundgesetz als Implementationsgarant der Unionsgrundrechte' [2015] Europarecht 389, 392; H Sauer, 'Grundrechtskollisionsrecht für das europäische Mehrebenensystem: Konkurrenzbestimmung–Kollisionsvermeidung–Kohärenzsicherung', in N Matz-Lück and M Hong (eds), *Grundrechte und Grundfreiheiten im Mehrebenensystem: Konkurrenzen und Interferenzen* (Springer 2011) 32; Masing, supra n.7, 481.

law.[19] This conceptual view has important practical implications. According to the Bundesverfassungsgericht, the Basic Law limits the effect of EU law in the German legal order. Three conditions need to be fulfilled so that the Basic Law permits the transfer of competences to the EU or the exercise of competences by the EU. In this section of the chapter, the three conditions are each discussed in turn (3.1–3.3), before some common features are identified (3.4).

3.1 The *Solange II* Condition

The first condition that limits the application of the primacy principle was developed in the *Solange II* judgment, mentioned above. The Bundesverfassungsgericht refrains from reviewing national measures that are fully determined by EU law in light of the Basic Law, so long as the EU standard of fundamental rights protection is essentially comparable to that of the Basic Law.[20] As the *Solange II* ruling relates to EU fundamental rights protection in general, only systemic deficiencies of fundamental rights protection at the EU level would lead to the application of the fundamental rights enshrined in the Basic Law.

Since 1992, the *Solange II* condition is reflected expressly in Article 23(1) of the Basic Law, which governs the relationship between national and supranational law. That provision stipulates that the Federal Republic of Germany participates in European integration 'that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law'.[21]

The common view in German academic literature is that it is currently highly unlikely that the EU level of fundamental rights protection will fall below the level of protection that would trigger the *Solange II* condition.[22] In *Solange III*, the Bundesverfassungsgericht itself held that Article 6 of the Treaty on European Union (TEU), the Charter and the case law of the ECJ generally provide for effective fundamental rights

[19] M Hong, 'Human Dignity, Identity Review of the European Arrest Warrant and the Court of Justice as a Listener in the Dialogue of Courts: Solange-III and Aranyosi' [2016] European Constitutional Law Review 549, 552.

[20] See BVerfG, 22 October 1986, 2 BvR 197/83 *Solange II*, BVerfGE 73, 339, 387.

[21] Translation by Deutscher Bundestag, https://www.bundestag.de/gg.

[22] See e.g. (with further references) A Schwerdtfeger, 'Europäisches Unionsrecht in der Rechtsprechung des Bundesverfassungsgerichts: Grundrechts-, ultra-vires- und Identitätskontrolle im gewaltenteiligen Mehrebenensystem' [2015] Europarecht 290, 292; H-G Dederer, 'Die Grenzen des Vorrangs des Unionsrechts' [2014] Juristenzeitung 313, 313–14.

scrutiny of EU measures.[23] Hence, the *Solange II* condition does not seem to have any practical relevance these days.

3.2 The *Ultra Vires* Condition

The second condition for the transfer to or exercise of competence by the EU is that the EU does not act *ultra vires*. The Bundesverfassungsgericht is prepared to review EU acts that do not respect the limits of the competences conferred on the EU by the Member States. It considers itself as the ultimate arbiter of the principle of conferral.[24] The *ultra vires* condition was first mentioned in the *Maastricht* judgment and it was further developed in the *Lisbon, Honeywell* and *Gauweiler* judgments.[25]

The *ultra vires* condition does not extend to all *ultra vires* acts. It is triggered only in the case of a drastic violation of the principle of conferral. The Bundesverfassungsgericht has made clear that it will exercise jurisdiction over an act of the EU that is structurally significant and clearly *ultra vires*.[26] This means that the EU act has to be 'manifestly in violation of competences' and this violation has to be 'highly significant in the structure of competences between the Member States and the Union with regard to the principle of conferral'.[27]

The Bundesverfassungsgericht has assessed the ECJ's application of the Charter in the seminal *Åkerberg Fransson* case in light of the principle of conferral in the *Counter-Terrorism Database* judgment.[28] It warned that it would not accept an extension of the scope of the Charter to domestic measures that have only a vague link with EU law.[29] It

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[23] BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III,* para 46.

[24] See Schwerdtfeger supra n.22, 292–93.

[25] BVerfG, 12 October 1993, 2 BvR 2134, 2159/92 *Treaty of Maastricht*, BVerfGE 89, 155, 188; BVerfG, 30 June 2009, 2 BvE 2/08 *Treaty of Lisbon*, BVerfGE 123, 267, para 240; BVerfG, 6 July 2010, 2 BvR 2661/06 *Honeywell*, BVerfGE 126, 286, para 55; BVerfG, 14 January 2014, 2 BvR 2728/13 *Gauweiler*, BVerfGE 135, 366.

[26] Interestingly, in an extrajudicial report, the Bundesverfassungsgericht noted that the *ultra vires* condition applies to 'clear *or* structurally significant' (emphasis by the author) ultra vires acts and therefore presented the two as alternative instead of cumulative criteria. See BVerfG supra n.10, 3.

[27] Official English translation of BVerfG, 6 July 2010, 2 BvR 2661/06 *Honeywell*, BVerfGE 126, 286, para 61.

[28] *Åkerberg Fransson* supra n.11.

[29] BVerfG, 24 April 2013, 1 BvR 1215/07 *Counter-Terrorism Database*, BVerfGE 133, 277, para 91; Editorial Comments, 'Ultra Vires: Has the Bundesverfassungsgericht Shown Its Teeth?' [2013] Common Market Law Review 925,

concluded, however, that the *Åkerberg Fransson* case did not constitute a clear *ultra vires* act.[30]

3.3 The Constitutional Identity Condition

The third condition for the transfer to and exercise of competences by the EU is that the constitutional identity of the Basic Law is respected. The identity condition, as it was developed in the *Lisbon* judgment of the Bundesverfassungsgericht, protects a functioning democracy within the sovereign German state, and more precisely 'the ability of a constitutional state to democratically shape itself'.[31] It may be directed against the transfer of competences to the EU in sensitive policy fields.[32] The way in which the identity condition was formulated in the *Lisbon* judgment was thus related to the enactment of primary EU law.[33] The Bundesverfassungsgericht derived the identity condition from Article 23(1) of the Basic Law and from the 'eternity clause' enshrined in Basic Law Article 79(3).[34]

While the *ultra vires* condition applies only to clear and structurally significant *ultra vires* acts, the identity condition prohibits any violation of the constitutional identity of the Basic Law.[35] Moreover, in contrast to the *Solange II* condition, the identity condition is triggered not only in the case of systemic deficiencies at the EU level, but whenever the identity of the Basic Law is at issue in an individual case, as the *Gauweiler* judgment has shown.[36]

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927. For a detailed analysis of the judgment and its conceptual underpinnings, see Thym supra n.5.

30 BVerfG, 24 April 2013, 1 BvR 1215/07 *Counter-Terrorism Database*, BVerfGE 133, 277, para 91.

31 BVerfG, 30 June 2009, 2 BvE 2/08 *Treaty of Lisbon*, BVerfGE 123, 267, para 252. See Thym supra n.5, 400.

32 Thym supra n.5, 399–400.

33 Schwerdtfeger supra n.22, 294–95.

34 BVerfG, 30 June 2009, 2 BvE 2/08 *Treaty of Lisbon*, BVerfGE 123, 267. Article 79(3) of the Basic Law: Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible. Translation by Deutscher Bundestag, https://www.bundestag.de/gg.

35 Schwerdtfeger supra n.22, 299. The author refers to BVerfG, 14 January 2014, 2 BvR 2728/13 *Gauweiler*, BVerfGE 135, 366, paras 27–29.

36 Dederer supra n.22, 315.

3.4 Common Features of the Three Conditions

The link between the *ultra vires* and the identity condition is that, according to the Bundesverfassungsgericht, EU acts are always *ultra vires* if they violate German constitutional identity because competences violating national constitutional identity could not have been transferred to the EU in the first place.[37] As far as the relationship between the *Solange II* condition and the identity condition is concerned, the Bundesverfassungsgericht already has construed the fundamental rights provisions of the Basic Law as an element of the constitutional identity in its *Solange I* and *Solange II* judgments.[38] According to Hans-Georg Dederer, the common core of all three conditions is therefore the protection of the constitutional identity of the Basic Law.[39]

Moreover, the three conditions set out above have in common that they are not apt to guarantee the respect of the fundamental rights of the Basic Law in individual cases. According to the *Solange II* condition, national measures that are completely determined by EU law are reviewed in light of the Basic Law only if EU fundamental rights protection in general falls below a certain minimum level. I mentioned above that it is highly unlikely that the general level of EU fundamental rights protection will fall short of this standard nowadays. The *ultra vires* condition does not serve as a case-by-case safeguard mechanism for the fundamental rights of the Basic Law either because EU measures can violate the fundamental rights of the Basic Law without exceeding the EU's competences. Finally, the identity condition, as it was developed in the *Lisbon* judgment, is limited mainly to the transfer of competences to the EU in sensitive policy fields. It was not designed to ensure the respect of the fundamental rights of the Basic Law in individual cases.

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[37] BVerfG, 14 January 2014, 2 BvR 2728/13 *Gauweiler*, BVerfGE 135, 366, para 27.

[38] BVerfG supra n.10, 15; Dederer supra n.22, 316. See BVerfG, 29 May 1974, BvL 52/71 *Solange I*, BVerfGE 37, 271, 279; BVerfG, 22 October 1986, 2 BvR 197/83 *Solange II*, BVerfGE 73, 339, 375.

[39] Dederer supra n.22, 316–17.

4. *SOLANGE III*: THE ADVENT OF A CASE-BY-CASE REVIEW FOR THE RESPECT OF HUMAN DIGNITY

Originally, the identity condition did not appear to aim to ensure the respect of German fundamental rights in individual cases. However, the Bundesverfassungsgericht expanded the function of the identity condition in the seminal *Solange III* case. It turned the identity condition into a safeguard mechanism for the protection of human dignity in individual cases, as Subsection 4.1 shows. This new variant of the identity condition emerged in a European Arrest Warrant (EAW) case. Subsection 4.2 claims that there are good reasons for this. Subsection 4.3 argues that the Bundesverfassungsgericht successfully reconciled effective fundamental rights protection with the principle of primacy of EU law in the *Solange III* case. Finally, Subsection 4.4 demonstrates that the Bundesverfassungsgericht did not resort to its newly developed variant of the identity condition to decide the actual case at hand.

4.1 A New Variant of the Constitutional Identity Condition

In *Solange III*, the Bundesverfassungsgericht developed the constitutional identity condition into a safeguard mechanism for the protection of human dignity in individual cases. It confirmed that German constitutional identity comprised the protection of human dignity and it presented human dignity as the core of other fundamental rights that needs to be upheld in every case.

As a first step, the Bundesverfassungsgericht emphasised that the constitutional identity of the Basic Law entailed the protection of human dignity. Human dignity was a constitutive principle of the Basic Law, guaranteed not only by its Article 1, but also by the 'eternity clause' enshrined in its Article 79(3).[40] Therefore, respect for human dignity was an element of the constitutional identity of the Basic Law.[41] It enjoyed priority over the primacy of EU law and served as a limit to European integration.[42] Human dignity traditionally plays a central role in German constitutional law.[43]

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[40] BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III,* paras 48–49.

[41] Ibid.

[42] Id., paras 40–42.

[43] See H Dreier, 'Bedeutung und systematische Stellung der Menschenwürde im deutschen Grundgesetz', in K Seelmann (ed), *Menschenwurde als Rechtsbegriff: Tagung der internationalen Vereinigung für Rechts- und Sozialphilosophie* (Franz Steiner 2005) 3.

After having confirmed that respect for human dignity was part of German constitutional identity, the Bundesverfassungsgericht associated human dignity with fundamental rights more generally. It declared that it would guarantee the respect for domestic fundamental rights unreservedly [*uneingeschränkt*], if this was required to protect human dignity.[44] The underlying assumption is that a violation of other domestic fundamental rights may, at the same time, violate human dignity. The Bundesverfassungsgericht would review domestic measures that are completely determined by EU law in light of the fundamental rights of the Basic Law, if a violation of these rights also entailed a violation of human dignity. It plans to perform this review in each individual case [*im Einzelfall*].[45] It will scrutinise, on a case-by-case basis, that the respect for human dignity is maintained in measures that are determined completely by EU law.

The denomination '*Solange III*' was first used to describe the judgment in a few blog posts that appeared shortly after its publication.[46] It seems appropriate, insofar as the new human dignity condition is certainly different from the *Solange II* condition. *Solange II* related to the general level of EU fundamental rights protection in a systemic way, whereas *Solange III* requires respect for human dignity in the individual case at hand. However, the *Solange III* condition is not a completely new condition, but a new variant of the constitutional identity condition. Moreover, it has not replaced *Solange II*, but, rather, completed it.

Read together with the *Solange II* condition, the approach of the Bundesverfassungsgericht can be summarised as follows: an EU measure or domestic measure completely determined by EU law will not be assessed in the light of the fundamental rights of the Basic Law, so long as the general EU standard of fundamental rights protection is essentially equivalent to that afforded by the Basic Law, and so long as there is no infringement of human dignity in the case at issue.

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[44] BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III,* para 49.

[45] Ibid.

[46] See e.g. M Hong, 'Human Dignity and Constitutional Identity: The Solange-III Decision of the German Constitutional Court' (18 February 2016) Verfassungsblog, http://verfassungsblog.de/human-dignity-and-constitutional-identity-the-solange-iii-decision-of-the-german-constitutional-court/; C Bilz, 'Konfrontation statt Kooperation? "Solange III" und die Melloni-Entscheidung des EuGH' (15 March 2016) Junge Wissenschaft im Öffentlichen Recht Blog, https://www.juwiss.de/26-2016/; E Uría Gavilán, 'Solange III? The German Federal Constitutional Court Strikes Again' (22 April 2016) European Papers, http://www.europeanpapers.eu/it/europeanforum/solange-iii-german-federal-constitutional-court-strikes-again.

4.2 Human Dignity, the European Arrest Warrant and Individual Guilt

After having set out the new human dignity condition in abstract terms in the first part of the judgment, the Bundesverfassungsgericht moved on to examine the precise case at hand in the second part. The national measure at issue was a decision to enforce an EAW. The complainant, Mr R, a citizen of the United States of America, had been sentenced – *in absentia* and without legal representation – to 30 years' imprisonment by an Italian court in 1992. More than 20 years later, he was arrested in Germany pursuant to an EAW. A German Higher Regional Court, the *Oberlandesgericht* Düsseldorf, permitted his surrender to Italy because it assumed that the complainant would have the right to a new evidentiary hearing there. It made this assumption on the basis of information provided by the relevant Italian prosecutor.

The Bundesverfassungsgericht held that the decision to extradite Mr R to Italy violated the principle that individual guilt is a prerequisite for punishment (*nulla poena sine culpa*).[47] This principle was violated because the Higher Regional Court had not investigated whether the complainant would actually get the opportunity to defend himself effectively in Italy, according to the legal situation and legal practice in this Member State.[48] As the Bundesverfassungsgericht had held in previous cases, the principle of individual guilt stemmed from the right to human dignity. For this reason, its violation was at the same time a violation of the constitutional identity of the Basic Law.[49]

It is not a coincidence that the Bundesverfassungsgericht developed the new human dignity condition in an EAW case. Conflicts between EU and national fundamental rights tend to occur where the principle of mutual recognition is applied in the former third pillar and in particular in the context of the EAW.[50] National implementation of an EAW has been

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[47] BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III,* para 51.

[48] Id., para 110.

[49] Id., para 48. For an analysis of the relationship between the right to human dignity and the principle of culpability in German constitutional law, see M Kremnitzer and T Hörnle, 'Human Dignity and the Principle of Culpability' [2011] Israel Law Review 115, 122.

[50] A prominent example: *Melloni* supra n.11.

challenged before the constitutional courts of several Member States.[51] Criminal law scholars have generally questioned whether *Cassis de Dijon* style mutual recognition can be transferred from the single market to criminal law.[52] It was even claimed that the EAW framework has led to a serious erosion of classical constitutional rights to a fair trial in many Member States.[53]

The introduction of the new human dignity condition in *Solange III* shows that the Bundesverfassungsgericht is concerned about this development and that it is prepared to address it. Therefore, *Solange III* should not simply be understood as a move by the Bundesverfassungsgericht to strengthen its own powers of review. Julian Nowag emphasises that the reaffirmation of the Bundesverfassungsgericht's own powers of review should be understood in the context of the *Gauweiler* preliminary reference procedure.[54] He notes that some members of the Bundesverfassungsgericht might have considered it necessary to reaffirm its power before approving the Outright Monetary Transactions Programme and thereby following the ECJ in a later case.[55] This assessment could be correct, but it should not be forgotten that the EAW poses actual problems in terms of fundamental rights protection. It would be wrong to assume that the only reason that drove the Bundesverfassungsgericht to develop the human dignity condition was a selfish one. The Bundesverfassungsgericht might also have aimed to strengthen the rights of individuals in the context of the EAW.

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[51] J Komárek, 'European Constitutionalism and the European Arrest Warrant: In Search of the Limits of the "Contrapunctual Principles"' [2007] Common Market Law Review 9.

[52] V Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' [2006] Common Market Law Review 1277, 1280.

[53] A Albi, 'Erosion of Constitutional Rights in EU Law: A Call for "Substantive Co-Operative Constitutionalism": Part 1' [2015] Vienna Journal on International Constitutional Law 151, 164–75. See also A Albi, 'An Essay on How the Discourse on Sovereignty and on the Co-Operativeness of National Courts Has Diverted Attention from the Erosion of Classic Constitutional Rights in the EU', in M Claes and others (eds), *Constitutional Conversations in Europe: Actors, Topics and Procedures* (Intersentia 2012).

[54] J Nowag, 'EU Law, Constitutional Identity, and Human Dignity: A Toxic Mix? Bundesverfassungsgericht: Mr R' [2016] Common Market Law Review 1441, 1445–46.

[55] Nowag supra n.54, 1446.

4.3 Reconciliation of Primacy and Fundamental Rights Protection

The condition for the application of the principle of primacy that was developed in *Solange III* contributes to the effective protection of individuals' fundamental rights. The Bundesverfassungsgericht guarantees and enforces the right to human dignity even if the impugned domestic measure is completely determined by EU law. At the same time, the Bundesverfassungsgericht is cautious to avoid grave disrespect of EU law; although it declared that respect for human dignity had priority over primacy of EU law, it attempted to reconcile the two principles.

That the ECJ's adjudication of the Charter is subjected to critical peer review by the Bundesverfassungsgericht through the condition developed in *Solange III* certainly strengthens individuals' rights. The ECJ is pressured to interpret Charter rights in a way that does not infringe the German conception of human dignity because it will want to avoid the invalidation of national measures that are completely determined by EU law in Germany. The human dignity condition is therefore not only beneficial for right holders in Germany but also for individuals across the entire EU. The previous *Solange* judgments certainly had just such a positive effect. According to the Bundesverfassungsgericht, it is generally accepted that it was their influence that made the ECJ develop fundamental rights protection in the EU legal order.[56]

According to the Bundesverfassungsgericht, the condition would not pose a substantial threat to the uniform application of EU law because it would function as a safeguard mechanism for exceptional cases only. It substantiated this argument in three ways. First, the Bundesverfassungsgericht announced that it would only apply the condition in exceptional cases under narrowly constrained conditions [*ausnahmsweise*, *unter eng begrenzten Voraussetzungen*, *in eng begrenzten Einzelfällen*].[57] This seems to indicate that the court will not be quick to establish a violation of the core of fundamental rights in future cases. Second, a violation of human dignity by EU measures will be very rare in the opinion of the Bundesverfassungsgericht because Article 6 TEU, the Charter and ECJ case law generally provide for effective fundamental rights protection.[58] To prove this claim, the Bundesverfassungsgericht referred to four judgments of the ECJ in which the latter had declared

[56] BVerfG supra n.10, 15.
[57] BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III,* paras 43–46.
[58] Ibid.

provisions of EU law to be in violation of Charter rights.[59] Third, the Bundesverfassungsgericht emphasised that it was the only domestic authority that could determine a violation of German constitutional identity.[60] In line with the Basic Law's commitment to European integration, this exclusive jurisdiction prevented domestic authorities from easily disrespecting the primacy of EU law.[61]

The arguments put forward by the Bundesverfassungsgericht suggest that the condition developed in *Solange III* will not lead to judicial review of EU measures in the light of national fundamental rights on a regular basis. The condition is narrowly construed and it will be reserved for exceptional cases. It will be applied only by the Bundesverfassungsgericht, which has shown its general commitment to European integration on many occasions. Therefore, it certainly does not seem to pose a substantial threat to the uniform application of EU law. The condition developed by the Bundesverfassungsgericht can be welcomed as a successful balance between the primacy of EU law and effective fundamental rights protection.

4.4 A Mere Obiter Threat

The lengthy statements on human dignity in *Solange III* were not actually relevant to the case at hand. The Bundesverfassungsgericht announced merely that it would give priority to human dignity if it was in conflict with EU law. It did not establish such a conflict in the specific case and therefore saw no need to trigger the identity condition.[62] As Julian Nowag puts it, the Bundesverfassungsgericht did not 'press the constitutional identity bomb button', but 'plant[ed] a constitutional identity mine'.[63]

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[59] BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III,* para 46. The Bundesverfassungsgericht referred to Joined Cases C-92/09 and C-93/09, *Schecke and Eiffert,* EU:C:2010:662; Case C-131/12, *Google Spain,* EU:C:2014:317; Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland,* EU:C:2014:238; Case C-362/14, *Schrems,* EU:C:2015:650.

[60] BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III,* para 43.

[61] Ibid.

[62] Id., para 84.

[63] Nowag supra n.54, 1447. First use of the term 'identity bomb': M Steinbeis, 'Europarechtsbruch als Verfassungspflicht: Karlsruhe zündet die Identitätskontrollbombe' (26 January 2016) Verfassungsblog, http://verfassungsblog.de/europarechtsbruch-als-verfassungspflicht-karlsruhe-zuendet-die-identitaetskontroll-bombe/.

The Bundesverfassungsgericht avoided any conflict between EU law and German constitutional identity by reading a degree of implementing discretion into the relevant EU secondary law. It recognised that the decision to extradite Mr R to Italy was determined by the EAW Framework Decision,[64] which, in principle, enjoyed primacy over domestic law.[65] However, it found that the relevant provision of the EAW Framework Decision did not oblige the Higher Regional Court to execute the EAW in the case at issue and that there was therefore no conflict between EU law and German constitutional identity.

The extradition decision was determined by Article 4a(1) of the EAW Framework Decision, which governs the execution of an EAW in cases of conviction *in absentia*.[66] According to this provision, the execution of an EAW can be refused if the individual concerned was convicted in his absence in the requesting Member State, unless one of a number of premises listed in Article 4a(1)(a)–(d) is fulfilled. The famous *Melloni* case was governed by Article 4a(1)(a)–(b). These provisions demanded the surrender of Mr Melloni because he had been aware of the scheduled trial.[67] In contrast, Mr R, the complainant in the *Solange III* case, had not personally been served with the decision by which he was convicted.[68] This meant that Article 4a(1)(d) of the EAW Framework Decision was applicable. This article provides that an EAW has to be executed if the convicted individual will be served with the judgment immediately after the surrender and will be informed of his or her right to a retrial or appeal that allows the merits of the case to be re-examined. Based on information provided by the Italian prosecutor, the German Higher Regional Court assumed that Mr R did indeed have a right to have the merits of the case re-examined in Italy and it therefore authorised his extradition.

However, the Bundesverfassungsgericht held that Article 4a(1)(d) of the EAW Framework Decision required surrender only if the executing judicial authority had in fact established that the individual had a right to

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[64] Council Framework Decision 2002/584/JHA (EAW Framework Decision) [2002] OJ L190/1; Council Framework Decision 2009/299/JHA amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA [2009] OJ L81/24.

[65] BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III,* para 76.

[66] EAW Framework Decision supra n.64; Council Framework Decision 2009/299/JHA supra n.64.

[67] *Melloni* supra n.11, paras 35–46.

[68] BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III,* para 3.

a retrial or trial *de novo*.[69] The Higher Regional Court was not obliged to surrender Mr R on the basis of a mere assumption of his rights in Italy. As the Higher Regional Court had not actually investigated the complainant's right to a fair trial in Italy, but instead relied on assurances from the Italian authorities, its decision to execute the EAW was therefore not mandated by EU secondary law in the form of Article 4a(1)(d) of the EAW Framework Decision.[70] According to the Bundesverfassungsgericht, the national measure at issue was not completely determined by EU law and it was therefore to be reviewed in light of the fundamental rights of the Basic Law.

The Bundesverfassungsgericht interpreted 4a(1)(d) of the EAW Framework Decision itself, instead of asking the ECJ to do so in a preliminary reference. It explicitly stated that the correct interpretation of EU law in this case was evident, in a way that did not leave room for any reasonable doubt and was thus a matter of *acte clair*.[71] This assessment is questionable. The ECJ has not yet interpreted Article 4a(1)(d) in this way. It is definitely not beyond reasonable doubt that it would do so, since it has emphasised thus far that the EAW Framework Decision seeks to 'facilitate and accelerate judicial cooperation' by establishing 'a new simplified and more effective system for the surrender of persons convicted or suspected'.[72]

5. HUMAN DIGNITY REVIEW SINCE *SOLANGE III*

The *Solange III* judgment did not go unnoticed by the ECJ, which reacted to it in its judgment in the joined cases *Aranyosi and Căldăraru*.[73] The ECJ found that Member States could refuse to execute an EAW under certain conditions if the person to be extradited might face inhumane and degrading detention conditions in the requesting Member State.[74] This finding marks 'a change in tone and posture compared to *Melloni*' and it shows that the ECJ can be 'an attentive

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[69] Id., paras 88–90.
[70] Id., para 125.
[71] BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III,* para 125.
[72] *Melloni* supra n.11, para 37.
[73] Case C-404/15, *Aranyosi and Căldăraru,* EU:C:2016:198.
[74] For an analysis of the judgment, see e.g. G Anagnostaras, 'Mutual Confidence is Not Blind Trust! Fundamental Rights Protection and the Execution of the European Arrest Warrant: Aranyosi and Căldăraru' [2016] Common Market Law Review 1675.

listener' because it directly took into account the *Solange III* judgment of the Bundesverfassungsgericht.[75]

The Bundesverfassungsgericht, for its part, repeatedly referred to *Solange III* in its subsequent case law and confirmed its key message on several occasions.[76] In several cases, it noted that sovereign acts of the EU and acts of German public authority – to the extent that they are determined by EU law – should generally not be measured against the fundamental rights of the Basic Law. However, the primacy of EU law was limited by the constitutional principles that are beyond the reach of European integration [*integrationsfest*], pursuant to Articles 23(1) and 79 of the Basic Law. In particular, these principles encompassed the guarantee of human dignity enshrined in Article 1 of the Basic Law. Human dignity had to be upheld in every individual case, even when applying national legal provisions that are determined by EU law.[77]

In two decisions delivered after *Solange III*, complainants before the Bundesverfassungsgericht asserted that their human dignity was violated by an act of German public authority that was determined by EU law.[78] Just as in *Solange III*, the impugned national act was a decision by a lower court to enforce an EAW.

In *Solange III*, the Bundesverfassungsgericht had held that, in order to rely on the exception to the primacy of EU law, complainants had to submit in a substantiated manner that their human dignity was in fact interfered with.[79] This requirement was satisfied in both subsequent EAW cases and the constitutional complaints were therefore admissible in this regard. One case concerned the surrender of a Croatian citizen to the United Kingdom by means of an EAW. The Bundesverfassungsgericht acknowledged implicitly that the complainant had sufficiently substantiated the violation of his human dignity because it did not find inadmissibility in this regard.[80] In the other EAW case, the complainant claimed that his surrender to Romania would violate his human dignity because

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[75] Hong supra n.19, 561–62.

[76] Case law that was delivered until 30 September 2017 could be considered.

[77] BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III,* para 36; BVerfG, 6 May 2016, 2 BvR 890/16, para 19; BVerfG, 6 September 2016, 2 BvR 890/16, para 32; BVerfG, 21 September 2016, 2 BvL 1/15, para 32; BVerfG, 18 August 2017, 2 BvR 424/17, para 32.

[78] BVerfG, 6 May 2016, 2 BvR 890/16; BVerfG, 6 September 2016, 2 BvR 890/16; BVerfG, 18 August 2017, 2 BvR 424/17.

[79] BVerfG, 15 December 2015, 2 BvR 2735/14 *Solange III,* para 36.

[80] BVerfG, 6 September 2016, 2 BvR 890/16, paras 27–29.

of the conditions of detention in that Member State. The Bundesverfassungsgericht stated that this claim was admissible because the complainant had analysed the case law of the ECJ and the European Court of Human Rights on the size of prison cells in-depth and had substantiated why his human dignity would be at risk in Romania.[81] The two cases show that the Bundesverfassungsgericht does not set a very high threshold for claims regarding violations of human dignity.

The two EAW cases confirm that *Solange III* has paved the way for an extended review of EU measures for their compliance with the Basic Law and has thereby enhanced the Bundesverfassungsgericht's powers of review. Before *Solange III*, the Bundesverfassungsgericht considered itself incompetent to undertake any fundamental rights review of national measures that are completely determined by EU law. Now, a substantiated claim of the violation of human dignity, in respect of a national act that is completely determined by EU law, will fulfil the admissibility criteria for constitutional complaints. Moreover, in both cases, the Bundesverfassungsgericht granted the complainants a preliminary injunction because their complaints were not manifestly unfounded.[82]

By September 2017, when this chapter was submitted, the Bundesverfassungsgericht had reached a final decision on the merits in one of the two EAW cases. The complainant in this case had asserted that surrender to the UK would violate the core of his right to remain silent in criminal proceedings and therefore his human dignity and Germany's constitutional identity. The Bundesverfassungsgericht concluded that the constitutional complaint was unfounded because the decision of the lower court to surrender the complainant to the UK did not violate constitutional principles that are beyond the reach of European integration pursuant to Articles 23(1) and 79 of the Basic Law.[83]

First, the Bundesverfassungsgericht indicated that the decision to surrender the complainant to the UK was completely determined by EU law. It repeated the ECJ's finding in *Aranyosi*, according to which a judicial authority can refuse to execute an EAW only in the exhaustively listed cases of non-execution laid down in the EAW Framework Decision.[84] The assessment of the suspect's silence in criminal proceedings

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[81] BVerfG, 18 August 2017, 2 BvR 424/17.

[82] BVerfG, 6 May 2016, 2 BvR 890/16, para 22; BVerfG, 18 August 2017, 2 BvR 424/17, para 38.

[83] BVerfG, 6 September 2016, 2 BvR 890/16, para 30.

[84] Id., para 31. See *Aranyosi and Căldăraru* supra n.73, 80.

was not listed as grounds for non-execution.[85] The complainant would therefore have to be surrendered to the UK under EU law.

The Bundesverfassungsgericht then recalled that the primacy of EU law was limited by the guarantee to human dignity of the Basic Law.[86] The judicial authority that decides on the execution of the EAW was obliged to investigate the legal and factual situation in the requesting Member State if the person concerned claimed in a substantiated way that their human dignity was at risk.[87]

However, the Bundesverfassungsgericht concluded that the complainant's human dignity would not be violated by his surrender to the UK. The right to silence touched upon human dignity, but not every element of the constitutional protection of this right was part of the guarantee to human dignity of Article 1 of the Basic Law.[88] Only a violation of the very core of the right to silence would violate Article 1.[89] For example, it would violate the suspect's human dignity if he was forced to incriminate himself by coercive means.[90] The guarantee provided by Article 1 of the Basic Law does not prohibit interpreting the suspect's silence in one way or another in the criminal proceedings, as would be possible under UK law.[91] The complainant's human dignity was therefore not at risk and the decision of the lower court to surrender him to the UK was in line with the Basic Law.[92]

This ruling confirms that the Bundesverfassungsgericht intends to disregard the primacy of EU law in exceptional and extreme cases only. Only the very core of constitutional principles is protected by Article 1 of the Basic Law, and this human dignity core is narrowly construed. As mentioned above, the *Solange III* review of human dignity does not appear to pose a substantial threat to the uniform application of EU law. The final decision on the merits in the other EAW case, currently pending, will be an opportunity for the Bundesverfassungsgericht to flesh out its definition of the human dignity core of constitutional principles for the purpose of the application of the *Solange III* review.[93]

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85 BVerfG, 6 September 2016, 2 BvR 890/16, para 31.
86 Id., para 32.
87 Id., para 33. See also BVerfG, 18 August 2017, 2 BvR 424/17, para 33.
88 BVerfG, 18 August 2017, 2 BvR 424/17, paras 34–36.
89 Ibid.
90 Ibid.
91 Ibid.
92 BVerfG, 6 September 2016, 2 BvR 890/16, paras 36–37.
93 See BVerfG, 18 August 2017, 2 BvR 424/17.

6. CONCLUSION

It can be concluded that the Bundesverfassungsgericht created a powerful review mechanism in *Solange III*. It developed a new variant of the constitutional identity condition that guarantees the respect for German fundamental rights in every individual case. It associated constitutional identity with human dignity by confirming that the constitutional identity of the Basic Law entailed the respect for human dignity. It then declared that it would uphold the core of the fundamental rights and constitutional principles of the Basic Law on a case-by-case basis.

The new review mechanism does not alter the Bundesverfassungsgericht's general approach to EU law, but it adds a further condition to it. The basic rule remains that sovereign acts of the EU and acts of German public authority – to the extent that they are determined by EU law – are not to be measured against the fundamental rights of the Basic Law. With this rule, the Bundesverfassungsgericht gives effect to the primacy of EU law. However, the primacy of EU law is limited by German constitutional principles that are beyond the reach of European integration [*integrationsfest*] pursuant to Articles 23(1) and 79 of the Basic Law. Human dignity belongs to these principles and it has to be respected in every individual case for this reason, even if this means going against EU law.

Nevertheless, the new human dignity review does not pose a substantial threat to the primacy principle. *Solange III* has certainly enhanced the Bundesverfassungsgericht's powers of review. If complainants assert that their human dignity was violated by a national measure that is completely determined by EU law, their claims are admissible if they are substantiated. However, recent case law shows that the Bundesverfassungsgericht construes the core of constitutional rights and principles very narrowly. The primacy of EU law is ignored only in cases of extreme violations of human dignity. The Bundesverfassungsgericht should flesh out this very core of constitutional rights and principles in future cases.

6. Balancing privacy and national security in the global digital era: A comparative perspective of EU and US constitutional systems

Luca Pietro Vanoni

1. INTRODUCTION

A few years ago, in the movie *Captain America: Civil War*, the American government was frightened by the uncontrolled use of power by superheroes and sought to bring them under government authority, forcing them to register with an oversight body and thus give up their secret identities. This move split the superhero world in two, with one faction following the lead of Iron Man, a fervent supporter of the government's approach and the necessity to sacrifice privacy in the face of national security, and the other headed by Captain America, a dogged defender of the American dream and his right to secrecy as a person and as a superhero.

The ensuing epic duel between our two superheroes clearly tells the tale of the battle between national security and privacy our democracies are forced to confront in the age of global terrorism. This conflict reached its apex in the Datagate scandal, that is, the global surveillance disclosures that began in June 2013 with former NSA contractor Edward Snowden revealing details of secret surveillance programmes like PRISM and TEMPORA. These programmes allowed American intelligence agencies such as the NSA and FBI (as well as GCHQ in Britain and DGSE in France) to acquire and store an unprecedented amount of digital information through cooperation with leading telephone and internet providers. These revelations inevitably sparked a debate in Europe and America on the right to privacy and personal data protection in the age of digital terrorism. A comparative analysis of these two systems can thus help in understanding the difficult balance between privacy and security in our

democracies. At the end of the film, Captain America turns to Iron Man and asks him how far individual rights can be compressed in the name of national security before this ultimately damages the values of freedom and justice our constitutional democracies were created to uphold. It is a question that sums up the problem well.

2. DATA PROTECTION IN EUROPEAN UNION LAW: AN OVERVIEW

Protection of the right to privacy and the use of personal data in Europe is especially extensive, based on Convention 108 – Council of Europe, on the legal devices of the European Union (EU) and on the case law of the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ).

In the EU, the right to privacy is guaranteed and governed both by the Treaties and secondary legislation. Following the approval of the Lisbon Treaty, Article 16 of the Treaty on the Functioning of the EU governs the fundamental right to the processing of personal data, establishing the procedures for the legislative protection of this sphere. Article 16 establishes the competences of the EU for protecting personal data, indicating the European Parliament and the Council, acting in accordance with ordinary legislative procedure, shall approve rules able to safeguard citizens against the undue use of their personal data by EU institutions and Member States when carrying out activities which fall within the scope of Union law.[1] This article operates in conjunction with all European competences, especially internal market provisions, as the creation of this market – along with the arrival of the digital era – has resulted in the constant transmission of digital information and data. By establishing the legal basis for European data processing on recognizing

[1] Charter of Fundamental Rights of The European Union [2016] OJ C202/2, Art. 16: "1. Everyone has the right to the protection of personal data concerning them. 2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities."

a fundamental freedom, Article 16 clarifies that "where a conflict between privacy protection and the circulation of personal data makes finding a balance impossible … the former must prevail."[2]

Additionally, "constitutional" protection of the right to privacy and data protection are expressly guaranteed to every individual by Articles 7 and 8 of the EU Charter of Fundamental Rights. Article 7 specifically sets out the general provision that "Everyone has the right to respect for his or her private and family life, home and communications."[3] Article 8 safeguards "the right to the protection of personal data" establishing that such data "must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law" and that every individual "has the right of access to data which has been collected concerning him or her, and the right to have it rectified."[4] The protection of personal data is both independent of the right guaranteed in Article 7 and a specification thereof since it regulates the protection of the individual and its nature in relation to the digital era challenges of adopting the principles set out by the Preamble to the Charter, according to which the protection of European rights must be guaranteed "in the light of changes in society, social progress and scientific and technological developments."[5]

Special legislative acts actually guaranteed this right even before these rules were adopted in the Treaty. For many years, the main tool – albeit along with other specific acts – for such protection was the EU Data Protection Directive (95/46/EC), which required Member States to "protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy, with respect to the processing of personal data."[6]

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[2] Bruno Cortese, 'Protezione dei dati di carattere personale nel diritto dell'Unione europea' [2013] in Diritto dell'Unione Europea no. 2, 316.

[3] Charter of Fundamental Rights of The European Union, Art. 7.

[4] Id. Art. 8.

[5] See Charter of Fundamental Rights of The European Union at Preamble. See also Filippo Donati, 'Art. 8. Protezione dei dati di carattere personale', in Raffaele Bifulco, Marta Cartabia and Alfonso Celotto (eds), *L'Europa dei diritti* (Il Mulino, 2001) 83.

[6] Directive (EC) 46/1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31, Art. 1.

This act was recently replaced by what is often called the "personal data protection package" consisting of Regulation (EU) 2016/679,[7] which introduces uniform, general rules in Union law, and Directive (EU) 2016/680,[8] which governs data protection in relation to police and judicial cooperation when preventing, investigating, detecting or prosecuting criminal offences. These provisions now provide pervasive new privacy protection, adopting the indications issued by the European Court of Justice and Article 29 Working Party in interpreting Union law. Some of the key innovations are the right to be forgotten, the right to data portability, and the right to transparent, honest information about the processing of one's data and any breaches. Finally, the creation of the role of Data Protection Officer (DPO) is another notable change as this role is entrusted with the key tasks in checking data security and processing.

The personal data protection package is far too broad and detailed to be covered thoroughly in this work. Generally, it seeks to give the Union "an updated legislative fabric" that is "more suited to today's needs" by defining precise, robust rules that will undoubtedly have a significant influence across European law. It represents an "enormous leap forward for data protection, especially because it marks the change from a system of a directive harmonizing differing national laws based on mutual recognition to a system based on Regulation, which is, by its very nature, binding for all Union citizens."[9]

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[7] Regulation (EU) 679/2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1.

[8] Directive (EU) 680/2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA [2016] OJ L 119/89.

[9] Francesco Pizzetti, *Privacy e il diritto europeo alla protezione dei dati personali: Dalla Direttiva 95/46 al nuovo Regolamento europeo* (Giappichelli, 2016) 177.

3. DATA PROTECTION AND NATIONAL SECURITY BETWEEN THE EUROPEAN UNION AND MEMBER STATES

Despite this legislative framework, "the EU data protection regime contains a number of weaknesses and derogations which dilute the capacity to protect privacy rights."[10] The primary shortcoming lies with the Member States being competent for national security, which comes into conflict with the right to privacy when sophisticated digital data collection and storage programmes are used.

The EU has tried on occasion in the past to adopt legislative measures to harmonize national laws on foreign politics and common defence,[11] but national security remains the responsibility of Member States. As set out in Article 4(2) EU Treaty, "The Union shall respect the equality of Member States before the Treaties as well as their national identities … It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State."[12] This recognition of exclusive state competence has practical implications right down to secondary legislation level. For example, the EU Data Protection Directive (95/46/EC) allows Member States to adopt legislative measures to restrict the scope of the obligations and rights provided "when such a restriction constitutes a necessary measure to safeguard: (a) national security; (b) defence; (c) public security …"[13] and these exceptions were recalled by the recent Regulation (EU) 2016/679.[14]

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[10] David Cole and Federico Fabbrini, 'Bridging the Transatlantic Divide? The United States, the European Union, and the Protection of Privacy across Borders' [2016] 14 I●CON 255.

[11] Valsamis Mitsilegas et al., *The European Union and Internal Security* (Palgrave Macmillan, 2003).

[12] Treaty on European Union [2006] OJ C326/1, Art. 4 (2).

[13] Data Protection Directive, supra n. 6, art. 13.

[14] Regulation (EU) 679/2016, supra n. 7, art. 16 considering: "This Regulation does not apply to issues of protection of fundamental rights and freedoms or the free flow of personal data related to activities which fall outside the scope of Union law, such as activities concerning national security. This Regulation does not apply to the processing of personal data by the Member States when carrying out activities in relation to the common foreign and security policy of the Union." See also Art. 23: "Union or Member State law to which the data controller or processor is subject may restrict by way of a legislative measure the scope of the obligations and rights provided for in Articles 12 to 22 and

Specific legislation also has provisions establishing exceptions to the digital privacy of citizens. For example, in 2006 the European Parliament approved the Data Retention Directive (2006/24/EC),[15] which allows Member States to store telephone and computer metadata for public security purposes and for preventing crime and terrorism. This provision has now been invalidated by the Court of Justice, but it was adopted following the London underground bombings in 2005. It was an attempt to define the European balance between individual rights to data protection and the intelligence needs of states. The clash between these two rights is an issue for all western democracies, but in Europe it is an example of the "special European federalism"[16] and the EU's constitutionalization process initiated with the Treaty of Lisbon.

This conflict, while remaining part of the division of competences between the European Union and Member States, will become ever more accentuated because of the numerous state laws approved by countries in response to the ever-increasing number of terror attacks in our societies. The United Kingdom, France, Germany and most recently Italy have established digital surveillance programmes to thwart the terrorist threat before attacks actually occur.[17] These measures use technologies that require digital databases and hence the collection of electronic data from citizens. The "laws of fear" in question fall under state responsibility and are not directly subject to Articles 7 and 8 of the Charter, as clarified by Article 51, since these "are addressed to the institutions, bodies, offices

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Article 34, as well as Article 5 in so far as its provisions correspond to the rights and obligations provided for in Articles 12 to 22, when such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society to safeguard: a) national security; b) defence; c) public security …"

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

[16] Giovanni Bognetti, 'Lo speciale federalismo europeo', in Angelo Maria Petroni (ed), *Modelli giuridici ed economici per la Costituzione europea* (Il Mulino, 2001) 245.

[17] For a recent comparative analysis of the legislative measures concerning terrorism, see Laurent Mayali and John Yoo, 'A Comparative Examination of Counter-Terrorism Law and Policy' [2016] UC Berkeley Public Law Research Paper No. 2949078, available at SSRN: https://ssrn.com/abstract=2949078. For Italy, see Giovanna De Minico, 'Le libertà fondamentali in tempo di ordinario terrorismo' [2015] Federalismi.it no. 10/2015, http://www.federalismi.it/nv14/articolo-documento.cfm?Artid=29517.

and agencies of the Union," while the Member States are merely required to respect them "only when they are implementing Union law." As a result of how competences are assigned, protecting the privacy and ensuring the security of citizens is really entrusted to national, not European, legislation.

Nonetheless, the integration between European and national law is such that the rights in the Charter do influence political and legislative decisions, and often do so quite substantially. This is even more true because of the interpretation of treaties by the Court of Justice, which "has long extended the scope of application of the fundamental rights it interprets … identifying the implications in Member States and binding even national bodies and institutions."[18] Thus, decisions by judges in Luxembourg provide an essential perspective in understanding the actual sphere and scope of European privacy law where state or European laws come into conflict with the provisions in Articles 7 and 8 of the Charter.

4. DIGITAL PRIVACY BEFORE THE COURT OF JUSTICE OF THE EUROPEAN UNION

Court of Justice rulings on digital privacy provide an especially important approach to defining the sphere and scope of this right. The Court was initially exceptionally wary in its case rulings, but it now seems to have carved out a role as a protagonist even when it comes to concretely defining the rights established by Articles 7 and 8 of the Charter.

This change in approach by EU judges can be traced particularly to 2014 and the following cases: C-131/12 *Google Spain* (2014),[19] C-293/12 and C-594/12 *Digital Rights Ireland* (2014),[20] C-362/14 *Schrems* (2015)[21] and finally C-203/15 and C-698/15 *Tele2 Sverige and*

[18] Marta Cartabia, 'Art. 51. Ambito di applicazione', in Raffaele Bifulco, Marta Cartabia and Alfonso Celotto (eds), *L'Europa dei diritti* (Il Mulino, 2001) 347.

[19] Case C-131/12 *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* [2014] ECLI:EU:C:2014:317.

[20] Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland, Seitlinger and others* [2014] ECLI:EU:C:2014:238.

[21] C-362/14 *Maximillian Schrems v. Data Protection Commissioner* [2015] ECLI:EU:C:2015:650.

Watson (2016).[22] These four rulings are a fundamental starting point for understanding the extent and scope of Articles 7 and 8 of the Charter and for finding the balance that judges have adopted between those rights and conflicting interests/rights. The *Digital Rights Ireland* and *Schrems* cases sought to balance digital privacy and security; the *Google Spain* case attempted to resolve the conflict with another freedom – the freedom of expression – in the digital world. However, the latter case is as important as the other two in understanding the reasoning of European judges in relation to the protection of privacy in Europe.

In the *Google Spain* case, the Court of Justice was petitioned in relation to a request for Google to remove links from search results to web pages that were potentially harmful or were no longer relevant to the person. The claimants thus sought a true right to be forgotten in relation to web data, arguing that Google's web page indexing amounted to the collection of personal data. The Court's incredibly broad (some have even called it "manipulative"[23]) interpretation of the rules in the Directive accepted the claimants' arguments and ruled they were entitled to have links to web pages containing personal data removed from search results, without any changes to the actual web pages and without the publication of such information being in any way illegal.

This interpretation is the result of the "constitutionalization" of the privacy set out in the Charter. European judges thus hold that the rights granted by Articles 7 and 8 "override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in finding that information upon a search relating to the data subject's name" (para. 97). The Court then limited the scope of this statement by adding the recognition of this right must be weighed against the interests in play and thus requires a case-by-case assessment. Generally, the judges' ruling does extend the scope of the European right to privacy, as it becomes a positive right to control information about oneself (that is the "*habeas data* right"[24]).

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[22] Joined Cases C-203/15 and C-698/15 *Tele2 Sverige AB (C-203/15) v. Postoch telestyrelsen, and Secretary of State for the Home Department (C-698/15) v. Tom Watson and Others* [2015] ECLI:EU:C:2016:970.

[23] Oreste Pollicino, 'Interpretazione o manipolazione? La Corte di giustizia definisce un nuovo diritto alla privacy digitale' [2014] in Federalismi.it no. 3, 14, http://www.federalismi.it/nv14/articolo-documento.cfm?artid=28017.

[24] Tommaso Frosini, 'Google e il diritto all'oblio preso sul serio', in Giorgio Resta and Vito Zeno-Zencovich (eds), *Il diritto all'oblio su internet dopo il caso Google v. Spain* (TrE-PRESS, 2015) 2.

A few months prior to the *Google Spain* ruling, the Court had almost suggested it would interpret privacy rights so broadly when it annulled the Data Retention Directive in the *Digital Rights Ireland* case. As noted, this directive was introduced to harmonize national legislations governing the mass storage of metadata from digital traffic to prevent serious crimes. The directive set out that such data could be stored for no less than six months and no more than two years. In deciding the case, the Court initially noted the interference of these provisions in the rights established by Articles 7 and 8 of the Charter was "particularly serious" because it is "likely to generate in the minds of the persons concerned the feeling that their private lives are the subject of constant surveillance" (para. 37).

Based on these considerations, the judges assessed whether the interference was justified (in the light of Article 52 of the Charter, which allows limitations on European freedoms provided the essence of those freedoms is respected), met the objectives of general interests and was proportional to the purpose. In relation to the first aspect, the judges argued it did not harm the essence of this right as it was limited to the use of data and did not regard the content of the communications. Moreover, such data collection was meant to prevent and combat crime, and was consequently justified, according to the Court, for reasons of public security. However, it did fall short on the issue of proportionality for two reasons. First, the directive rules would seem to be generic and contain gaps when it comes to the people influenced by the data collection, which encompasses "the entire European population" (para. 56) and "covers, in a generalized manner, all persons and all means of electronic communication as well as all traffic data without any differentiation, limitation or exception being made in the light of the objective of fighting against serious crime" (para. 57). Secondly, the directive "fails to lay down any objective criterion by which to determine the limits of the access of the competent national authorities to the data and their subsequent use for the purposes of prevention, detection or criminal prosecutions concerning offences that, in view of the extent and seriousness of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter, may be considered to be sufficiently serious to justify such an interference" (para. 60). The judgement's effect primarily concerns Union law and thus does not invalidate national rules. Nonetheless, the ruling does open the way for European citizens to seek the repeal of national rules on data retention by their own courts as

they breach the right to the protection of personal data.[25] Unsurprisingly, in the wake of the Court of Justice ruling, many national legal systems effectively declared the rules unconstitutional and thus highlighted the increased importance of this right across the continent.[26]

The cases analysed have marked the first increase in the level of privacy protection in the EU. Various reasons underlie such conduct, including the reasonable hypothesis of the tension between European countries and the United States that grew out of Snowden's revelations about the NSA's operations. This tension reached its apex with the *Schrems* ruling, in which the Court invalidated the Safe Harbour agreement between the European Commission and the United States on data transmission between the two sides of the Atlantic. The case was brought by an Austrian lawyer, Maximillian Schrems, who initially petitioned the Irish authorities and then the Court of Justice seeking to declare illegitimate the transfer of his personal data acquired via Facebook from the Irish subsidiary of that company to its Californian parent. The cross-border traffic of digital data has long been a fundamental tool in trade relations between Europe and America. In order to implement Directive 95/46/EC, the European Commission had adopted Decision 2000/520/EC authorizing the transfer of data from the EU to US companies that had ratified the Safe Harbour principles (i.e. adopting the principles of privacy protection set out in European law).[27]

In *Schrems*, the Court invalidated that decision, arguing it "cannot prevent persons whose personal data has been or could be transferred to a third country from lodging with the national supervisory authorities a claim … concerning the protection of their rights and freedoms in regard to the processing of that data" (para. 53). This strengthened the powers of national authorities, which had to be able to independently assess if the transfer of a person's data to a country outside the Union complied with

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[25] See Federico Fabbrini, 'The European Court of Justice Ruling in the Data Retention Case and its Lessons for Privacy and Surveillance in the U.S.' [2015] 28 Harv. Hum. Rts. J. 88: "The ECJ decision does not automatically remove national implementing acts from the legal order. … However, because national data retention laws are technically exceptions to the Data Protection Directive, they are subject to review for compatibility with EU human rights law."

[26] See Niklas Vainio and Samuli Miettinen, 'Telecommunications Data Retention after Digital Rights Ireland: Legislative and Judicial Reactions in the Member States' [2015] 23 (3) Int J Law Info Tech 290.

[27] Commission Decision (EC) 520/2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce [2000] OJ L215/7.

the directive. Secondly, the judges focused on the Commission decision, determining whether this met European data protection standards. On this front, the judges noted the Safe Harbour regime is binding for American companies that sign it, but is subordinate to requests by the US government when such requests are justified on national security grounds. In essence, the American Safe Harbour system does not genuinely protect the privacy of European citizens because it does not prevent such data from being accessed by American agencies in accordance with current US law. Consequently, the Court ruled the Commission's decision to be invalid as a rule "permitting the public authorities to have access on a generalized basis to the content of electronic communications" compromises "the essence of the fundamental right to respect for private life" (para. 94) when (as in the current case) it does not provide for "any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him, or to obtain the rectification or erasure of such data" (para. 95).

The last chapter in the ECJ privacy saga is the *Tele2 Sverige* and *Watson* case. In that ruling, the Grand Chamber further strengthened the privacy protection afforded to European citizens, holding that national laws that establish a general and indiscriminate obligation on electronic communication service providers to store client data and that allow national authorities generalized access to such data were incompatible with Union law. The matter had been brought before the Court by two national courts (Kammarrätten i Stockholm and Court of Appeal England and Wales) and specifically concerned the interpretation of Article 15 of the Electronic Communications Directive (2002/58/EC), which allows Member States to require public electronic communications service providers to retain data about communication activities for certain defined public interests such as the fight against terrorism and serious crime.[28]

[28] Directive (EC) 58/2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector [2002] OJ L201, Art. 15: "1. Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in Article 5, Article 6, Article 8(1), (2), (3) and (4), and Article 9 of this Directive when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e., State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in Article 13(1) of Directive 95/46/EC. To this end, Member States may, *inter alia*, adopt legislative measures providing for the retention of data for a limited period

The Court provided a restrictive interpretation of Article 15, establishing that it "must be interpreted as precluding national legislation which, for the purpose of fighting crime, provides for the general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication" (para. 112). The storage of such data is only permitted when national legislation "indicates in what circumstances and under which conditions a data retention measure may, as a preventive measure, be adopted, thereby ensuring that such a measure is limited to what is strictly necessary" (para. 109). Consequently, the Court "challenges the compatibility of mass data retention with Articles 7 and 8 EUCFR even in the context of the fight against terrorism,"[29] establishing that exceptions to the right to data protection should be limited to what is absolutely necessary. This interpretation also extends to the requirements for national authorities to access such data. As the *Tele2 Sverige* ruling noted, EU law "must be interpreted as precluding national legislation governing the protection and security of traffic and location data and, in particular, access of the competent national authorities to the retained data, where the objective pursued by that access, in the context of fighting crime, is not restricted solely to fighting serious crime, where access is not subject to prior review by a court or an independent administrative authority, and where there is no requirement that the data concerned should be retained within the European Union" (para. 125).

Starting from the *Google Spain* case, the Court of Justice would seem to have taken on a leading role in defining the right to digital privacy in Europe. Following this ruling, the cases heard by EU judges have resulted in a significant strengthening of that freedom in "constitutional terms," establishing the primacy of this right over other, also legitimate rights and interests. The level of protection of digital data is thus higher than in the rest of the world, especially than in America. Concerning the question of national security, the Court's reasoning would seem to move in concentric circles that progressively restrict this public interest. Following the *Tele2 Sverige* ruling, the "obligation to 'take digital data

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justified on the grounds laid down in this paragraph. All the measures referred to in this paragraph shall be in accordance with the general principles of Community law, including those referred to in Article 6(1) and (2) of the Treaty on European Union."

[29] See Lorna Woods, 'Data Retention and National Law: The ECJ Ruling in Joined Cases C-203/15 and C-698/15 Tele2 and Watson (Grand Chamber)' [2016] http://eulawanalysis.blogspot.it/2016/12/data-retention-and-national-law-ecj.html, accessed 20 April 2017.

protection seriously' falls not only to European (*Digital Rights Ireland*) and American (*Schrems*) institutions, but also binds Member State legislators."[30] In essence, the Court has adopted an almost political stance, affirming the "digital sovereignty" of the European Union over data processing and "establishing its [own] judicial supremacy over questions of the highest political level."[31] Yet at the same time, the "data-centric" approach of the European Union creates a potential risk of radicalizing the right to privacy to the detriment of legitimate interests and rights that are also "constitutionally" protected, thus marginalizing, for example, the requirements of freedom of online information or national security measures.

5. PRIVACY IN THE UNITED STATES OF AMERICA: CONSTITUTIONAL FRAMEWORK

In the United States of America, safeguarding confidentiality has been a fundamental value since the very birth of the Federation. Even before Warren and Brandeis famously defined the "right to be alone,"[32] the fathers of the American Constitution placed enormous importance on the freedom of the individual because, during colonial times, they hated the arrogance with which English officials would search their property and communications without any form of judicial review.[33] Once the English had been defeated, this widespread mistrust of excessive governmental control was codified in the Fourth Amendment to the American Constitution, which establishes the right of citizens "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[34] This article is still the standard on which the American right

[30] Oreste Pollicino and Marco Bassini, 'La Corte di giustizia e una trama ormai nota: la sentenza *Tele2 Sverige* sulla conservazione dei dati di traffico per finalità di sicurezza e ordine pubblico' [2017] DPC http://www.penalecontemporaneo.it/d/5162-la-corte-di-giustizia-e-una-trama-ormai-nota-la-sentenza-tele2-sverige-sulla-conservazione-dei-dati, accessed 28 April 2017.

[31] Vincenzo Zeno-Zencovich, 'Intorno alla decisione nel caso Schrems: la sovranità digitale e il Governo internazionale delle reti di telecomunicazione', in Giorgio Resta and Vito Zeno-Zencovich, *La protezione transnazionale dei dati personali* (TrE-PRESS, 2016) 9.

[32] Samuel Warren and Louise Brandeis, 'The Right to Privacy' [1890] 4 Har. L.R. 193.

[33] William J. Cuddhy, *The Fourth Amendment: Origins and Original Meaning* (Oxford University Press, 2008).

[34] U.S. Const. Am. IV.

to privacy is based, as well as being one of the pillars of the system of criminal law and procedures. Nonetheless, the modern meaning and role of that clause has changed in at least two ways.

First, technological development has strongly influenced its implementation because the American Framers could never have imagined the extent of the impact of the digital revolution on people's lives and this has necessitated a series of interpretative adjustments by judges and legislators. By the early twentieth century, the Supreme Court had already had to reconsider the meaning of the constitutional amendment for phone tapping, that is, to interpret the clause for a technology not envisaged by the American Constitution. In society today, this problem has grown substantially as widespread use of technology constantly generates new interpretation problems.

Secondly, the fight against terrorism influences the right to privacy because the arrival of the digital era has provided everyone with new communication means, which for terrorists, make it easier to recruit potential terrorists and plan attacks. To protect national security, the American government has devised mass digital data collection programmes that try to obtain, before an attack, information that can be used to prevent attacks before they happen. Clearly, this requires a preemptive, widespread investigative approach that could easily invade the privacy of individuals. Consequently, American legal scholarship has begun to debate the role of the Fourth Amendment in the age of the global digital war since, as can easily be realized, "the current criminal laws and traditional enforcement process cannot provide absolute protection against terrorist acts" and "traditional Fourth Amendment requirements may thwart many investigations of terrorism, which depend on stealth to prevent terrorist plans before they are carried out."[35]

Bearing in mind these two considerations, it is now necessary to look at how privacy, as regulated under the Constitution, differs in America and Europe. First, a distinction has been made since *United States v. United States District Court* (1972)[36] between personal privacy in relation to ordinary criminal acts and those that have an influence on national security. The latter are considered to fall under the constitutional provision that the president has to "preserve, protect and defend the Constitution of the United States."[37] A further distinction is made between internal threats, which are covered by the safeguards envisaged

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[35] William C. Banks and Marion E. Bowman, 'Executive Authority for National Security Surveillance' [2000] 1 Am. U. L. Rev 50, 92.

[36] *United States v. U.S. District Court* [1972] 407 U.S. 297.

[37] U.S. Const. Art. II sec. 2.

in the Fourth Amendment, and external ones, which are tied to the actions of foreign states or agents. The protections afforded in the latter case are significantly weakened to bolster national defence.[38]

Secondly, while Articles 7 and 8 of the European Charter recognize the right to digital privacy for "everyone," the American Constitution differentiates between citizens and foreigners. On American soil, the application of the Fourth Amendment is guaranteed for both Americans and foreigners, but this same level of protection does not apply to government surveillance outside of the federal borders. The Supreme Court ruling in *United States v. Verdugo-Urquidez* (1990)[39] reiterates this amendment can only be applied to limit government surveillance if it "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection" with this community.

Finally, the Supreme Court's interpretation of the Fourth Amendment has created a series of doctrines that would seem to restrict the sphere to which privacy applies. The original wording of the amendment refers primarily to the protection of the physical limits of citizens' privacy, defining these against illegitimate searches of "persons, houses, papers, and effects." In line with this interpretation, the Supreme Court initially applied this clause on the basis of the physical trespass doctrine, that is, against cases of police search and seizure in one of the "places" listed in the Constitution. The application of this theory led the Supreme Court, for example, to rule it was legitimate for the FBI to conduct an investigation using wiretapped private telephone conversations without judicial approval because these were obtained outside of the claimant's home (*Olmstead v. United States* 1928).[40]

As technology has spread, the Court has moved beyond that doctrine, arguing the Fourth Amendment "protects people, not places." In *Katz v. United States* (1967),[41] the Supreme Court extended and "dematerialized" the physical boundaries established by the Constitution, using the perception citizens have of their privacy to define privacy. As noted by Judge Harlan, the Fourth Amendment should protect "an actual (subjective) expectation of privacy" that society "is prepared to recognize as 'reasonable'" (p. 389). The Court's intent was the adoption of the reasonable expectation of privacy test should extend the scope of

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[38] Ioanna Tourkochoriti, 'The Transatlantic Flow of Data and the National Security Exception in the European Data Privacy Regulation: In Search for Legal Protection against Surveillance' [2014] 36 U. Pa. J. Int'l L. 459 ss.

[39] *United States v. Verdugo-Urquidez* [1990] 494 U.S. 259.

[40] *Olmstead v. United States* [1928] 277 US 438.

[41] *Katz v. United States* [1967] 389 US 347.

application of constitutional guarantees to cases not specifically envisaged by the Constitution, introducing – through the reasonableness principle – less rigid use of the parameters in the Fourth Amendment. This has not, though, always been the case and subsequent rulings ended up reducing the scope of constitutional guarantees.

Starting from the reasonable expectation of privacy doctrine, the Supreme Court created a legal presumption that excludes information citizens freely reveal to third parties from the scope of the Fourth Amendment. In *United States v. Miller* (1976)[42] and *Smith v. Maryland* (1979),[43] the Supreme Court formed the third party doctrine according to which "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."[44] Therefore, citizens who freely grant personal data to public service providers such as banks (*Miller*) or telephone companies (*Smith*) implicitly forgo privacy guarantees. Consequently, if government agencies acquire such information, it is not necessary to have judicial approval or probable cause. The *Smith* case is especially notable as the Supreme Court took a major step in limiting American citizens' right to privacy because applying the third party doctrine to information collected using a pen register (i.e. an electronic device that records all numbers called) installed without judicial approval on a telephone line as part of an investigation created the legal basis for extending that theory to the use and processing of computer data in the digital era.

6. RIGHT TO PRIVACY WITHIN THE NATIONAL SECURITY PROGRAMMES

The constitutional system described above is directly acknowledged by legislation. Congress has been especially active in passing bills to govern the right to privacy. In addition to the key Privacy Act of 1974,[45] the American legislative branch has approved specific laws on the protection of this right in the digital age, such as the Electronic Communications Privacy Act (1986)[46] and the Communications Assistance for Law

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[42] *United States v. Miller* [1976] 425 US 435.
[43] *Smith v. Maryland* [1979] 442 US 735.
[44] *United States v. Miller*, supra n. 42, 442–443.
[45] Privacy Act of 1974, 5 U.S.C. § 552a.
[46] Electronic Communications Privacy Act 1986 (ECPA), 18 U.S.C. § 2510–22.

Enforcement Act (1994).[47] These laws definitely extend and specify the nature of this right, but they are also influenced by the constitutional limitations discussed above, for example, distinguishing between the protections afforded to "US persons" and those – far weaker – that foreigners are guaranteed.[48] Moreover, the third party doctrine limits the scope of these provisions when personal data is voluntarily given to third parties, thus giving the government legitimate national security grounds to acquire the data and metadata stored by telephone companies and internet service providers.

Privacy rules in America also conflict with specific legislative acts designed to regulate digital surveillance by the American government. For many years, national security was not the subject of specific legislative provisions as it was largely understood to be synonymous with the public order guaranteed locally by the police force in each state. The need to have a federal investigation service (the FBI) only became apparent as organized crime took root during probation. The end of the two World Wars and the advent of the Cold War led to the United States strengthening its intelligence system with the creation of two agencies tasked with permanently defending national security through spying (CIA) and the collection and decryption of secret messages (NSA).

For a number of years, the supervision of these agencies was largely left to the government, but the exceptionally rapid development of surveillance techniques and the scandals linked to J. Edgar Hoover's dossiers and then Watergate forced Congress to approve legislation to limit excessive surveillance power. This led to the approval of the Foreign Intelligence Surveillance Act (FISA) in 1978,[49] which sets out the limits of government power in relation to privacy.

The law establishes a series of measures designed to limit the NSA's collection of sensitive data, for example, by restricting the concept of "foreign power or agent thereof" and establishing that the government must show "probable cause" to believe the person under surveillance is a genuine security threat. Consequently, Congress has instituted special courts and review courts (Foreign Intelligence Surveillance Court – FISC; Foreign Intelligence Surveillance Court of Review – FISCR) to

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[47] Communications Assistance for Law Enforcement Act 1994 (CALEA), 47 U.S.C. § 1001–10.

[48] Francesca Bignami, 'The US Legal System on Data Protection in the Field of Law Enforcement. Safeguards, Rights and Remedies for EU Citizens' [2015] Study for the LIBE Committee, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2705618.

[49] Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. § 36.

determine the reasonableness and legitimacy of government surveillance requests. The powers of control of these judges are far more limited than ordinary judges, consisting merely of a formal assessment of compliance with legal requirements.[50]

Numerous specific laws and regulations have followed this first one. Undoubtedly, the most important of these is the Patriot Act (2001)[51] adopted by Congress in the aftermath of the World Trade Center attacks. This law profoundly changed the organization and functioning of the US system to fight terror, heavily cutting into the privacy of citizens. Notably, the law amended various FISA rules to increase federal agency powers to collect "tangible things" that might be useful in investigations (Section 215) and to limit privacy protection to American citizens (Section 702). These measures gave NSA agents the power to obtain telephone and computer records from the main industry providers to produce a massive searchable database that could be used in investigations.[52]

Computer metadata collection programmes ran largely uninterrupted from 2006 onwards. These included the Bulk Metadata Surveillance Program, which was started by Bush and extended by Obama on more than one occasion. This requires the main telephone companies to provide the NSA with records – i.e. metadata – containing the place, time and duration of telephone calls, but not their content.[53] This metadata feeds a searchable database that could be mined to find contact between terror cells. NSA analysts have the ability to use this database using an "identifier" – that is, the "contact" assumed to be involved in criminal activity – that forms the starting point or "seed" for the search (also called the "seed identifier"). Once authorized, computer analysts can process the data to find first, second and third level contacts of the seed identifier (called "three hops"). This allows the NSA to gather an almost unimaginable amount of data and indefinitely extend its search to users that – in by far the majority of cases – have absolutely nothing to do with

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[50] Daniel J. Solove, *Nothing to Hide: The False Tradeoff between Privacy and Security* (Yale Un. Press, 2011) 74–75.

[51] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Public Law 107-56.

[52] Laura K. Donohue, 'Bulk Metadata Collection: Statutory and Constitutional Considerations' [2014] 37 Harv. J.L. & Pub. Pol'y 757 ss.

[53] Administration White Paper, *Bulk Collection Of Telephony Metadata Under Section 215 Of The USA Patriot Act 2* (9 August 2013) https://perma.cc/V7VM-5MAU, accesssed 29 April 2017.

the "reasonable articulate suspicion" that forms the standard for investigating potential terrorists.[54]

7. DIGITAL SURVEILLANCE PROGRAMMES AND FEDERAL JUDGES

The Snowden disclosures caused an uproar in the United States, with plenty of doubt about the constitutionality of this digital surveillance programme. It also produced conflicts that had to be resolved, for example, by the federal courts in the Columbia and New York districts. In both cases, the claimants argued the government programme was illegitimate and sought for the NSA to be required to suspend the bulk collection of their data (i.e. their phone and internet records) and to destroy the data already collected. While both claims largely mirrored each other, they were ruled on differently. In *Klayman v. Obama*,[55] Justice R. Leon ordered the NSA to stop the programme, but in *ACLU v. Clapper*,[56] Justice W.J. Pauley decided it was constitutionally legitimate. These two interpretations clearly show the tension between the need to protect citizens' freedom and their security.

In *Klayman v. Obama* (2013), the District Court for the District of Columbia ruled the indiscriminate and arbitrary collection of telephony metadata by the NSA amounted to an illegitimate search and seizure under the Fourth Amendment. To reach this conclusion, Justice Leon had to move away from the third party doctrine, stating this was conceived at a time in history when the use of mobile phones "was, at best, the stuff of science fiction" (p. 52), and it was unable to adequately protect the privacy of citizens in a cell phone-centric culture.[57] If "the basic purpose

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[54] Elizabeth Atkins, 'Spying on Americans: At What Point Does the NSA's Collection and Searching of Metadata Violate the Fourth Amendment' [2014] 10 Wash. J.L. Tech. & Arts. 87: "The metadata information the Government is able to collect, store, and search on a massive scale makes Section 215 a violation of the Fourth Amendment. The Fourth Amendment is clear: to search a constitutionally protected area, one must have probable cause and obtain a warrant from a detached and neutral judge. That is not being done under the metadata program."

[55] *Klayman v. Obama* [2013] 2013 WL 6598728, 18 (D.D.C., 2013).

[56] *ACLU v. Clapper* [2013] 959 F. Supp. 2d 724, 748 (S.D.N.Y., 2013).

[57] As recalled by Justice Leon in *Klayman v. Obama*, supra n. 55, "records that once would have revealed few scattered tiles of information about a person, now reveal an entire mosaic – a vibrant and constantly updating picture of the person's life" (p. 54).

of [the Fourth] Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials" (p. 63), there is no doubt that "this systematic and high-tech collection and retention of personal data on virtually every single citizen for purposes of querying and analysing it … infringes on 'that degree of privacy' that the Founders enshrined in the Fourth Amendment" (p. 64). This would seem to return to an interpretation of the Constitution that uses the historical ban on government intrusion in the personal sphere of citizens, but reinterpreted in the light of current technology. In such an understanding, the traditional criterion of physical trespass should also be understood as digital trespass.

The conclusion reached but a few weeks later by the District Court for the Southern District of New York in *ACLU v. Clapper* (2014) was quite the opposite, rejecting the petition filed by the ACLU and holding the Bulk Metadata Surveillance Program was perfectly legitimate. The different conclusion was evident right from the beginning of the ruling. It focused on the tragic consequences of the 9/11 attack and noted that more efficient use of computerized systems by federal agencies could have potentially prevented the attack as "telephony metadata would have furnished the missing information and might have permitted the NSA to notify the FBI of the fact that Al Mihdhar [one of the 9/11 terrorists] was calling the Yemeni safe house from and inside the United States" (p. 2). The entire judgement is thus based on national security. The NSA programme is seen as a legitimate tool to combat the terror threat in compliance with the Patriot Act and the Supreme Court's interpretation of the Fourth Amendment.[58] For this aspect, Justice Pauley drew from *Smith v. Maryland* the constitutional parameters for deciding on the case. Citizens are aware telephone companies store metadata for commercial reasons and hence – applying the third party doctrine – they cannot have a reasonable expectation for the privacy of such information "because *Smith* controls, the NSA's bulk telephony metadata collection program does not violate the Fourth Amendment" (p. 44).

This decision was vacated on appeal for procedural reasons linked to the legal foundation for the Bulk Metadata Program (*ACLU v. Clapper II*[59]). Yet, exploring the argument made in Justice Pauley's decision, it would seem to return to the problem of the relationship between privacy

[58] See *ACLU v. Clapper*, supra n. 56, p. 36: "Congress was clearly aware of the need for breadth and provided the Government with the tools to interdict terrorist threats."

[59] *ACLU v. Clapper*, No. 14-42-CV, 2015 WL 2097814 (2d Cir. 2015).

and security based on the third party doctrine. It is noted in the ruling people voluntarily provide personal data to multinationals that use this for commercial purposes, but even though such information is far more relevant and invasive than telephony metadata, only a few people seem worried by it.

8. CONCLUSIONS

Analysing privacy and personal data protection in Europe and America shows differing legal and political approaches. Particularly following the adoption of the Charter of Fundamental Rights of the European Union, the EU would appear to guarantee an exceptionally high degree of privacy protection. This is reinforced by the interpretation in Court of Justice rulings in recent years, such that Europe can today be seen as "the fortress of digital privacy."

By contrast, in the United States privacy protection has weakened as the technology used in combating international terrorism has improved. The legislative and constitutional tools safeguarding this right would seem to be inadequate in the face of the challenges of the digital era. For example, the third party doctrine has long been criticized in legal scholarship[60] and recently various Supreme Court Justices (Alito; Sotomayor) have seemed to be prepared to move beyond that doctrine in their concurring opinion in *United States v. Jones* (2012).[61]

The two systems clearly differ in approach, but comparing them also brings to the surface various points that could be useful in defining a common, global approach to privacy.

First, America is slowly changing its position on personal data protection. In the wake of the debate sparked off by Datagate, the president and Congress approved the Judicial Redress Act (2015), which (partially) extended privacy protection to non-American citizens, and the

[60] See, among others, Laura K. Donohue, 'Bulk Metadata Collection: Statutory and Constitutional Considerations', supra n. 52; Ioanna Tourkochoriti, 'The Transatlantic Flow of Data and the National Security Exception in the European Data Privacy Regulation: In Search for Legal Protection against Surveillance', supra n. 38.

[61] *United States v. Jones*, 565 US (2012) concurring opinions Justices Samuel Alito and Sonia Sotomayor.

Freedom Act (2015),[62] which curtailed the American government's surveillance powers. These hesitant first steps towards broader protections for citizens should be viewed positively, although they are unlikely to provide definitive solutions.

Secondly, the American system might have some shortcomings, but the approach adopted does question the European balance between privacy and other interests/rights that (especially in Court of Justice rulings) seem to have been forgotten. On the national security front, the lack of interest at the European level is largely because such an interest falls under Member State competence and so does not directly relate to Union law. In the United States, by contrast, the correct balance between privacy and national security is a true challenge faced entirely by the federal government. As the 2013 Intelligence Report commissioned by President Obama noted, "the problem here is that the United States Government must protect, at once, two different forms of security: *national* security and *personal* security (which is 'the right of the people *to be secure* in their persons, houses, papers' established by the Fourth Amendment.)"[63] Europe does not have to deal with the same problem. As European citizens, we want the Union to provide a high level of protection for our personal data and, at the same time, we look to our state governments to protect us from terrorist attacks. This asymmetry makes it far easier for the EU to guarantee substantial privacy protection, but it does not fully resolve the balance between privacy and the security of individuals.

Finally, business and trade, along with the multidimensional nature of the digital era, make it necessary to have an agreement between the two legal systems about privacy protection on both sides of the Atlantic.[64] The Privacy Shield agreement is an example of this. It replaces the earlier Safe Harbour system the Court of Justice found to be illegitimate. In terms of the national security question, mention must be made of EU

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[62] Uniting and Strengthening America by Fulfilling Rights and Ending Eavesdropping, Dragnet-collection and Online Monitoring Act (USA FREEDOM Act) 2015, Pub.L. 114-23.

[63] See Liberty and Security in a Changing World – Report and Recommendations of the President's Review Group on Intelligence and Communications Technologies 14-15 (2013) https://www.nsa.gov/about/civil-liberties/resources/assets/files/liberty_security_prgfinalreport.pdf, accessed 27 April 2017.

[64] David Cole and Federico Fabbrini, 'Bridging the Transatlantic Divide? The United States, the European Union, and the Protection of Privacy across Borders', supra n. 10, p. 236.

Directive 2016/681 (2016)[65] on the use of passenger name records (PNR) for the prevention, detection, investigation and prosecution of terrorist offences and serious crime. The problem of data monitoring on both sides of the ocean cannot be resolved simply by defining high levels of privacy protection in each system. It requires joint efforts to find areas of agreement that correctly balance the various interests/rights in play. On this issue, special attention must be paid to the actual use of government digital surveillance programmes given the purposes of such programmes. As a New American Foundation investigation found, the NSA's collection of metadata was not always proportional to the goal nor was it especially useful in uncovering terrorist plots.[66] At the same time, metadata collection programmes originated to resolve communication problems between federal agencies highlighted by the 9/11 Commission. They are a fundamental tool for preventing terrorist attacks because, as the then NSA Director Keith Alexander said, "there is no other way we know of to connect the dots."[67]

It is no simple task to determine precisely which of the two judgements better fits reality. Yet, that merely makes it more important and pressing to find the right balance between security and privacy. As

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[65] *Directive* (EU) 681/2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime [2016] OJ L119/132.

[66] See Peter Bergen, David Sterman, Emily Schneider and Bailey Cahall, 'Do NSA's Bulk Surveillance Programs Stop Terrorism?' *New American Foundation Report* (14 January 2014) https://www.newamerica.org/international-security/policy-papers/do-nsas-bulk-surveillance-programs-stop-terrorists/, accessed 29 April 2017: "However, our review of the government's claims about the role that NSA "bulk" surveillance of phone and email communications records has had in keeping the United States safe from terrorism shows that these claims are overblown and even misleading. An in-depth analysis of 225 individuals recruited by al-Qaeda or a like-minded group or inspired by al-Qaeda's ideology, and charged in the United States with an act of terrorism since 9/11, demonstrates that traditional investigative methods, such as the use of informants, tips from local communities, and targeted intelligence operations, provided the initial impetus for investigations in the majority of cases, while the contribution of NSA's bulk surveillance programs to these cases was minimal. Indeed, the controversial bulk collection of American telephone metadata, … appears to have played an identifiable role in initiating, at most, 1.8 per cent of these cases."

[67] See Spencer Ackerman, 'NSA chief on spying programs: "There is no other way to connect the dots"' *The Guardian online* (Washington, 13 December 2013) https://www.theguardian.com/world/2013/dec/11/nsa-chiefs-keith-alexander-senate-surveillance, accessed 2 May 2017.

Benjamin Franklin noted at the birth of the American Constitution, "they who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety."

PART III

The 'hidden' side of fundamental rights protection: Agencies and international bodies

7. The Fundamental Rights Agency of the EU: A step on the way toward an integrated EU policy in the domain of fundamental rights

Lorenza Violini

1. INTRODUCTION

The discussion on fundamental rights in the EU has very deep roots that sprouted almost at the same time as the European integration. The story, though told in hundreds of books, articles and reports, is still ongoing. As Elise Muir recently stated, "one aspect that should figure prominently in any forward looking reflection on the European project is the protection and promotion of fundamental rights. The theme runs across several recent crises, whether we discuss social rights in the context of the euro and financial shocks or rights of third country nationals as threatened by current world imbalances. The theme also cuts across all areas of EU intervention, be they internal or external."[1]

The story is long but still needs to be further explored, especially if one aims to focus not on the main actors performing on the European "stage" but on some more hidden and underexplored bodies. Among the many actors who have played and still play a significant role in the drama, the Fundamental Rights Agency (FRA) can be considered a background actor, the main characters of which are the Parliament, the Commission and – above all – the Court of Justice.

After a short overview over the pre-history of the FRA, the present essay deals first with the difference between negative and positive

[1] E. Muir, *Reflections on the European Project: Some Thoughts on the Agenda*, VerfBlog 22 December 2016, Discussion on Chalmers, Jachtenfuchs and Joerges, 'The End of the Eurocrats' Dream: Adjusting to European Diversity'.

integration and its consequences. It then addresses the (late) establishment of the FRA and its difficulties as evidence of the problematic situation of fundamental rights in the EU. After a survey of the activities put forward by the Agency in its ten years of life, the essay closes with some remarks on the influence this apparently second level actor has played in the very complex and busy scene of fundamental rights protection within the EU institutional landscape.

2. THE RAISING OF THE IDEA OF A MONITORING AGENCY FOR THE PROTECTION OF FUNDAMENTAL RIGHTS IN EUROPE

To address the role of the FRA within the development of the human rights at the EU level and its contribution to the protection of such rights, one has to go back to the year 1996, when the *Comité des Sages*, composed of Antonio Cassese, Catherine Lalumière, Peter Leuprecht and Mary Robinson, presented its ground-breaking report *Leading by Example: A Human Rights Agenda for the European Union for the Year 2000* at the Social Policy Forum. The report underlined the growing importance of human rights in the European and the international arenas[2] while denouncing, at the same time, the lack of comprehensiveness, the fragmentation and the marginalisation of the policies of European institutions in the field. As one of the remedies to this situation, the *Comité* suggested the creation of an agency, whose main features were outlined and explored under an institutional perspective in the well-known essay by Alston and Weiler. In that essay, the two prominent scholars suggested a new institutional framework able to put into place a fully-fledged European policy for the protection of human rights,[3] in which the activity of a monitoring body was held to be of primary importance.

After the presentation of the report of the *Sages*, the Commission established another independent expert group on fundamental rights, chaired by Professor Spiros Simitis. This group of scholars was tasked with the elaboration of recommendations and suggestions for facing the

[2] A. Cassese, C. Lalumière, P. Lauprecht and M. Robinson, 'Leading by Example: A Human Rights Agenda for the European Union for the Year 2000', in P. Alston (ed.), *The EU and Human Rights* (OUP New York) 921–927.

[3] P. Alston and J. Weiler, 'An "Ever Closer Union" in Need of a Human Rights Policy' (1998) 9 European Journal of International Law 658–723.

urgent need for a comprehensive approach to the guarantee of fundamental rights. The report clearly emphasised the importance of judicial protection for fundamental rights and its explicit recognition by the Treaties by acknowledging that "it is vital to establish rights which are genuinely justiciable and which entail more than a passive obligation of non-violation."[4] At the same time, it stressed the fact that such protection, based on the duo of *charters and courts*, "… is by no means its only prerequisite. Legal remedies have to be complemented by legislative or administrative activities intended to implement and secure individual rights."[5] In other words, the role of courts (which was paramount in the first stage of the European integration), combined with the codification of rights in the Treaties, needed to be completed by a coherent institutional framework. And indeed one can find this in the report: "As imperative as an explicit recognition of fundamental rights is, attention must also be paid to furthering the protection of rights through policies and related organisational changes."[6]

As one can see, the two groups of experts that have worked on the protection of fundamental rights at the end of the last century agreed on the insufficiency of a protection based primarily on courts' activism; they proposed to add to the Treaties the explicit codification of such rights but, at the same time, perceived the need for a coherent policy based on adequate institutional arrangements. Only a similar "global" institutional framework was held to be able to generate the "comprehensive" approach to the protection of the rights of the European citizens which was perceived necessary for the EU at a time when Europe was moving fast toward monetary union and enlargement.

Having assessed the insufficiency of the traditional instruments for the protection of rights, based on charters and courts as well as the need of a global policy put forward by a reformed institutional framework, a "fundamental rights agency" was envisaged – among a wide range of measures – to complete the institutional picture composed by the Council, the Commission, the Parliament and the Courts, as well as Member States.

Despite this widespread agreement on the need of this new dimension of EU action in the field of human rights, it took several years before the

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[4] Executive summary of the Report, in European Commission, Directorate-General for Employment, Industrial Relations and Social Affairs, *Report of the Expert Group on Fundamental Rights: Affirming Fundamental Rights in the EU: Time to act*, Unit V/D.2, February 1999, 5.

[5] Id. 13.

[6] Ibid.

Fundamental Rights Agency was established in 2007.[7] The time span alone provides evidence of how problematic this step was perceived both by the European and international institutions,[8] and by the state governments,[9] all of them fearing an undue interference in their domains and in their competences. Moreover, the failure of the approval of the Constitutional Treaty in 2004 contributed to doubts about the opportunity of creating an agency for fundamental rights with a broad mandate as part

[7] O. De Shutter, 'The EU Fundamental Rights Agency: Genesis and Potential', in K. Boyle, *New Institutions for Human Rights Protection* (OUP 2009) 93, 136. See also, W. Hummer, 'The European Fundamental Rights Agency', in A. Reinich and U. Kriebaum (eds), *The Law of International Relations – liber amicorum Hanspeter Neuhold* (Eleven International Publishing 2007); D. Geradin and N. Petit, 'The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform', in P. Eeckhout and T. Tridimas (eds), *Yearbook of European law* (OUP 2005) 137, 197.

[8] On the critical position of the Council of Europe, see O. De Shutter, 'The Division of Tasks between the Council of Europe and the European Union in the Promotion of Human Rights in Europe: Conflict, Competition and Complementarity', in M. Kolb, *The European Union and the Council of Europe* (Palgrave Macmillan 2013).

[9] The UK government stated, "Respect for fundamental rights has been for many years a general principle of the Community, and the Agency should look first at those human rights which thereby form part of Community law. In this context, the Charter of Fundamental Rights could also be used as a starting point, as a statement of rights, freedoms and principles applicable at Union level, bearing in mind its horizontal Articles and the official explanations. In addition, although it should not play a policy or operational role on human rights issues in third countries, it is for consideration whether the Agency should be available to provide assistance to countries interested in EU best practice, for example as part of the accession process or European Neighbourhood Policy. The UK believes that an Agency established with such a remit would be able to focus on tasks of greatest priority to citizens throughout the EU. Any role for the FRA based upon Articles 6 and 7 TEU would compromise its effectiveness and run the risk of overload. It would also lead to unwelcome and inefficient duplication with other established or developing institutions in the Council of Europe, within the Union itself, and within Member States – in the case of the latter also compromising the principle of subsidiarity". Summary of the UK position regarding the establishment of the European Fundamental rights Agency. PACE Doc. 10894 11 April 2006, available at http://ec.europa.eu. On the objections of the House of Lords, the German Bundesrat and the French Senate, see W. Hummer, 'The European Fundamental Rights Agency', in A. Reinisch and U. Kriebaum (eds), *The Law of International Relations – liber amicorum Hanspeter Neuhold* (Eleven International Publishing 2007) 117–144.

of a complete fundamental rights policy, since both would lack a consolidated constitutional framework.[10]

Many of those doubts were dispelled during the different steps undertaken by the different EU institutions before the decision to create the Fundamental Rights Agency was made, but the basic constitutional problem remained unresolved. And, therefore, a compromise was agreed, according to which the Agency was established but not as part of an institutional framework able to design, enact and implement a fully fledged policy. This is the reason why one of the first documents tracing the path along which the Agency should act, i.e. the Founding Regulation[11] – together with the first Multi-annual Framework (hereinafter MAF) – designed a rather limited mandate, conferring to the Agency only nine thematic areas to be explored and monitored, thus explicitly excluding the area covered by the third pillar as well as a formal involvement with the procedure foreseen by Art. 7 TEU.[12] In other words, in contrast with the philosophy envisaged by the legal scholarship

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[10] The Lisbon Treaty was signed in 2007, in the same year that the Agency was established (15 February 2007). The Treaty of Lisbon and the EU Charter of Fundamental Rights became legally binding on 1 December 2009. Even though the Charter was not legally binding, the Agency used the Charter as a reference point of its activities and work, even before it was entered into force. See for instance, the FRA Opinion on a proposal for a Council Framework decision on the use of Passenger Name Record (PNR) data for law enforcement purposes (28/10/2008). See J. M. Schlichting and J. Pietsch, 'Die Europäische Grundrechte-agentur. Aufgaben – Organisation – Unionskompetenz' (2005) 19 EuZW, 587, 589. See also G. N. Toggenburg, *Fundamental Rights and the European Union: How Does and How Should the EU Agency for Fundamental Rights Relate to the EU Charter of Fundamental Rights?* (December 2013) 13 EUI Department of Law Research Paper. Available at http://ssrn.com/abstract=2368194 or http://dx.doi.org/10.2139/ssrn.2368194. See also, G. N. Toggenburg, 'Exploring the Fundament of a New Agent in the Field of Rights Protection: The Fundamental Rights Agency in Vienna' (2007) 8/7 EYMI, 624, 626.

[11] Council Regulation (EC) No 168/2007 establishing a European Union Agency for Fundamental Rights [2007] OJ L 53/1 (hereinafter FRA Founding Regulation).

[12] A recent article by political scientists, based on the so called "information processing approach to public organizations" shows, on the contrary, that "the FRA is able to circumvent its formal restrictions through the exploitation of the structural incoherence and gaps that are inevitable concomitants of political compromise in its daily operations". See T. Blom and V. Carraro, 'An Information Processing Approach to Public Organizations: The Case of the European Union Fundamental Rights Agency' (2014) 18 European Integration online Papers (EloP), 1–36, available at http://eiop.or.at/eiop/pdf/2014-001.pdf.

of the late nineties, the competent institutions ruling over FRA gave the Agency very narrow and scattered tasks reflecting (and not repairing) the fragmentation and the marginalisation denounced almost ten years earlier.

Despite the limits encountered by the FRA from the very beginning of its establishment, it is important to clarify the contribution offered by the activities of FRA – that are new and very important for a sound and comprehensive policy of protection of human rights – to the understanding of what it means in the present era to protect rights.

Protection of rights today needs to open itself to all the dimensions of possible rights violations. Such protection, in turn, should be based on a deep knowledge of the legal systems in which rights are embedded and their effectiveness, in order to *avoid* violations and to suggest to the competent institutions, on the basis of the acquired knowledge of the field, the best policies able to provide the necessary protection of fundamental rights. It is no matter that this idea was put in place only partially: it is important to underline that the original project was a very rational one and that this global goal must be pursued even at present.

3. NEGATIVE VERSUS POSITIVE INTEGRATION AND THE NEED OF A MONITORING AGENCY FOR A SOUND POLICY IN THE FIELD OF FUNDAMENTAL RIGHTS

In parallel with the framing of the project of a comprehensive policy for human rights based on an independent monitoring agency with a broad mandate along with other arrangements in the existing institutional framework, legal scholarship put under criticism the monopolist role played by the Court in the protection of fundamental rights.[13] They underlined the incapacity of the judicial system to overcome the unilateral approach labelled "negative integration," as opposed to positive integration, the latter being much more effective than the former. And

[13] A. von Bogdandy and J. von Bernstoff, *The EU Fundamental Rights Agency within the European and International Human Rights Architecture: The Legal Framework and Some Unsettled Issues in a New Field of Administrative Law* (2009) 46 C.M.L.R., 1067. According to E. Miur, "the politicisation of fundamental rights will inevitably remain intertwined with a strong constitutional framing. This would create pressure on the Court to increasingly use a human rights discourse and place it – as well as itself – in a position of greater centrality in the European political process", Reflections on the European Project: Some Thoughts on the Agenda, Verfassungsblog, 22 November, 2016 (cit. n. 1).

indeed, there is a marked difference between positive and negative integration: the latter is confined to redressing the violation of legal principles (such as equality) or constitutional rights (such as data protection and privacy), while the former requires positive steps to be undertaken in order to achieve specific goals in terms of protection of rights. There is therefore an urgent need to bridge the cleavage between the two dimensions of rights protection.

This "positive" role of European institutions can be achieved by the Parliament, the Council and the Commission, provided that some basic reforms are introduced by the legislator. But, to be fully efficient, the action of such institutions must be prepared with and accompanied by data collection, information, and knowledge of the situation on the ground both at the European and national levels, and the involvement of civil societal entities.

All these activities, based on knowledge provided by experts and stakeholders, should be enacted by a monitoring body independently performing comprehensive activities in the field of rights protection. Those activities could pave the way to the elaboration of adequate "positive" policies, thus understood not as a *political* choice (often perceived as divisive[14]) but as a necessity imposed by neutrally assessed, structural, *technical* problems of a factual nature.

4. THE MONITORING ACTIVITY OF THE FRA AND ITS RELEVANCE IN THE PROTECTION OF HUMAN RIGHTS

The same legal scholarship that has underscored the insufficiencies of Community policies in the field of human rights has also identified some causes of them. Among others, they have considered the incapacity of the European approach to human rights as deriving from a gap in the knowledge of the real rights situation on the ground. Taking as examples the UN bodies responsible for controlling the implementation of Treaties signed by public authorities, they proposed to transplant such examples at European and state levels;[15] the monitoring agency that they were

[14] J. H. H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision,* in (1995) 1 European Law Journal, 219–258.

[15] The relevance of monitoring activity for human rights protection at the international level is clearly explained by V. V. Stoyanova, 'The Council of Europe's Monitoring Mechanisms and Their Relation to Eastern European Member States' Noncompliance' (2005) 45 S. Cal. L. Rev., 739. See also

furthering should have been capable of collecting such information "in a regular, ongoing and systematic fashion."[16]

This understanding of the value of information as a basis of political actions, as utopian as it may sound, surely played a strong influence on the most active bodies in the field of human rights, so that eventually, as discussed above, the FRA was established in 2007 and started working in 2008,[17] an era in which both the Austrian crisis (with the report of the three wise men) and the project of incorporating the Charter of Fundamental Rights into the Constitutional Treaty raised new interest in the issue.

In order to assess the role of this new body in the field of human rights, it is worth giving an overall picture of the activities put in place in its almost ten years of existence.[18]

Back in 2014, a doctoral thesis discussed at the University of Milan assessed that "although the Agency has in few years produced 81 reports, 5 handbooks in cooperation with the Council of Europe, 23 working discussion papers, issued 15 opinions, worked on 43 research projects and promoted dissemination strategies of a culture of respect for fundamental rights among the civil society, this institution is not very well known."[19]

Since then, the FRA has increased its productivity. Data collected from the institution's website show the strong commitment of the FRA to human rights, in particular in the area of non-discrimination (also in part

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J. Hughes and G. Sasse, 'Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEECs' (2003) 1 JEMIE, 1.

[16] Alston and Weiler, supra n. 3, 699.

[17] A detailed report on the steps undertaken by EU institution as to the creation of FRA is offered by Blom and Carraro, supra n. 12, 15 On the same subject, see also M. Nowak, 'The Agency and National Human Rights Institutions for the Promotion and Protection of Human Rights', in O. De Schutter and P. Alston, *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (Oxford and Portland, Hart Publishing) 91–107.

[18] On the premise of the creation of the Agency, see P. Alston and O. De Shutter, 'Introduction: Addressing the Challenges Confronting the EU Fundamental Rights Agency', in P. Alston and O. De Shutter, *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (Hart Publishing 2005).

[19] M. Giungi, 'Strengthening Fundamental Rights Protection at European Union Level: The Role of the European Union Fundamental Rights Agency' (PhD Thesis, University of Milan 2015). According to Blom and Carraro, supra n. 12, 3, the FRA is also rather neglected by political scientists studying the EU.

because the Agency was built upon the pre-existing EUMC[20]) and data protection. In the last three years the Agency has enlarged its field of activities even more. Since 2014, it worked on 21 items between projects and surveys (of which nine are still ongoing or in preparation); it delivered nine opinions (seven between 2016 and 2017).[21] Moreover, from 2014 to January 2018, the Agency published almost 40 reports on several and varied topics: access to data protection remedies, violence against women, migrants, disability, victims of crime, child protection, workers moving, freedom of business, healthcare, discrimination on grounds of sexual orientation, gender identity and sex characteristics, detention and so on. This enlargement of the field of interest of the FRA, especially in the macro-area of discrimination, can be linked to the second MAF, entered into force on 11 March 2013. As to the third MAF, entered into force on 1 January 2018, it is worth noting that it includes a list of thematic areas slightly more detailed than the first one adopted in 2008. Despite these additions, the FRA's scope at ten years doesn't seem so far from its start.

The following table shows the new fields of action included during the years of each of the FRA's MAFs. It demonstrates that no big differences can be identified.

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[20] The EUMC (European Union Military Committee) was established on the basis of the Kahn Commission proposal by the Council Regulation (EC 1035/97 of 2 June 1997).

[21] In 2014, the Agency produced the Opinion on a proposal to establish a European Public Prosecutor's Office; in 2015, the Opinion on the exchange of information on third-country nationals under a possible system to complement the European Criminal Records Information System; in 2016, an Opinion concerning an EU common list of safe countries of origin, an Opinion on the development of an integrated tool of objective fundamental rights indicators able to measure compliance with the shared values listed in Article 2 TEU based on existing sources of information, an Opinion concerning requirements under Article 33 (2) of the UN Convention on the Rights of Persons with Disabilities within the EU context; an Opinion on the impact on children of the proposal for a revised Dublin Regulation and an Opinion on the impact of the proposal for a revised Eurodac Regulation on fundamental rights. In 2017, it delivered an opinion on improving access to remedies in the area of business and human rights at the EU level; and moreover, an opinion on the impact on fundamental rights of the proposed Regulation on the European Travel Information and Authorisation System (ETIAS).

Table 7.1 Fields of Action in FRA's MAFs

MAF 2007–2012	MAF 2013–2017	MAF 2018–2022
• compensation of victims; access to efficient and independent justice	• **victims of crime**, including compensation to victims; access to justice;	• victims of crime and access to justice;
	• Roma integration;	• integration and **social inclusion** of Roma;
• discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation and against persons belonging to minorities and any combination of these grounds (multiple discriminations);	• discrimination based on sex, race, **colour**, ethnic or **social origin**, **genetic features**, **language**, religion or belief, **political or any other opinion**, membership of a national minority, **property**, **birth**, disability, age or sexual orientation;	• **equality** and discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation, or on the grounds of **nationality**;
• asylum, immigration and integration of migrants; visa and border control.	• immigration and integration of migrants, visa and border control and asylum.	• migration, borders, asylum and **integration of refugees** and migrants.

5. THE ACTIVITY OF THE FRA AS A BRIDGE BETWEEN EU INSTITUTIONS AND CIVIL SOCIETY

Along with the monitoring activities, the *Comité des Sages* designed for the new Agency a second field of action as foreseen at the European Council meeting in Luxembourg in December 1997. In that framework, recommendations were put forward designed to strengthen the role of civil society in protecting human rights as the second face of the coin of the new policy in the field.[22] The scholarship, in turn, has warned that "all relevant structures and institutions must be made more open and

[22] European Council Meeting in Luxemburg 1996 strengthening, in particular, training and education programmes concerning human rights, 12–13 December 1996.

responsive to pressures from civil society and other watchdogs to respect human rights."[23] Not only the *Comité des Sages*, but also the Simitis Report stressed that "the guarantee of rights must be seen an open process, based on dialogue within civil society and capable of responding to new challenges."[24]

In these ten years this platform has been fundamental for the FRA's life. Following the idea that a general policy on fundamental rights should involve representatives of civil society, the Agency was tasked to include in its institutional framework a network of non-governmental organisations, social partners, research centres, representatives of competent public authorities and other persons or bodies that have to do with fundamental rights matters. Such a network should cooperate to establish a permanent dialogue at European level between institutions and civil society and to participate in discussions, meetings, conferences, campaigns, round tables and seminars both at the European and national levels in order to promote and disseminate the findings of the FRA.

As a consequence, a Fundamental Rights Platform was established and has played a fundamental role for the FRA life in these ten years.[25] The FRP is a network of societal bodies and institutions working in the field of fundamental rights, is understood as a "device" for exchanging information and sharing knowledge, and ensures cooperation between the Agency and the stakeholders. The Agency can request that the FRP make suggestions to the Management Board as to the Annual Work Programme, to give feedback on the Annual Report and to help disseminate outcomes and recommendations arising from the work of the Agency, which it has done with positive results.

6. CONCLUSIONS

Examining the bulk of work done by the Agency since its establishment, one can wonder why its influence in shaping European and state policies

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[23] P. Alston, M. R. Bustelo and J. Heenan (eds), *The EU and Human Rights* (Oxford University Press 1999) 5.

[24] Report of the Expert Group on Fundamental Rights, *Affirming Fundamental Rights in the European Union: Time to Act* (Simitis Report February 1999) 5.

[25] According to Blom and Carraro, supra n. 12, 11, the FRA is ranked high as to its "social" dimension due to the high level of involvement of private actors in the decision making process.

on human rights is still relatively low.[26] The main actors in the field remain the courts, to which legal scholars and political actors still focus their attention. On the side of a more comprehensive fundamental rights protection, many of the problems envisaged in the late nineties are still unresolved. As it has been said, almost 20 years from the "powerful call (n.d.r. of Alston and Weiler)" for the development of coherent EU fundamental rights policies, "the EU does not have a fully-fledged competence to regulate fundamental rights." In 20 years, many steps have certainly been made both in the field of negative duties and in the enhanced opportunities for positive interventions. Nonetheless, "the EU still has no direct mandate and institutional framework to develop a fundamental rights policy …"[27] and "the EU Court of Justice … cannot make up for the absence of the necessary legal and political commitments on the part of the other institutions."[28]

Today more than ever, the development of a fully-fledged EU fundamental rights policy is a promising path for rethinking the EU integration process itself.

In order to take this challenge on, however, we should be aware of the main causes that have prevented the flourishing of the EU human rights policy and, consequently, of the FRA's action.

First of all, the uncertainty about the constitutional basis for the EU activity in the field of rights might have played a role in limiting the activity of the FRA in a few listed areas. This limit, first taken into consideration by the report of the *Comité des Sages,* was reaffirmed on October 2004, when the Commission launched a public consultation on the Agency remit, tasks, structure, rights and thematic areas by issuing a Communication on the Fundamental Rights Agency. In that communication,[29] the Commission expressed its awareness on the delicate constitutional implication raised by the creation of the Agency. And the Council, when adopting the Founding Regulation, followed an even more

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[26] As to the informal influence of FRA on the activity of EU institutions and of the Council of Europe, see Blom and Carraro, supra n. 12, 23–27. According to these scholars, "in terms of its political, administrative and judicial competences the FRA is a 'weak' agency". Nonetheless, the Council of Europe, the EP and the Commission have started to cooperate with FRA more intensively, thus allowing FRA to extend its monitoring activity to the domain of the former third pillar and of the Charter of Fundamental Rights.

[27] E. Muir, supra n. 1.

[28] Simitis Report, supra n. 24.

[29] Communication from the Commission, The Fundamental Rights Agency Public consultation document, COM (2004) 693 final.

prudent approach: as already said, it excluded both the third pillar and the implementation of Art. 7 of the TEU from the Agency's fields of action. This very cautious approach did not change even after the entry into force of the Treaty of Lisbon and the Charter of Fundamental Rights. As a result, at present, the EU still bears in itself a monitoring agency whose field of action has remained almost the same as ten years ago.

However, the status quo is difficult to change in the short run: indeed, according to Article 350 TFEU any change in the structure of the Agency needs to be unanimously taken by all Member States. Given the high degree of divisiveness of the human rights discourse within the EU framework (just think of the migrants issue or the "nuclear option" invoked for the Polish case), it is not likely that a unanimous decision on the FRA could be taken.

A second ground of weakness flows from the circumstance that the monitoring and assessing activity of the Agency is not considered an essential part of the decision making process in the field of human rights. As already mentioned several times, the original idea of a monitoring agency was deeply entrenched in the creation of a fully-fledged policy in the area of human rights by all the EU institutions.[30] But this suggestion remained partially ignored. One of the characteristics of the new policy originally envisaged was "the establishment of detailed, systematic and reliable information bases upon which the various actors (including Member States, the Commission, the Council, the European Parliament and civil society) can construct integrated, calibrated, transparent and effective policies."[31] At present, the Agency's interventions remain puzzling: as to the reports, they are confined within the boundaries of the Founding Regulation and the MAF; as to the opinions directed to the EU institutions (such as those that the EP requests on legislative drafts), they depend upon the requests issued by the institutions themselves and only occasionally emerge from independent FRA action. The huge monitoring

[30] In the nineties, one of the objectives of the proposed new human rights policy was "the acceptance of the fact that there is a need for a comprehensive and coherent EU human rights policy based on a clarification of the constitutional ambiguity which currently bedevils any discussion of the Community action in the field". Such a policy would have implied "the development of a pool of knowledgeable and experience personnel with the necessary technical and policy-making expertise in human rights, thereby overcoming the current dispersion of human and financial resources, especially within the Commission". Alston, Weiler, supra n. 3, 675.

[31] Ibid., 674.

and fact-finding of the Agency only occasionally make the basis of judicial or legislative decisions.

This shows how far developed this system is where data collection, policy designing and enforcement activities are conceived as three steps of a unitary process.

The original idea – according to which "a veritable monitoring agency with monitoring jurisdiction over all human rights in the field of application of Community law"[32] should have been accompanied by "the establishment of a clear set of executive functions to be exercised by the Commission through the creation or designation of a Directorate-General with responsibility for human rights to be headed by a separate Member of the Commission"[33] and by "the development of a specialist human rights unit within the functions already envisaged to be performed by the new High Representative for the Common Foreign and Security Policy"[34] – still needs to be fully accomplished. However, the same original idea may represent today a new starting point for rethinking the EU fundamental rights architecture, which is very much needed in our times of crisis and constitutional challenges.

[32] Ibid., 677.
[33] Ibid., 677.
[34] Ibid., 677.

8. Fundamental rights protection beyond individual complaints: The potential of national human rights institutions in Europe

Katrien Meuwissen*

1. THE TRADITIONAL FOCUS ON INDIVIDUAL COMPLAINTS-HANDLING IN EUROPE

Human rights are generally conceived as rights inherently pertaining to each individual which need to be respected and protected by states. Human/fundamental[1] rights protection in Europe is accordingly typically examined in light of the avenues that are open to individuals to make human rights claims against state authorities.

Across the national democracies in Europe, individuals in the first place have the possibility to initiate human rights related claims against state authorities before the national judiciary which can take legally binding and enforceable decisions. An extra layer of judicial protection for individuals in the area of human rights is provided on the regional level in Europe by the European Court for Human Rights (ECtHR) and – increasingly[2] – the Court of Justice of the European Union (CJEU).

* This chapter has been written while finishing a PhD at KU Leuven on 'National Human Rights Institutions as Bridge-Builders Between the State and the Multi-Layered Human Rights System? An International Legal Analysis from a European Perspective'. The chapter does not present the insights gained since January 2017, working as development officer for ENNHRI, the European Network of National Human Rights Institutions.

[1] In the European context 'fundamental rights' is often used rather than 'human rights'. In this chapter, the two terms will be used interchangeably.

[2] G. De Burca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20(2) Maastricht Journal of European and Comparative Law 168–184.

Especially compared to other regions in the world, the European region thus provides a robust system of judicial protection of individuals' human rights against the state.

In addition to individual complaints-handling by the judiciary, many European countries also have a long and widespread tradition of quasi-judicial complaints-handling by ombuds-institutions resulting in non-judicially binding but more flexible remedies.[3] While ombuds-institutions traditionally merely dealt with governments' mal-administration, an increasing focus on human rights protection has become apparent in this context too.[4] Quasi-judicial handling of individuals' human rights complaints carries some risks (such as power imbalances) and will not be appropriate in all circumstances,[5] but it appears an increasingly popular avenue to complement the often overburdened judicial complaints-handling mechanisms on the domestic as well as regional level across European countries.[6]

While acknowledging the central importance of individual complaints-handling mechanisms in the area of human rights, this chapter focuses on the relevance of the furtherance of fundamental rights protection in

[3] The ombudsman dates back to 1809 in Sweden and started to diffuse beyond Scandinavia from the 1960s on. Further: L. Reif, *The Ombudsman, Good Governance and the International Human Rights System* (Martinus Nijhoff Publishers, 2004).

[4] For example: L. Reif, 'The Shifting Boundaries of NHRI Definition in the International System', in R. Goodman and T. Pegram, *Human Rights, State Compliance and Social Change, Assessing National Human Rights Institutions* (Cambridge University Press, 2012) especially 67.

[5] Notwithstanding the projected strengths of alternative dispute settlement (such as increased party autonomy, empowerment and creative and tailored remedies), criticism has been raised regarding the diversion of disputes away from courts, as well as the risk of exposure of the parties to power imbalances and inequality of arms in the resolution of the dispute. L. McGregor, 'Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach through the ECHR' (2015) 26(3) European Journal of International Law especially 609. McGregor (2015) therefore examines the types of tests that supranational bodies should employ to determine the compatibility of a particular dispute resolution process with the right of access to justice.

[6] An example can be the practice in the context of the ECtHR where the Registry often presents parties with a draft settlement to which they either agree or reject, or the state acknowledges the violation and proposes a settlement that the Court deems satisfactory and strikes the case off its list. See: McGregor (2015) especially 619, referring to H. Keller, M. Forowicz and L. Engi, *Friendly Settlements before the European Court of Human Rights: Theory and Practice* (Oxford University Press, 2010).

Europe moving beyond individual complaints. In a first stage, the need for more attention directed to mechanisms reaching beyond individual complaints-handling will be shortly highlighted. In a second stage, the chapter will examine how a particular type of domestic human rights body – national human rights institutions (NHRIs) – can engender fundamental rights protection in Europe moving beyond individual complaints-handling. The focus on NHRIs in this chapter reflects the wider need for more attention for the multiple faces of 'the state' in the area of human rights, and the potential of state authorities (also other than the judiciary) to further enhance the promotion and protection of human rights across the European region.

2. THE NEED FOR FUNDAMENTAL RIGHTS IMPLEMENTATION: LOOKING BEYOND INDIVIDUAL COMPLAINTS

Despite the principal focus on individual complaints-handling in the area of human rights, it is obvious that human rights protection is far from being realised in this manner. Even if all complaints filed by individuals would be perfectly handled by the various domestic and supranational judicial and/or quasi-judicial mechanisms in place (which is not the case)[7] this would not guarantee the enjoyment of human rights by all individuals for a variety of reasons.[8]

First, it is apparent that the filing of individual complaints is reactive in nature, and only takes place after human rights violations have taken place and – often irreversible – harm is done. Another important shortcoming of fundamental rights protection on the basis of individual complaints-handing is the high level of underreporting of human rights violations. Four large-scale surveys carried out by the EU's Fundamental Rights Agency (FRA) concerning the victimisation of minorities, LGBT persons, anti-Semitic offences and violence against women consistently show that the majority of victims do not report human rights related crimes.[9] It could even be argued that the more sensitive and grave the human rights violation is, the more difficult it may be for individuals to

[7] Think, for example, of the important backlog in cases of the European Court of Human Rights.

[8] See also: G. de Beco, *Non-Judicial Mechanisms for the Implementation of Human Rights in European States* (Bruylant, 2010) especially 11.

[9] Available at: http://fra.europa.eu/en/research/surveys.

launch a complaint.[10] Moreover, not all individuals – especially those pertaining to the most vulnerable groups – have the necessary resources to file complaints.[11] A problem inherent to human rights work merely based on the handling of individual complaints is that attention is automatically paid to those complaints most filed, independent of whether those complaints also represent the most pressing human rights issues. Furthermore, while the handling of individual complaints may have preventative side-effects to the benefit of a larger (and future) category of persons, the complaints procedures *per se* revolve around the facts under consideration and the satisfaction of the parties involved in light of the harm that has been done. Judicial/quasi-judicial individual complaints-handling procedures are not geared towards resorting structural and preventative effects.

In the following sections, an examination will follow of a particular type of domestic human rights body – national human rights institutions (NHRIs) – and their potential contribution to the protection of fundamental rights in Europe with a focus on moving beyond individual complaints-handling. An NHRI is loosely described as 'a body which is established by a Government under the constitution, or by law or decree, the functions of which are specifically defined in terms of the promotion and protection of human rights'.[12] NHRIs can be closely affiliated to (and often overlap with) ombuds-institutions, but are not 'typically European' and have been conceptualised as a specific type of institution rather recently, at the level of the United Nations (section 3.1). NHRIs may handle individual complaints, but these state actors carry particular potential to further European fundamental rights protection in a more comprehensive manner (section 3.2). While acknowledging that NHRIs face significant challenges (section 3.3), this chapter argues that the increasing establishment of NHRIs in Europe represents an important shift from human rights enforcement against the state towards joined-up governance for the better implementation of human rights at national level.

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[10] Think, for example, of the risks involved for an individual to file a complaint with a judicial/quasi-judicial public authority concerning issues of torture or enforced disappearances that involve state authorities.

[11] Think, for example, of illiterate individuals or individuals pertaining to tribal communities far removed from complaints-handling bodies.

[12] UN Centre for Human Rights, 'A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights' (1995) para. 39. This description has been generally taken over in NHRI literature.

3. LOOKING BEYOND INDIVIDUAL COMPLAINTS: THE POTENTIAL OF NHRIS IN EUROPE

3.1 The Origin of the NHRI Concept: Not 'Typically European'

The NHRI concept revolves around a list of international standards, the Paris Principles, which since the early nineties provide guidelines on the composition, competences and methods of work of NHRIs.[13] The Paris Principles largely require NHRIs to be pluralistically composed, to have a broad and legally embedded mandate covering the promotion and protection of all human rights, and to function in an independent manner.[14] The Paris Principles were elaborated in 1991 in the context of an international seminar on NHRIs organised in Paris, under auspices of the UN. While by the start of the nineties an impressive framework of UN human rights conventions was in place, the promotion of independent national institutions fully dedicated to human rights was conceived as an avenue to further enhance the implementation of UN human rights standards in Member States. Already in 1993, the UN General Assembly acknowledged the global relevance of the establishment of NHRIs in compliance with the Paris Principles.[15]

Since the mid-nineties, NHRIs have been established by states across the world.[16] Yet, especially in view of the dense European human rights infrastructure already in place at the start of the nineties, the establishment of Paris Principles compliant NHRIs has not been as straightforward in Europe as elsewhere in the world. In the same vein, academic attention for NHRIs in Europe has been rather scarce up until today.[17]

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[13] UN General Assembly, A/RES/48/134 of 20 December 1993, Annex.

[14] For a further analysis of the Paris Principles: G. De Beco and R. Murray, *A Commentary on the Paris Principles on National Human Rights Institutions* (Cambridge University Press, 2014) 202. Further on the independence of NHRIs: K. Meuwissen, 'NHRIs and the State: New and Independent Actors in the Multi-Layered Human Rights System?' 15 Human Rights Law Review (2015) 441–484.

[15] A/RES/48/134 of 20 December 1993, Annex.

[16] Further: S. Cardenas, *Chains of Justice, the Global Rise of State Institutions for Human Rights* (University of Pennsylvania Press, 2014) 482; T. Pegram, 'Diffusion Across Political Systems: The Global Spread of National Human Rights Institutions' (2010) 32(3) Human Rights Quarterly, 729–760.

[17] Literature with a regional focus on Europe is so far limited to a handful of authors: G. de Beco, 'National Human Rights Institutions in Europe' (2007) 7 Human Rights Law Review 331–370; G. de Beco, 'Networks of European National Human Rights Institutions' (2008) 14(6) European Law Journal

At the start of the 2000s, still only a handful NHRIs in Europe were deemed compliant with the Paris Principles.[18] More recently, though, the Paris Principles compliant NHRI concept has gathered momentum in the European region. Currently, around half of the countries in Europe have an NHRI which is deemed Paris Principles compliant.[19] Not unrelatedly, it is also apparent that in the context of regional frameworks – including the Council of Europe (CoE), the European Union (EU) and the Organisation for Security and Cooperation in Europe (OSCE) – a particular role for NHRIs is increasingly recognised and supported. A study of the European Union's Fundamental Rights Agency (FRA) suggests for example that 'a more comprehensive and systematic promotion and protection of fundamental rights should be supported within the European Union – which must include [NHRIs]'.[20] The director of the OSCE's Office for Democratic Institutions and Human Rights (ODIHR), at his turn, has highlighted that 'NHRIs are our key counterparts and allies while we strive to strengthen and uphold international human rights standards at the national level across the OSCE area'.[21]

A closer look at the roles put forward by the Paris Principles can further clarify the relevance of NHRIs, including in the European region with its already dense human rights scene. Different than national bodies with a human rights related mandate typical to Europe (such as ombuds-institutions or national equality bodies), NHRI mandates need to encompass the promotion and protection of human rights in their entirety

860–877; R. Carver, 'National Human Rights Institutions in Central and Eastern Europe, The Ombudsman as Agent of International Law', in R. Goodman and T. Pegram, *Human Rights, State Compliance and Social Change, Assessing National Human Rights Institutions*, 181–209; J. Wouters and K. Meuwissen (eds.), *National Human Rights Institutions in Europe, Comparative, European and International Perspectives* (Intersentia, 2013) 330.

[18] The list of attendance of the meeting of European NHRIs in 2002 refers to 5 institutions as fully Paris Principles compliant: the Danish, French, Greek, Spanish and Swedish NHRI. Summary of discussion of the Fourth European Meeting of National Institutions, Belfast and Dublin, 14–16 November 2002.

[19] For an overview of Paris Principles compliant NHRIs, see: Global Alliance of NHRIs, Chart of the Status of National Institutions, available at http://www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf.

[20] EU Agency for Fundamental Rights, 'National Human Rights Institutions in the EU Member States' (2010) 7.

[21] Opening speech by Michael Georg Link Director of ODIHR, Opening Session of the OSCE Human Dimension Seminar, 'The Role of National Human Rights Institutions in Promoting and Protecting Human Rights in the OSCE Area' (1 June 2015) HDS.ODIHR/0011/15, 10.

(section 3.2.1). Moreover, the Paris Principles emphasise the role of NHRIs to monitor and report on the human rights situation across their country rather than to focus on handling individual human rights complaints (section 3.2.2). An especially relevant characteristic of NHRIs is their close engagement with human rights actors of a state and non-state nature, leading to descriptions of NHRIs as 'bridge-builders' across the multi-layered human rights regime (section 3.2.3).

3.2 The Potential Contributions of Paris Principles NHRIs in Europe

3.2.1 Broad, legally entrenched human rights mandate

The Paris Principles require NHRIs to have 'such a broad mandate as possible' encompassing functions relating both to the promotion and protection of human rights, encompassing civil and political as well as economic, social and cultural rights.[22] The broad NHRI mandate should be established by law, and preferably the constitution.[23] Accordingly, within the broad contours of their mandate, NHRIs should be free to prioritise their activities without being dependent upon governmental approval or request. An example in place can be the Netherlands Institute for Human Rights which opened its doors in October 2012 and identified its priorities on the basis of wide stakeholders' consultations and desk research.[24]

Especially in the area of human rights it is relevant that a broad mandate leaves leeway for the determination of priorities independent from governmental agendas. In democratic systems, it is inherent to both the executive and legislative powers to prioritise the interests of the structural (democratic) majorities in a country. Human rights problems, however, are rights inherently attached to each individual, whether that individual is part of a democratic majority or not. It is indeed noteworthy in the European region that several of the most pressing human rights problems are those of groups of individuals which lack electoral significance, such as persons in detention, Roma, migrants and refugees.

While various domestic human rights bodies exist across European countries, the mandates of such institutions are generally limited to particular thematic priorities which reflect political compromises. EU

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[22] Paris Principles, competence and responsibilities, 2.

[23] Ibidem.

[24] See: Y. Donders and M. Olde-Monnikhof, 'The Newly Established Netherlands Institute for Human Rights: Integrating Human Rights and Equal Treatment', in Wouters and Meuwissen supra n. 17, 92–97.

law, for example, requires the establishment of national equality bodies concerning race and gender related issues, but does not do so with regards other areas of discrimination.[25] The mushrooming of various issue-specific human rights bodies has led to a fragmented human rights scene across European countries, with continuous attention going out to some human rights issues but not to others, independent from whether attention is secured for the most pressing human rights problems.[26]

With their legal mandate to promote and protect human rights in their entirety, NHRIs have the potential to fill gaps in national human rights infrastructures, and can ensure that attention goes out to the most pressing human rights issues in a country. As suggested by the Paris Principles, NHRIs can also function as facilitators of cooperation and coordination among various domestic human rights bodies in place in a country, preventing overlap of work and engendering synergies.[27] In view of the indivisibility and interdependence of human rights, broadly mandated NHRIs can also create added value through facilitating comprehensive approaches towards multi-faceted human rights problems. NHRIs can play a role as one-stop-shops, offering comprehensive human rights information to different counterparts, including individuals but also state authorities and supranational organisations active in the area of human rights.

3.2.2 Strategic information gatherer and provider beyond individual complaints

The Paris Principles encompass a long and non-exhaustive list of functions, but suggest a focus on information gathering activities and the formulation of recommendations with a view to structurally enhance the promotion/protection of human rights in a state, rather than on providing remedies to individuals.

A crucial role for NHRIs is to monitor the human rights situation across a country. NHRIs have been described by the UN Office of the

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[25] Further, for example: I. Rorive, 'A Comparative and European Examination of National Institutions in the Field of Racism and Discrimination', in K. Boyle (ed.), *New Institutions for Human Rights Protection* (Oxford University Press, 2009) 137–173.

[26] As noted in FRA, 'National Human Rights Institutions in the EU Member States: Strengthening the Fundamental Rights Architecture in the EU' (2010).

[27] Paris Principles, 'competences and responsibilities', (e).

High Commissioner for Human Rights (OHCHR) as 'neutral fact-finders'.[28] Typically, NHRIs will draw on a wide range of information sources in their work. All NHRIs will rely on external information (originating from public authorities, individuals, human rights NGOs and/or supranational human rights bodies), and some NHRIs will also possess investigatory powers in order to obtain first-hand information.[29] When NHRIs do not have strong investigatory powers to conduct enquiries themselves, the effective drawing on multiple external sources of information will be especially important in order to fulfil the NHRI function as independent fact-finder.[30] While ombuds-/commission-type NHRIs (such as the Northern Ireland Human Rights Commission) have strong enquiry competences, other NHRIs, typically of the 'institution-type' (such as the German Institute for Human Rights or the Danish Institute for Human Rights), do not have strong enquiry competences but rather draw on research and outreach with human rights counterparts for obtaining information.

Drawing up and sharing reports/opinions with recommendations is a principal avenue for NHRIs to further the promotion and protection of human rights. The Paris Principles indicate that NHRIs should formulate recommendations on legislative/administrative regulation concerning human rights, and point out that NHRI reports can cover a wide array of different matters, concentrating on specific themes of concern or the general human rights situation in a state.[31] Topics covered in NHRI documents will differ depending on the national context. NHRI can elaborate reports at the request of governmental authorities or other counterparts who seek expert advice, or can compile reports on their own initiative. The information provided by NHRIs should encompass attention for the substantial content of human rights, but also for how human rights mechanisms can be accessed, including the NHRI itself.[32] NHRIs' monitoring and reporting work also encompasses an international aspect. As suggested by the Paris Principles,[33] NHRIs can advise governments

[28] OHCHR, 'National Human Rights Institutions, History, Principles, Roles and Responsibilities' (2010, Professional Training Series No. 4, Geneva) 13, para. 3.

[29] The Paris Principles, 'methods of work' (b), indicate that NHRIs should: 'Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence;'.

[30] Further: FRA supra n. 26, especially 36–37.

[31] Id, (i)–(iv).

[32] FRA supra n. 9.

[33] Paris Principles, 'competence and responsibilities', 3, (d).

on how to draft their periodic reports to supranational human rights monitoring bodies, and can also submit their own shadow reports in the context of UN/regional human rights procedures, parallel to the official state report.[34] Ideally, the drafting of NHRI documents should be modified according to the counterparts addressed. NHRI reports with recommendations for experts in line ministries or UN human rights treaty bodies, for example, should have a different format and scope than reports seeking to inform the wider public. In view of their broad mandate and wide range of target groups, particular attention for the elaboration of clear media and communications strategies by NHRIs thus appears warranted.[35]

The Paris Principles provide a non-exhaustive list of functions, but a separate heading at the very end of the Paris Principles points out one function as optional: quasi-judicial complaints-handling. The optional nature of the complaints-handling function constitutes a criticised aspect of the Paris Principles.[36] Various supranational human rights actors which engage with NHRIs encourage – or even require – states to provide NHRIs with a complaints-handling competence.[37] Advantages of complaints-handling by an NHRI have been pointed out to be accessibility, flexibility and cost effectiveness.[38] While many of the NHRI roles enumerated in the Paris Principles can contribute to human rights protection of individuals, directly addressing individual complaints is probably one of the most visible and apparent ways to do so.

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[34] Further below section 3.2.3.

[35] As pointed out by De Beco and Murray supra n. 14, 130, referring to Carver and Korotaev, 'Assessing the Effectiveness of NHRIs' (UNDP, 2007) para. 5.

[36] Inter alia: A. E. Pohjolainen, 'The Evolution of National Human Rights Institutions, the Role of the United Nations' (Danish Institute for Human Rights, 2006) 60; R. C. Kumar, 'National Human Rights Institutions: Good Governance Perspectives on Institutionalization of Human Rights' (2003) 19(2) American University International Law Review 274.

[37] Examples of encouraging the complaints-handling function: FRA supra n. 26, 9; UN Special Rapporteur on the situation of human rights defenders, A/HRC/22/47 of 16 January 2013, paras. 76, 117–118. CRC Committee, General Comment No. 2, CRC/GC/2002/2 of 2002, para. 13.

[38] De Beco and Murray supra n. 14, 110; L. Lindholt and F. Kerrigan, 'General Aspects of Quasi-Judicial Competence of National Human Rights Institutions', in B. Lindsnaes, L. Lindholt and K. Yigen (eds), *National Human Rights Institutions: Articles and Working Papers* (Copenhagen: Danish Centre for Human Rights, 2000) 95; B. Burdekin, 'The Paris Principles: Lessons Learned' (2011) 4 OSCE Magazine 16.

Individual complaints-handling is undoubtedly important. However, considerable (and less highlighted) arguments also exist which call into question the added value of individual complaints-handling when carried out by NHRIs.[39] The risk exists that NHRIs are inundated with individual complaints which divert their resources from activities that allow addressing structural human rights violations which require systemic changes and a preventative rather than reactive approach.[40] Moreover, while many NHRIs are involved in individual complaints-handling, they generally do not appear mandated to provide effective remedies to individuals.[41] Decisions of NHRIs will often not be binding, and in the large majority of cases the decisions will not be enforceable.[42]

Rather than settling individual complaints,[43] it has been suggested that NHRIs could promote access to remedies for individuals through information provision,[44] and could refer complaints to other competent authorities.[45] Information provision and referral of individual complaints seem to be roles more easily reconcilable with the NHRIs' overarching goal to engender structural human rights change in a country. In this regard, it can also be pointed out that some NHRIs focus on strategic interventions in the context of domestic and supranational judicial proceedings which carry the potential to create precedents with an impact beyond the individual case at hand.[46] As the Paris Principles suggest,

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[39] In this regard, R. Carver in Goodman and Pegram supra n. 4 202: '[t]here is a very strong case for saying that complaints-handling is actually one of the least effective means of addressing human rights issues' and that 'the most effective NHRIs are those that address in a systemic fashion the most important human rights problems'. Also: De Beco and Murray supra n. 14 especially 101–112.

[40] De Beco and Murray supra n. 14 107–108.

[41] According to ECtHR case-law, a 'remedy' should allow the competent domestic authorities both to deal with the substance of the relevant Convention complaint and to grant appropriate relief (*M.S.S. v. Belgium and Greece*, App. No. 30696/09, judgment of 21 January 2011, para. 288).

[42] Further: OHCHR supra n. 28 93–95.

[43] Paris Principles, 'additional principles concerning the status of commissions with quasi-jurisdictional competence', (a).

[44] Id, (b).

[45] Id, (c).

[46] On 30 November 2015, for example, the Northern Ireland NHRI proved successful in bringing a case to the high court in relation to the almost absolute ban on abortion. The high court ruled that the abortion legislation in Northern Ireland breached Article 8 of the European Convention on Human Rights by failing to provide an exception to the prohibition on abortion in cases of a fatal foetal abnormality or where the pregnancy is the result of sexual crime. European

NHRIs can also build upon individual complaints 'by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights'.[47] In as far as NHRIs are involved in individual complaints-handling, it seems important that such activities are geared towards structurally improving government policy and legislation, beyond settling individuals' disputes.

3.2.3 Bridge-builders between multiple layers of the human rights system

NHRIs generally lack binding/enforcement powers and are to an important extent dependent on whether NHRI counterparts cooperate with them and follow-up their recommendations.[48] A particular characteristic of NHRIs lies in their multi-layered engagement with state and non-state actors at home and abroad which offers a plethora of avenues to strategically share human rights information and formulate recommendations with the aim to ensure that decision-makers act in line with international human rights standards.[49]

NHRIs 'sit at the crossroads between government and civil society' and can constitute bridges 'between the governing and governed' in the area of human rights.[50] This is visible both in the composition and role of NHRIs. With regards NHRI composition, the Paris Principles underline the need for a pluralistic representation of 'social forces (in civilian society) involved in the promotion and protection of human rights'.[51] The Paris Principles highlight that NHRIs should closely engage with civil

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NHRIs have also (in some limited instances) intervened as *amici curiae* before the European Court of Human Rights.

[47] Paris Principles, 'additional principles concerning the status of commissions with quasi-jurisdictional competence', (d).

[48] As indicated in SCA General Observation 1.6: 'Public authorities are encouraged to respond to recommendations from National Institutions in a timely manner, and to provide detailed information on practical and systematic follow-up action, as appropriate, to the National Institution's recommendations.'

[49] As indicated at the 1991 Paris meeting in this regard: 'if [NHRI] recommendations yielded no results, [NHRIs] should be able to inform public opinion and bring the matter before the competent jurisdictional bodies.' See: E/CN.4/1992/43, para. 39.

[50] A. Smith, 'The Unique Position of National Human Rights Institutions: A Mixed Blessing?' (2006) 28 Human Rights Quarterly 908–909.

[51] Paris Principles, 'composition and guarantees of independence and pluralism', 1 and 3.

society organisations, especially human rights NGOs.[52] NGOs can expand the work of NHRIs in multiple ways, including by disseminating NHRI reports and recommendations towards the public, and by providing NHRIs with specialised grassroots information.

As public institutions dedicated to human rights in a country, NHRIs also enjoy formal opportunities for engagement with state authorities. The presentation of annual NHRI reports to parliament is an important instrument in this respect.[53] Various NHRIs also have formal competences to access the judiciary or executive power in a country. The British and Scottish Human Rights Commissions, for example, have the power to intervene in ordinary judiciary proceedings by providing support, advice or testimony in human rights related cases. The Polish ombudsman can lodge applications before the constitutional court to verify the compliance of regulation with individual rights safeguarded by the constitution.[54] The Human Rights Defender of Armenia, at its turn, has the power to directly and formally intervene on the occasion of cabinet meetings.[55]

NHRIs do not only enjoy formal access to state authorities, but also enjoy formal access to a broad range of supranational human rights monitoring bodies. Different than other national bodies in the area of human rights, Paris Principles compliant NHRIs have acquired a distinct and formal participation status across UN and European human rights procedures.[56] This has led to descriptions of NHRIs as a 'fourth player' on the supranational human rights scene, in addition to state delegations, international organisations and NGOs.[57] Importantly, the supranational status and role of NHRIs can strengthen their leverage towards state authorities at home. When NHRI information is resonated in recommendations and decisions of supranational human rights bodies, NHRIs can build upon international findings – often embedded in international legal obligations of states – to foster domestic human rights change.

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[52] Paris Principles, 'methods of operation', (e).

[53] SCA General Observation 1.11.

[54] Further: A. Gliszczynska-Grabias and K. Sekowska-Kozlowska, 'NHRI in Poland: As Good as it Gets?', in Wouters and Meuwissen supra n. 17 61–82.

[55] As highlighted in: J. Barata Mir, 'How to Strengthen Soft Powers for Press Freedom: National Human Rights Institutions', Report Commissioned by the Council of Europe (May 2016) 11.

[56] For a further study of the status and role of NHRIs across the UN and European organisations: Wouters and Meuwissen supra n. 17.

[57] K. Roberts, 'National Human Rights Institutions as Diplomacy Actors', in M. O'Flaherty, U. George, K. Zdzislaw and M. Amrei (eds), *Human Rights Diplomacy: Contemporary Perspectives* (Martinus Nijhoff, 2011) 221–247.

In order to facilitate the functioning of NHRIs beyond national borders, the integration of NHRIs from across the world in one global and four regional networks is highly relevant.[58] In the context of NHRI networks, good practices are shared, capacity-building activities are organised, and collective NHRI messages are produced. The NHRI networks play a crucial role in supporting and informing their members to engage in supranational human rights procedures, and also carry out lobby activities in order to ensure the recognition of a special status and role for NHRIs by supranational human rights actors. A permanent representative of the global NHRI network (GANHRI) is located in Geneva, ensuring UN-related NHRI engagement on a permanent basis. The four regional NHRI networks (integrated in the global network) prioritise interaction with regional mechanisms and actors. ENNHRI, the European Network of National Human Rights Institutions, has a permanent secretariat in Brussels since 2013, installing a focal spot for cooperation among European NHRIs and enhancing NHRI interaction with the wide range of European human rights mechanisms.

3.3 Challenges Faced by NHRIs

The position of NHRIs as bridge-builders in between a range of other actors does not only create opportunities but also challenges. Two principal problems which may render NHRIs ineffective are the potential lack of independence of NHRIs *from* other actors as well as the lack of follow-up of NHRI recommendations *by* other actors. NHRIs have the delicate task to foster cooperative relations with a wide range of human rights counterparts (taking account of disperse interests and priorities) without precluding their own independence.

The Paris Principles stipulate a series of requirements to ensure the independence of NHRIs, especially from the executive power.[59] Such requirements include the pluralistic composition of NHRIs as well as the legal embedment of NHRIs' broad human rights mandate. As public state authorities, however, the functioning of NHRIs remains ultimately dependent on approval by democratically elected bodies (the executive

[58] These four regional NHRI networks are: the Asia Pacific Forum of National Human Rights Institutions (APF), the European Network of NHRIs (ENNHRI), the Network of African National Human Rights Institutions (NANHRI), and the Network of National Institutions of the Americas.

[59] Further addressed in: K. Meuwissen, 'NHRIs and the State: New and Independent Actors in the Multi-Layered Human Rights System?' (2015) 15 Human Rights Law Review 441–484.

and legislature) which can decide cutting NHRI budgets or amending NHRI mandates. A trend is visible in Europe where governments decide to merge various independent bodies with a human rights related mandate into one broadly mandated NHRI.[60] While cost effectiveness considerations are relevant when determining a nation's human rights infrastructure, the merger of various independent human rights bodies into one NHRI regularly appears to be merely triggered by cost-saving rationales, resulting in a net loss of expertise and resources being dedicated to human rights protection/promotion in a country.[61] In these times of austerity in Europe, NHRIs are accorded an increasingly wide range of roles in very challenging national and regional contexts, while the resources dedicated to carry out their tasks do not rise accordingly.[62]

In a context of ample challenges and limited resources, the relevance for NHRIs to take a strategic approach to carrying out their multi-faceted role multiplies. For purposes of accountability, the Paris Principles require NHRIs to compile annual reports on the activities they have carried out.[63] However, the publication of reports and provision of advice is no guarantee for engendering impact on the ground. With a view to be effective, it is crucial for NHRIs to perform their roles in a transparent and participatory manner. NHRIs need to be – and need to be seen – as reliable and trustworthy actors by rights-holders and duty-bearers alike. Accordingly, multi-stakeholder involvement across their work (in planning, implementation and follow-up stages) is essential. Through their multi-layered and pluralistic embeddedness, NHRIs can consider various avenues to convince decision-makers and need to be strategic about how to build bridges that are conducive to address the human rights situation at hand. When NHRI advice and recommendations are not followed-up, NHRIs can consider avenues to create external pressure on decision-makers, including through the broad publication of findings or engagement with NHRI partners at regional and international level.

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[60] Further: R. Carver, 'One NHRI or Many? How Many Institutions Does it Take to Protect Human Rights? – Lessons from the European Experience' (2011) 3(1) Journal of Human Rights Practice 1–24.

[61] Annual Report on ECRI's activities 2012, para. 6; Equinet 'Equality Bodies and National Human Rights Institutions, Making the Link to Maximise Impact' (2011) 8.

[62] Further: German Institute for Human Rights and European Network of National Human Rights Institutions, 'Austerity and Human Rights in Europe – Perspectives and Viewpoints from Conferences in Brussels and Berlin 12–13 June 2013'.

[63] See: SCA General Observation 1.11, 'Annual reports of National Human Rights Institutions'.

Multi-stakeholder support for NHRIs can also prove important when NHRIs face threats at home. In 2002, for example, the Danish government threatened to close down the Danish NHRI, which was met with swift reaction from the domestic and international community, including the UN High Commissioner for Human Rights.[64] In the end, the Danish NHRI underwent reform but was not shut down. The current political climate in Europe where space for fundamental rights, democracy and rule of law is shrinking has also negative repercussions on NHRIs. In this context, the relevance of fostering bridges across human rights actors, including NHRIs, becomes even more important. ENNHRI has developed guidelines on how the network can provide support to members under threat, including through engendering NHRI peer-support and outreach with regional and international partners.[65]

4. CONCLUSIONS: TOWARDS MORE COMPREHENSIVE FUNDAMENTAL RIGHTS PROTECTION IN EUROPE, BEYOND INDIVIDUAL COMPLAINTS-HANDLING, INCLUDING NHRIS

(Quasi-) judicial settlement of individual complaints is important, but this chapter argued that more attention is needed for mechanisms that reach beyond individual complaints-handling to address the important implementation gap in the area of human rights.

The focus of the analysis was to examine the potential of a particular type of public institution dedicated to human rights: Paris Principles compliant NHRIs. NHRIs are not a typical European phenomenon and their establishment is not legally required. Still, NHRIs are increasingly established across Europe and their added value has been recognised by many European mechanisms dedicated to human rights which support the establishment of such institutions by states.

The particular potential of Paris Principles compliant NHRIs has been highlighted from three perspectives. NHRIs have a broad and legally entrenched human rights mandate which enables them to prioritise the

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[64] Further: B. Lindsnaes, 'Postscript, Profile of a Human Rights Director', in R. F. Jorgensen and K. Slavensky (eds.), *Implementing Human Rights: Essays in Honour of Morten Kjaerum* (The Danish Institute for Human Rights, 2007) especially at 482–484.

[65] See the dedicated ENNHRI webpage: http://ennhri.org/-NHRIs-under-threat-112-, making reference also to ENNHRI and partner statements in support of the Polish Commissioner for Human Rights.

most pressing human rights issues in a country. Moreover, it has been argued that the strength of NHRIs lies in taking action which targets structural human rights change (such as legal amendments) rather than settling individual complaints. NHRIs generally do not have the competence to engender change by making binding decisions; their strength lies in providing well-informed human rights expertise and recommendations to relevant human rights actors, including domestic and international decision-makers. Also highlighted is the bridge-building role of NHRIs (and their networks) in engendering continuous and mutual information exchange between state authorities and civil society, as well as linking up supranational human rights monitoring mechanisms with national realities.

Last but not least, various challenges have been highlighted for NHRIs in Europe, including deteriorating resources in a context of austerity, the absence of follow-up on NHRI recommendations by decision-makers, and the need for the elaboration of regularly updated NHRI strategies, including prioritisation of tasks and follow-up on the impact of action undertaken. Enhanced threats to human rights, democracy and rule of law in Europe also have negative repercussions on NHRIs which need to operate in a context that is more hostile to human rights and human rights defenders. In challenging circumstances, the relevance of working together through human rights networks and partnerships becomes even more apparent.

NHRIs are not so much geared towards human rights enforcement ('respect'), but rather represent a means to engender multi-layered human rights governance geared towards ensuring the fulfilment of human rights ('promote and protect'). Rather than implementing human rights though an antagonist approach (individuals' rights that are to be enforced against the state), NHRIs are legally mandated to build bridges between rights-holders and duty-bearers, and represent an important shift towards joined-up governance to further realise the implementation of human rights in Europe.

9. Promoting equality by non-judicial actors: The role of equality bodies in the European Union landscape

Maria Elena Gennusa

1. THE RISE OF NATIONAL EQUALITY BODIES IN EUROPE VIA EUROPEAN DIRECTIVES

At the turn of the last century, when a new constitutional moment seemed close to opening for the European Union, the principle of non-discrimination experienced an extremely lively season. New suspect grounds of discrimination (religion or belief, disability, age and sexual orientation) were mentioned in Article 13 of the Treaty of Amsterdam, and new competences were created for the EU in this field. The newly proclaimed Charter of Fundamental Rights entirely devoted its third chapter to equality, focusing on many different aspects of this multi-faceted principle, and a new anti-discrimination legislation – at first, most notably, Directive 2000/43/EC (Race Equality Directive)[1] and Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (Framework Equality Directive)[2] – saw the light in the same year. Although still partially confirming the previous piecemeal approach to non-discrimination issues[3] – exclusively addressing the former to discrimination on ground of race, while aiming the latter to tackle discrimination on any ground, but only in the specific field of employment and occupation – both directives reveal a more robust attitude and provide a clearer legal framework to combat discrimination,

[1] Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] OJ L 180/22.

[2] Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, [2000] OJ L 303/16.

[3] Bruno De Witte, 'From a Common "Principle of Equality" to "European Antidiscriminatory Law"', [2010] 53 American Behavioral Scientist, 1715, 1719.

particularly if we take into account that they more precisely distinguish between direct and indirect discrimination, expressly recognise the admissibility of positive action, improve the remedies available to victims of discrimination, and cover quite a significantly wide scope (access to employment and self-employment; access to occupation and promotion; access to vocational training; working conditions; to such fields the Race Equality Directive also adds social protection, social security and health-care, education and access to and supply of goods and services available to the public, including housing).

However, the most remarkable novelty introduced by the Race Equality Directive was probably, at least on the operational side, the provision of a duty upon Member States to put into place "bodies for the promotion of equal treatment" (Article 13), i.e. institutions aimed at more effectively enforcing the principle of equality within the domestic order. Indeed, such National Equality Bodies (NEBs) – whose establishment was later confirmed by several directives on related matters (Directive 2002/73/EC on equal treatment in employment for women and men[4] and the following Recast Directive,[5] Directive 2004/113/EC on gender equality in the supply of goods and services[6] and, lastly, Directive 2014/54/EU on measures facilitating the freedom of movement for workers[7]) – were at that time almost unknown in Europe. Initially experimented with in the United States in the 1960s,[8] NEBs had been adopted in the United Kingdom in the 1970s and later in the Netherlands in the 1990s, but they had remained essentially unfamiliar to the other European states, until they became widespread across the whole EU in the 2000s as an effect of

[4] Directive 2002/73/EC amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, [2002] OJ L 269/15, Article 8a.

[5] Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), [2006] OJ L 204/23, Article 20.

[6] Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, [2004] OJ L 373/37, Article 12.

[7] Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers, [2014] OJ L 128/8, Article 4.

[8] On a comparison between the United States and Europe on this matter, see, for example, Gráinne De Burca, 'The Trajectories of European and American Antidiscrimination Law', [2012] 60 American Journal of Comparative Law, 1.

the national transposition of the EU equality directives into domestic law. As it was highlighted, the sudden proliferation of NEBs in Europe can be described as the result of "a series of legal-institutional transplants embedded within a broader policy transfer":[9] from the US, the UK and the Netherlands, up to the EU and then down again, from the latter to all the EU Member States.

There are probably reasons capable of explaining why, just in 2000, fifteen Member States unanimously adopted the Race Equality Directive – and, as a result, accepted the following establishment of NEBs – in a record time of only six months,[10] despite the existing different national traditions in approaching equality issues. A growing concern for the protection of racial minorities due to the forthcoming enlargement to Eastern European countries and to the Austrian crisis following the participation of an extreme right-wing party in the national government, on the one hand, and a higher attention towards fundamental rights issues, jointly with a certain diffusion of the Nordic Ombudsman tradition throughout Europe and the rise of independent National Human Rights Institutions (NHRIs), on the other, might undoubtedly have played a role therein. However, it seems as almost unquestionable that an imposition stemming from the Race Equality Directive[11] has triggered such a wide – and quick – diffusion of EBs at national level.

2. FREE REIGN TO CREATIVITY: THE "EU MODEL" AND THE NATIONAL TRANSPOSITIONS

The reasons why the Commission proposed to include the establishment of NEBs in the draft of the Race Equality Directive are intuitively quite clear. It is now a widespread belief that judicial protection, while certainly essential, is not sufficient for a full implementation of the principle of equality. Not only is access to courts often difficult and expensive and judicial proceedings are generally slow (it is well known that the scarcity of complaints about discrimination primarily depends on

[9] Bruno De Witte, 'National Equality Institutions and the Domestication of EU Non-Discriminatory Law', (2011) 18 Maastricht Journal of European and Comparative Law, 157, 159.

[10] For a more thorough explanation, Id., 161–167.

[11] As pointed out by Bruno De Witte, it was an even more "coercive" imposition for the twelve new Members of the EU that had not adopted the directive, but which should nevertheless enact NEBs as part of the acquis communautaire they were mandatory required to adapt to. See Id., 160.

procedural, time and financial barriers to access justice), but it is also clear that judicial approach is, by its very nature, limited and consequently unable to combat discrimination systematically by deploying all the instruments made available for this purpose. In fact, judicial actors can merely take an essentially passive and reactive approach. The function of a court is to respond to a situation. Therefore, the circumstances of the case and the way in which issues are framed are decisive for the judgment of the Court, which is legally binding only on the case at stake. Moreover, the complaints-led model requires the perpetrator to be identified and proof that the law has been breached, and even where a shift in the burden of proof is provided, it remains difficult to prove discrimination.

As a consequence, the establishment of non-judicial actors complementing courts in combating discrimination may prove very useful to enforce equality more effectively. Such non-judicial institutions can take advantage of simpler and more flexible procedures to ensure closeness to individuals and, due to their versatile nature, can address inequalities by taking a more holistic approach. They can combine reactive with proactive measures, as the latter is more capable of improving awareness of anti-discrimination legislation, promoting a culture of rights and compliance with equal treatment legislation and therefore preventing discrimination from happening.

However, the model of non-judicial institution introduced by the Race Equality Directive is partially disappointing and open to criticism. Indeed, Article 13 textually provides that:

1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.
2. Member States shall ensure that the competences of these bodies include:
   - without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,
   - conducting independent surveys concerning discrimination,
   - publishing independent reports and making recommendations on any issue relating to such discrimination.

Some features of this provision deserve specific consideration. Firstly, while requiring that competences are carried out in an independent manner, Article 13 does not mention independence as an institutional

requirement of the bodies at stake.[12] Secondly, it does not mention effectiveness either, not even as an attribute of the activities performed. Thirdly, the tasks of NEBs (particularly if we refer to the function of "providing assistance to victims of discrimination") "are only *mentioned* and not *defined*".[13] More generally, it seems obvious that Article 13 does not provide any clear criteria to lead – and measure – the functioning of NEBs.

Other normative sources can be certainly used for this purpose. For example the Paris Principles, which were established by the United Nations in 1993[14] in order to provide standards for NHRIs and requirements for their effective functioning, could be profitably applied to NEBs as well. Very briefly, the criteria identified by the Paris Principles to ensure independence and effectiveness of NHRIs are the following: enactment through a binding constitutional or legislative act, pluralism in the composition of their boards, guarantee of adequate funding and a stable mandate (i.e. that the appointment of the member "be effected by an official act which shall establish the specific duration of the mandate").[15] Additionally, the Paris Principles quite precisely list the NHRIs' tasks,[16] also adding further guidance with respect to institutions that are

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[12] On the issue of NEBs' independence, see Kutsal Yesilkagit and Berend Snijders, 'Between Impartiality and Responsiveness Equality Bodies and Practices of Independence', Report commissioned by Equinet, December 2008, <http://www.equineteurope.org/IMG/pdf/EN_-_Between_Impartiality_and_Responsiveness.pdf> accessed 30 August 2017.

[13] De Witte, supra n. 9, 172.

[14] UN General Assembly Resolution 48/134 (20 December 1993), *Principles Relating to the Status of National Institutions (The Paris Principles)*, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx> accessed 18 September 2017. See also Fundamental Rights Agency, *National Human Rights Institutions in the EU Member States (Strengthening the Fundamental Rights Architecture in the EU)*, 2010, <http://fra.europa.eu/en/publication/2012/national-human-rights-institutions-eu-member-states-strengthening-fundamental> accessed 27 September 2017; and Jan Wouters, Katrien Meuwissen and Ana Sofia de Barros, 'The European Union and National Human Rights Institutions', Leuven Centre for Global Governance Studies, WP No. 112/2013, <http://www.fp7-frame.eu/wp-content/materiale/w-papers/WP112-Wouters-Meuwissen-Barros(1).pdf> accessed 10 September 2017.

[15] See *The Paris Principles*, supra n. 14, sub "Composition and guarantees of independence and pluralism". On this point, more thoroughly Lorenza Violini, 'Beyond Courts and Judges: Human Rights Protection by Non-judicial Bodies', forthcoming.

[16] See *The Paris Principles*, supra n. 14, sub "Methods of operation".

charged with quasi-jurisdictional competence.[17] Similarly, more detailed criteria specifically focused on NEBs are also provided by the ECRI General Policy Recommendation No. 2 and No. 7.[18] The Recommendations specify the legal basis necessary for their establishment ("constitutional or legislative text"); the NEBs' competences and responsibilities (assistance to victims, i.e. providing general advice, legal assistance, and assistance in seeking friendly settlements; investigation powers; the right to initiate, and participate in, court proceedings; monitoring legislation and advice to legislative and executive authorities; awareness-raising of issues of racism and racial discrimination among society; and promotion of policies and practices to ensure equal treatment);[19] the criteria for administration and functioning (pluralism in composition; enactment of safeguards against arbitrary dismissal; supply of sufficient resources as for both expertise and budgetary means); and the style of operation (high quality work to earn credibility; politically independent performance of functions). However, it is worth highlighting that both the Paris Principles and the ECRI Recommendations are not legally binding. Meanwhile Article 13 of the Race Equality Directive, which is legally binding, completely fails to frame NEBs in clear and precise terms.

It is also remarkable that the same structure of Article 13 was almost verbatim reiterated in Article 8a of the Directive 2002/73/EC on equal treatment in employment for women and men[20] and in Article 12 of the Directive 2004/113/EC on gender equality in the supply of goods and services, although, obviously, for NEBs acting in the field of sex discrimination. The EU willingness not to encroach too harshly upon a sensitive policy area at national level, potentially impacting also the

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[17] See *The Paris Principles*, supra n. 14, sub "Additional principles concerning the status of commissions with quasi-jurisdictional competence".

[18] *ECRI General Policy Recommendation No. 2 on Specialized Bodies to Combat Racism, Xenophobia, Anti-Semitism and Intolerance at National Level*, CRI (97) 36 of 13 June 1997, <http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N2/Rec02en.pdf> accessed 18 September 2017; *ECRI General Policy Recommendation No. 7 on National Legislation to Combat Racism and Racial Discrimination,* adopted on 13 December 2002, CRI (2003) 8, <http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N7/ecri03-8%20recommendation%20nr%207.pdf> accessed 18 September 2017.

[19] *ECRI General Policy Recommendation No. 7*, Id., para. 24.

[20] Article 20 of the Recast Directive merely includes among the competences of NEBs the task of "at the appropriate level exchanging available information with corresponding European bodies such as any future European Institute for Gender Equality".

domestic administrative organisation of Member States, may partially explain – and even justify – the vagueness of the wording. However, actually, we might even wonder whether a "European model" of NEBs really exists. Only Article 4 of the more recent Directive 2014/54/EU on measures facilitating the freedom of movement for workers – probably in response to criticism directed to the previous wording – is more precisely framed, at least when detailing NEBs' tasks and competences.[21]

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[21] See Article 4 of Directive 2014/54/EU: "1. Each Member State shall designate one or more structures or bodies ('bodies') for the promotion, analysis, monitoring and support of equal treatment of Union workers and members of their family without discrimination on grounds of nationality, unjustified restrictions or obstacles to their right to free movement and shall make the necessary arrangements for the proper functioning of such bodies. Those bodies may form part of existing bodies at national level which have similar objectives.

2. Member States shall ensure that the competences of those bodies include: (a) providing or ensuring the provision of independent legal and/or other assistance to Union workers and members of their family, without prejudice to their rights, and to the rights of associations, organisations and other legal entities referred to in Article 3; (b) acting as a contact point vis-à-vis equivalent contact points in other Member States in order to cooperate and share relevant information; (c) conducting or commissioning independent surveys and analyses concerning unjustified restrictions and obstacles to the right to free movement, or discrimination on grounds of nationality, of Union workers and members of their family; (d) ensuring the publication of independent reports and making recommendations on any issue relating to such restrictions and obstacles or discrimination; (e) publishing relevant information on the application at national level of Union rules on free movement of workers. In relation to point (a) of the first subparagraph where bodies provide assistance in legal proceedings, such assistance shall be free of charge to persons who lack sufficient resources, in accordance with national law or practice.

3. Member States shall communicate to the Commission the names and contact details of the contact points and any updated information or changes thereto. The Commission shall keep a list of contact points and shall make it available to the Member States.

4. Member States shall ensure that existing or newly created bodies are aware of, and are able to make use of, and cooperate with, the existing information and assistance services at Union level, such as Your Europe, SOLVIT, EURES, Enterprise Europe Network and the Points of Single Contact.

5. Where the tasks referred to in paragraph 2 are allocated to more than one body, Member States shall ensure that those tasks are adequately coordinated."

On some operational challenges raised by such Directive, see, however, *Equality Bodies and Freedom of Movement: An Equinet Discussion Paper*, 2015, <http://www.equineteurope.org/IMG/pdf/equality_bodies_and_free_movement_web_final_version.pdf> accessed 12 September 2017; and Herwig Verschueren, 'Free Movement of Workers: The Role of Directive 2014/54/EU in Tackling

In light of the above, it is hardly surprising that the domestic transposition of the European Equality Directives has resulted in a plethora of different national implementations. It is obviously impossible to examine each NEB in detail here. However, as a mere overview, we can highlight the following.

Firstly, since the creation of an entirely new equality institution was not required by the European directives (stating Article 13 of the Racial Equality Directive, and similarly all the other "NEBs norms", that "these bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights"), some states decided to charge new tasks to the already existing institutions or to extend the power of the general ombudsman to questions of discrimination.[22]

Secondly, it is worth mentioning[23] that, while the overwhelming majority of NEBs have their legal basis in ordinary law[24] or other legislative acts,[25] the most notable differences among NEBs lie on the grounds of discrimination covered by NEBs, on the NEBs' structure and appointment procedure and on the functions performed.

Current and Future Challenges', 2015, <http://www.equineteurope.org/IMG/pdf/4_-academic_presentation.pdf> accessed 12 September 2017.

[22] De Witte, supra n. 9, 169.

[23] A detailed analysis is provided by the *Study on Equality Bodies Set Up under Directives 2000/43/EC, 2004/113/EC and 2006/54/EC: Synthesis Report,* edited by Margin Ammer, Niall Crowley, Barbara Liegl, Elisabeth Holzleithner, Katrin Wladasch and Kutsal Yesilkagit, Human European Consultancy in partnership with the Ludwig Boltzmann Institute of Human Rights, October 2010, <http://bim.lbg.ac.at/sites/files/bim/Final%20Synthesis%20Report.pdf> accessed 10 May 2017.

[24] See, among others, the Austrian Ombud for Equal Treatment; the Belgian Institute for the Equality of Women and Men; the Finnish Non-Discrimination Ombudsman; the German Federal Anti-Discrimination Agency; the Spanish Council for the Elimination of Racial or Ethnic Discrimination. The French Défenseur des droits, which has succeeded four distinct authorities – the Médiateur de la République (French Mediator/Ombud), the Défenseur des enfants (Children's Ombudsman), the Haute Autorité de lutte contre les discriminations et pour l'égalité (HALDE, equality and anti-discrimination authority), and the Commission nationale de déontologie de la sécurité (CNDS) – was enshrined in the Constitution in 2008 and established by the Organic and Ordinary Laws of 29 March 2011.

[25] For example, the Italian Ufficio Nazionale Antidiscriminazioni Razziali (UNAR) was established by an act of delegated legislation, Legislative Decree No. 215 of 9 July 2003.

In some countries, NEBs were established in order to exclusively combat discriminations on the grounds required to be covered by such institutions in the EU directives (gender and racial and ethnic origin);[26] in others, NEBs were enacted to carry out functions also in additional fields (age, sexual orientation, religion or belief, disability),[27] sometimes even not covered by any European directive (for example civil status, state of health, political conviction, physical or genetic characteristics, way of life, language, etc.).[28] A further distinction can be drawn between NEBs pursuing a multi-ground equality agenda and NEBs which focus on one specific ground. Moreover, there are also countries which have integrated NEBs, but still maintain a separate NEB exclusively focusing on a single ground of discrimination.

As for the structure, NEBs may be part of another administrative entity or have a separate legal personality, and there are institutions internally governed by a collegiate body – including in some countries representatives of the government, and in others representatives of societal minority groups – and institutions governed by a single head. Also the appointment procedures may differ, although they are predominantly a competence of the national government or specific ministers and more rarely of the parliament.

Lastly, if we take into consideration the functions effectively performed by NEBs, we may distinguish between predominantly promotion-type and predominantly tribunal-type NEBs. The activity of the former focuses on providing information and offering advice and legal assistance to the victims of discrimination, sometimes also trying to achieve informal settlements between the parties. Additionally, the promotional-type NEBs conduct surveys and awareness-raising work, and publish research and recommendations, if they have sufficient financial and staff resources for this purpose. The tribunal-type NEBs have investigating powers and can issue recommendations, opinions or – in some countries – also binding decisions that, in case of non-compliance from the parties, can be enforced by taking the respective case to court.

In conclusion, we may notice from the wide array of NEBs briefly examined that the European landscape is, in this regard, still "marked by a considerable degree of *bricolage*, meaning that the national political

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[26] It is worth mentioning that in Italy, for instance, only one EB exists, uniquely acting in the field of racial discrimination.

[27] E.g., Austria, Belgium, Germany, France, Luxembourg, Norway, Sweden, United Kingdom, etc.

[28] E.g., Belgium, France, Ireland, the Netherlands, Norway, Portugal, Sweden, United Kingdom.

actors […] re-contextualize[d] the innovative European ideas by wrapping them in layers of existing national practices and adapting them to domestic political preferences".[29]

3. NEBS AT THE CROSSROAD OF EQUALITY IN A MULTI-LAYERED EUROPE: A PROVISIONAL (AND FRAGMENTED) ANALYSIS

The following subsections of this contribution give an overview of the activities carried out by NEBs when combating discrimination and enhancing equality. How do NEBs perform their tasks and what tools do they primarily use? Concerning this, two aspects might be conveniently disclosed from the start.

Firstly, it is almost impossible to achieve here final and conclusive results which could take into account all the national peculiarities of the NEBs capability of fostering equality. In fact, the already highlighted considerable variety of the national transpositions of the vague EU requirements has resulted in national equality institutions that significantly differ in their effective power to influence the protection and promotion of equality.

Different organisational characteristics do really impact the effectiveness of the NEBs performances. Even more crucial for a good NEBs' performance are the staff or budget resources made available to the equality body. A limited resource base is obviously an impediment to NEBs effectively performing their activities and it is well known that the recent economic and financial crisis has furthermore reduced the equality bodies funding in some EU countries, where NEBs reported significant – or even disproportionate, if compared to other public services – cuts to their budget.[30]

Lastly, the NEBs' capability of making information on their work available – or, said in other words, the NEBs' "public profile"[31] – can

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[29] Bruno De Witte, 'New Institutions for Promoting Equality in Europe: Legal Transfers, National Bricolage and European Governance', [2012] 60 The American Journal of Comparative Law, 49, 69.

[30] See, for a more detailed analysis, the Report *Equality Bodies – Current Challenges: An Equinet Perspective*, October 2012, 17, <http://www.equineteurope.org/IMG/pdf/Current_Challenges_Perspective_MERGED_-_EN.pdf> accessed 28 May 2017.

[31] The relevance of the NEBs' "public profile" for this purpose, too, is also remarked in *The Public Profile of Equality Bodies: An Equinet Report*, Prepared

seriously impact the completeness of the analysis of the functions performed by NEBs, as information is often fragmented and difficult to access.

As a consequence, the following investigation will be carried out by focusing on some concrete examples which could reveal – more and better than others – the potential of NEBs for promoting equality.

A second remark is appropriate here. Although *national* institutions, NEBs seem to perfectly encompass the multi-layered nature of the European system where they act, being potentially able to combat discrimination at national level and, in doing so, to implement EU legislation within the domestic order, but also to contribute to a better understanding of EU anti-discrimination law and a profitable development of anti-discrimination strategies at European (or even international) level. In light of this, the analysis below will distinguish between functions performed by NEBs at national level and the role they potentially play also at European (and international) level.

3.1 Implementing EU Anti-Discrimination Law at National Level: the Top-Down Side of NEBs Tasks

If we consider the function of enforcing EU anti-discrimination legislation at national level, the broad provisions of the EU directives, which require that NEBs provide independent assistance to the victims of discrimination, have resulted in the enactment of different types of support to the latter, depending also on the different nature – promotional or tribunal-type – of NEBs involved.[32]

Firstly, NEBs may assist victims in pursuing their complaints of discrimination. Promotional-type NEBs give applicants information on the legal situation and advice on different strategies to redress, after a detailed analysis of the case and, possibly, specific investigation, if the NEB is endowed with power of inquiry. In so doing NEBs can act as a "filter" of discrimination complaints, influencing the victim's decision for the path to be followed, or they can even play an active role, contacting victims after learning about their case through the media and before a complaint is submitted, in order to provide them useful advice

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by the Equinet Working Group on Communication Strategies and Practices, 2015, <http://www.equineteurope.org/IMG/pdf/public_profile_of_equality_bodies_report_external_.pdf> accessed 10 July 2017.

[32] See more thoroughly, *Synthesis Report*, supra n. 23, 81 ss.

on further steps that may be conveniently followed.[33] Promotional-type NEBs often try to achieve informal settlements between the parties, cooperating with external mediators and suggesting reasonable accommodation,[34] and where they fail, they can in some domestic orders[35] take cases to courts and, more rarely, represent victims in court.[36] Notably, in Italy, UNAR (National Office for Opposition to Racial Discrimination) agreed to a protocol of cooperation with Consiglio Nazionale Forense (the National Lawyers' Association), aimed at strengthening protection for vulnerable victims by setting up a solidarity fund for access to justice by victims of discrimination for the years 2014 to 2016 (Fondo di solidarietà per la tutela giurisdizionale delle vittime di discriminazione), which should have been used to anticipate cost of actions brought to courts. However, no report has ever been published about the application of this protocol.[37] In Denmark, on 1 January 2016, the Institute for Human Rights was authorised to submit cases of fundamental importance concerning discrimination – including on grounds of religion – to the Board of Equal Treatment and some results have already been achieved, notably with regard to the crucial issue of school segregation against ethnic minorities.[38]

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[33] Sara Benedi Lahuerta, 'Untangling the Application of the EU Equality Directives at National Level: A Bottom-up Approach', [2013] 2 CELLS On-line Papers Series, 14, <http://www.law.leeds.ac.uk/assets/files/events/Benedi-Lahuerta-(2013)-Untangling-the-application-of-the-EU-Equality-Directives.pdf> accessed 20 May 2017.

[34] See, for example, the Slovak National Centre for Human Rights' activity in tackling the complex issue of Roma discrimination, *Report on the Observance of Human Rights including the Principle of Equal Treatment in the Slovak Republic for the Year 2016*, 2017, 55, <http://www.equineteurope.org/SLOVAKIA-Report-on-the-observance-of-human-rights> accessed 25 August 2017.

[35] Belgium, Finland, France, Ireland, Malta, Slovakia, Sweden and the UK.

[36] Ireland, Slovakia, Sweden and the UK.

[37] Chiara Favilli, 'Country Report: Non Discrimination, Italy 2016', 82, <http://www.networkantidiscriminazione.it/wp-content/uploads/2017/02/2016-IT-Country-report-ND_final.pdf> accessed 29 May 2017.

[38] See *Human Rights on the Agenda, Report 2016–17* of the Danish Institute for Human Rights, 2017, 22, <https://www.humanrights.dk/publications/annual-report-danish-parliament-2016-17> accessed 30 May 2017. When the Langkaer Gymnasium of Aarhus formed four classes comprising only ethnic minority students, the Institute submitted a complaint to the Board of Equal Treatment, after which the Gymnasium agreed that pupils had been discriminated on the grounds of ethnicity and accepted an out-of-court settlement.

Tribunal-type NEBs are generally less service-oriented than promotional-type NEBs, but in some countries, they can conduct investigations and issue binding decisions[39] on the case, which are either directly enforceable by issuing fines when the respondent does not comply,[40] or by taking the case to a court.[41] In this regard, strategic litigation can play a crucial role in combating discrimination,[42] even if only a minority of NEBs can make use of this relevant tool. One of the NEBs, which has proved to be more effective in using strategic litigation, is for example the British Equality and Human Rights Commission,[43] whose quasi-judicial activity is led by specific criteria identifying factors that will be considered in determining whether the Commission should intervene in, support or take a particular legal case. Among such factors, particularly remarkable is the circumstance that a case addresses widespread or systemic equality and/or human rights problems that litigation brought by others has failed to resolve; is likely to clarify, extend,

[39] *Synthesis Report*, supra n. 23, 90. Id., 95–96 highlights the relevance of follow-up procedures, particularly for tribunal-type NEBs, although the latter do not allocate resources to follow-up activities, with the exception of the Dutch Equal Treatment Commission.

[40] Very few NEBs concretely use their power to impose fine. Examples can be found in Denmark, the Netherlands, Estonia and Ireland.

[41] Actually, in some countries, cases can also be brought to court by the NEB also in its own initiative (for example in Hungary). In other countries, NEBs can act in an *amicus curiae* capacity (Bulgaria, Finland, France, Ireland, Latvia, Lithuania, Norway, Romania, Slovenia), or can initiate an *actio popularis* claim (Bulgaria, Hungary, Slovakia, Ireland and the UK).

[42] Also, NGOs not qualified as equality bodies can provide a useful help in combating discrimination by making use of strategic litigation. An example is the Dutch Meldpunt Discriminatie Internet that is extremely active in the field of cybercrime discrimination. It is a service which deals with complaints of discrimination affecting Dutch society (it does not deal with complaints affecting specific persons; when complaints of this kind are received, they are referred to the most appropriate service in each case). When complaints are received, they are investigated and, if found to be discriminatory, the organisation asks the owner of the website or its moderator to remove the content (95% of the requests made by MDI obtain a positive result). If material is not removed, the MDI considers what further steps to take. This can be filing charges with the appropriate public prosecutor's office, although this is done on a strategic basis and depending on the case, as this is quite a long process (two years on average). Information is available at <http://www.meldpunt.nl/> accessed 1 October 2017.

[43] See Peter Reading, 'The Importance of Strategic Litigation: The Experience in Britain', 2010, <https://www.equalityhumanrights.com/en> accessed 20 March 2017.

strengthen or otherwise test compliance with equality and/or human rights law; will challenge a decision, policy or practice that is significantly detrimental or has adverse impact; has the potential to improve the equality and/or human rights policies or practices of a strategically significant organisation or sector; would have wider tangible benefits; will secure better understanding of rights and obligations; will improve public discourse on and increase public respect for human rights; has good prospects of success; provides an opportunity to positively advance arguments using European and international law to positively develop interpretation of domestic law.[44]

However, the function of enforcing anti-discrimination legislation can also include action aiming to increase knowledge of equality and discrimination by conducting surveys,[45] publishing reports and making recommendations on issues concerning discrimination,[46] and not least, pursuing awareness-raising activities. To this purpose the most common tools used are information campaigns consisting of TV/radio spots,

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[44] See *The Equality and Human Rights Commission's Strategic Litigation Policy*, <https://www.equalityhumanrights.com/sites/default/files/strategic_litigation_policy_100315.pdf> accessed 7 October 2017.

[45] See, for example, among many, the lastly published survey 'Discrimination in Croatia: Attitudes, Awareness and Forms', carried out in 2017 by the Ombudsman of the Republic of Croatia within the Project 'Measuring (in)equality in Croatia', <http://ombudsman.hr/attachments/article/1148/Survey%20on%20Discrimination%20in%20Croatia,%202016.pdf> accessed 20 September 2017; or the research 'Key Inequalities in Housing and Communities', carried out by the Northern Ireland Equality Commission, whose results are available at <http://www.equalityni.org/KeyInequalities-Housing> accessed 5 October 2017; or the '10th Barometer of the Perception of Discrimination in Employment' by the French Defender of Rights, <http://www.equineteurope.org/France-10th-Barometer-of-the-perception-of-Discrimination-in-Employment> accessed 5 May 2017; or the 'Survey on Discrimination Against Homosexual and Bisexual People' by the German Federal Anti-Discrimination Agency (FADA), <http://www.equineteurope.org/Germany-Survey-on-Discrimination-against-homosexual-and-bisexual-people> accessed 31 March 2017.

[46] See, for example, the recommendations made by the Slovak National Centre for Human Rights, as mentioned in the *Report*, supra n. 34, passim. Even more notably, see the 27 recommendations included in the Belgian UNIA (Interfederal Centre For Equal Opportunities) Report '10 Years of Belgian Antidiscrimination Laws', published in May 2017, <http://www.equineteurope.org/10-years-of-Belgian-antidiscrimination-laws-Unia-highlights-major-problem-spots> accessed 18 June 2017.

posters and newspaper articles, and educational activities, often consisting in training activities addressed to security forces and legal operators (prosecutors, judges, lawyers, forensic doctors, etc.).[47]

Regarding information campaigns, the Portuguese experience seems notable. Already the previous High Commission for Immigration and Intercultural Dialogue (ACIDI), established in 2007 and in 2014 renamed to High Commission for Migration (ACM), had adopted several strategies, involving media as opinion makers and therefore key agents for combating discrimination. Such strategies included TV and radio programs focused on the different cultures living in Portugal; a journalism award; day-long training meetings on how to treat information on immigration and immigrants, with the aim of avoiding the dissemination of stereotypes in the media; and the drawing up of databases of immigrants of outstanding expertise in certain fields to highlight their contribution to the Portuguese life.[48] Additionally in 2015, on the International Day for the Elimination of Racial Discrimination, the campaign "Find your colour" was launched by ACM to raise awareness against racism and xenophobia.[49] Also the Hungarian Commissioner for Fundamental Rights seems to be quite active in organising events

[47] See, for example, 'The Role of Equality Bodies in the Fight against Ethnic and Racial Discrimination', Conference of the Council for the Promotion of Equal Treatment and Non-Discrimination on the Grounds of Racial or Ethnic Origin, Madrid, November 2011, <https://www.msssi.gob.es/ssi/igualdadOportunidades/docs/2011_conclusions_key_challenges_conference_council_vfacc.pdf> accessed 2 April 2017. See also the Spanish initiative Calì Program, <http://cloud2.snappages.com/ecc3fa83da15cf423fe3aaa342f545fa355b24f3/Fundacion%20Secretariado%20Gitano.pdf> accessed 20 June 2017.

[48] For further information on the Portuguese NEB, see the ACM website <http://www.acm.gov.pt/acm/o-acm> accessed 1 May 2017.

[49] Such campaign was released through ACM's Facebook page. Each follower of the profile was invited to access a website created for this purpose which, through a connection with their Facebook account, identified the exact colour user's skin based on the selected photo submitted at the time. After this procedure, each person was faced with a question ("You find your colour, so what? Does it change anything in your life?") and invited to report any cases of racism or xenophobia that witnessed or experienced. See <http://www.equineteurope.org/Portugal-Campaign-Find-your-colour> accessed 28 July 2017. Other good practices are collected in 'Research on Equality Bodies' Good Practices in the Field of Non-Discrimination: Final Report', 2015, <https://ncpe.gov.mt/en/Documents/Projects_and_Specific_Initiatives/Developing_a_culture_of_rights/Research_Equality_Bodies.pdf> accessed 30 June 2017.

involving national minorities, with the purpose of making their positive contribution to the social life of the country more visible.[50]

As for educational activities, quite notable is the engagement of the ombudsman of Latvia in the field of tolerance and prevention of discrimination, as the study "Issues of Investigating Hate Crimes and Hate Speech in the Republic of Latvia" extensively reveals.[51]

NEBs may also play a relevant role when launching projects in support of disadvantaged and discriminated groups. An example is provided by the "temporary compensatory measures" adopted by the Slovak National Centre for Human Rights, in the field of public health,[52] education[53] and Roma integration.[54]

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[50] See *Report on the Activities of the Commissioner for Fundamental Rights and His Deputies*, 2016, 43–45, <http://www.equineteurope.org/HUNGARY-Annual-Report-2016> accessed 30 August 2017. See also Id., 56, with regard to two comprehensive inquiries launched in 2016, respectively dealing with the follow-up investigation of the training of teachers for national minorities and the review of the prospective careers of students from national minorities; and with public media services concerning broadcasts of programs for national minorities, as well as the enforcement of nationality rights in the public media. These inquiries are expected to be closed in 2017.

[51] See Ombudsman of the Republic of Latvia, *Summary of Annual Report 2016*, 2017, 19, <http://www.equineteurope.org/IMG/pdf/public_profile_of_equality_bodies_report_external_.pdf> accessed 30 September 2017.

[52] See the national project (NP) Healthy Communities, whose aim is to improve access to health care and public health, including preventive health care and health awareness, and balance differences in health condition between Roma and the majority population. *Report*, supra n. 34, 94.

[53] See the project 'You also have a chance!', which consists of support for Roma high school students by providing free preparation courses for entry exams to the University of Economics in Bratislava. *Report*, supra n. 34, 97.

[54] See the 'Take away package', including several projects as, for example, 'NP field social work' (aimed to increase participation of the most disadvantaged and vulnerable persons in social life through systematic innovation support in the field of social work, in order to increase integration of marginalised Roma in all areas of the society), the 'NP Community centres' (that would provide Roma and non-Roma citizens opportunities for joint social activities including informal education and leisure activities for children, youth and adults, assistance in community organising, conflict resolution and issues concerning housing, mutual relations as well as awareness raising and prevention activities), the 'NP Promotion of pre-primary education of children belonging to racial minorities' (whose purpose is to increase the number of children from racial minorities attending kindergartens and to improve chances for successful completion of higher levels of education), etc. *Report*, supra n. 34, 95–97.

Last but not least, NEBs may actively contribute to a development of anti-discrimination law at national level, particularly in countries where they are involved in legislative activities or may contribute to national consultations, policy development and strategy implementation in the field of equality.[55] The Irish Human Rights and Equality Commission has, for instance, a statutory mandate to examine any legislative proposal and to report its views on any implications for human rights or equality in Ireland. It may provide observations and make interventions on several pieces of draft legislation, and monitor the subsequent progress of bills in the Parliament.[56] The British Human Rights and Equality Commission is similarly engaged in developing anti-discrimination law, as the recent publication "Fair opportunities for all: A strategy to reduce pay gaps in Britain" widely confirms.[57]

3.2 The Bottom-up Side: Improving Understanding of EU Anti-Discrimination Law and Beyond – The Role of Equinet

As previously mentioned, although national institutions, NEBs have the potential, while implementing anti-discrimination law at national level, to actively contribute to positive development of anti-discrimination approaches and strategies at supranational and international levels.

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[55] Even where such involvement is not provided, other tools may be available. For example, the Czech Public Defender of Rights filed a petition with the Constitutional Court to abolish the unequal minimum wage for persons receiving disability pension, and as a result of this petition the Government equalised the minimum wage in 2017. See the *Summary Report on Protection against Discrimination 2016*, 2017, 19, <http://www.equineteurope.org/Czech-Republic-Summary-Report-on-Protection-Against-Discrimination-2016> accessed 25 May 2017.

[56] See Irish Human Rights and Equality Commission, *Annual Report 2016*, 2017, 21, <https://www.ihrec.ie/documents/annual-report-2016/> accessed 15 July 2017. Also, the Italian UNAR had attempted to suggest improvement to the most crucial aspects of the legislation in force, as the last *Report* concerning UNAR activities of 2012 seems to reveal. See *2012 Annual Report to the Parliament*, 71–73, <https://www2.immigrazione.regione.toscana.it/sites/default/files/relazioneunarparlamento2011.pdf> accessed 15 June 2017.

[57] The strategy is available at <https://www.equalityhumanrights.com/en/publication-download/fair-opportunities-all-strategy-reduce-pay-gaps-britain> accessed 2 September 2017.

It obviously happens when representatives of NEBs sit in international committees and can consequently bring the domestically gained experience with equality issues therein[58] or when NEBs submit reports to international committees involved in the field of human rights and equality protection in order to raise sensitive concerns. It was for instance the case of the Equality Commission for Northern Ireland, which, making formal submissions to the UN Committee on the Elimination of Discrimination Against Women, the UN Committee on the Rights of Persons with Disabilities, the UN Committee on the Elimination of All Forms of Racism, the Advisory Committee to the Framework Convention on the Protection of National Minorities and the European Commission Against Racism and Intolerance, used international human rights mechanisms to highlight inequalities in the fulfilment of economic and social rights and "as policy levers for reducing and eradicating these". Similarly, the Irish Human Rights and Equality Commission, in 2015 and during the Irish State's third periodic review under the International Covenant on Economic, Social and Cultural Rights, submitted a Report to the UN Committee on Economic, Social and Cultural Rights, which provided an excellent opportunity to raise a range of issues related to equality, diversity and non-discrimination.[59]

Even more remarkable is, however, the NEBs' potential when supporting victims of discrimination before the European Courts. The contribution offered by human rights organisations that supported victims of discrimination before the European Court of Human Rights (ECtHR) is well known, particularly if we consider the evolution of the ECtHR's jurisprudence in approaching cases where the death of Roma when in police custody was at stake. While initially the ECtHR's reasoning had been uniquely focused on the breach of Article 2 ECHR protecting the right to life or Article 3 ensuring freedom from torture without any racial

[58] See, for example, the Hungarian Deputy Commissioner for the Rights of National Minorities who was involved in intense international relationship, participating in the work of the UN Human Rights Committee in 2016. The Deputy has been also involved in the work of the OPRE Platform (Operational Platform for Roma Equality) since the very beginning, and represented the Office at the sessions of the Platform on Social and Economic Rights, whose activity is also focused on the situation of Roma communities and the educational segregation of Roma children. *Report*, supra n. 50, 48–50.

[59] Niall Crowley, 'Equality Bodies Contributing to the Protection, Respect and Fulfillment of Economic and Social Rights', 2015, 20–21, <http://www.equineteurope.org/IMG/pdf/economic_and_social_rights_electronic-3.pdf> accessed on 30 March 2017.

motivation being considered,[60] starting from *Nachova and Others v Bulgaria*,[61] the First Section of the Court amended its approach in two respects. Firstly, it found a violation of the procedural limb of Article 14. Indeed, "the Court considered that it did not have sufficient evidence of racist motivation *because* the Bulgarian authorities had failed to investigate racist motivations for the violence, despite having good reason to believe that such motivations might exist".[62] Secondly, in doing so, it shifted the burden of proof to the government, and since the latter had failed to prove that the deaths were not the result of racism, the First Section of the Court found a substantive violation of Article 14. Although the following Grand Chamber's Judgment on the *Nachova* case[63] partially reversed the First Section's one – confirming the violation of the procedural limb of Article 14, on the one hand, while returning to a finding of no substantive violation of Article 14 in light of insufficient evidence of discriminatory intent, on the other – it is worth highlighting that such more equality-oriented development in the ECtHR's jurisprudence was also due to the particularly active involvement of three human rights organisations (the European Roma Rights Centre, Interights and the Open Society Justice Initiative) which had prepared relevant third party interventions before the Court. Similarly, it happened in cases of racial segregation at school, after the European Roma Rights Centre decided to address the issue of discrimination against Roma children at school, identifying special schools in the Czech Republic as the target for litigation and selecting several Roma children to be applicants before the European Court. The result was the *D.H. and Others v the Czech Republic* Judgment,[64] where, after a disappointing Chamber Judgment, the Grand Chamber of the Court found a violation of Article 14, using for

[60] See, among many, *Velikova v Bulgaria* App no 41488/98 (ECHR, 18 May 2000). Here while finding that the applicant's complaint under Article 14 (ban on discrimination) was "grounded on a number of serious arguments", the Court unanimously held that it be unable to find "beyond a reasonable doubt" that the killing had been racially motivated. Similarly, although not unanimously, in *Anguelova v Bulgaria* App no 38361/97 (ECHR, 13 June 2002).

[61] *Nachova and Others v Bulgaria* App nos 43577/98 and 43579/98 (ECHR, 26 February 2004).

[62] Andrea Coomber, 'Strategically litigating equality – reflections on a changing jurisprudence', [2012] European Anti-discrimination Law Review, n. 15, 11, 14 (emphasis added).

[63] *Nachova and Others v Bulgaria* [GC] App nos 43577/98 and 43579/98 (ECHR, 6 July 2005).

[64] *D.H. and Others v the Czech Republic* [GC] App no 57325/00 (ECHR, 13 November 2007).

the first time the term "indirect discrimination" in this regard and shifting the burden of proof to the government. Where an applicant raises a *prima facie* case of discrimination, it is up to the government to provide a discrimination-neutral explanation for the treatment,[65] the ECtHR stated.

Although the organisations above were not strictly intended as NEBs, the mentioned examples clearly reveal the potential of non-judicial actors for influencing the approach taken by courts in dealing with equality issues and thus also the profitable synergies between judicial and non-judicial (or quasi-judicial) contribution to a better strategy against discrimination. Not coincidentally the British NEB, the Equality and Human Rights Commission, took a similar path of submitting comments as third party before the ECtHR,[66] and supporting victims of discrimination before the European Courts as a part of its strategic use of litigation, sometimes achieving notable results. Additionally, it was quite active also in issues involving the application of EU law, indirectly triggering relevant judgments from the Court of Justice of the European Union (CJEU).

Indeed, it is well known that the most effective mechanism to ensure uniform interpretation and application of the EU anti-discrimination directives is the ability of the national courts and tribunals – or the duty, for courts of last instance – to refer questions to the CJEU for a preliminary ruling on the interpretation (or validity) of EU law. Equality bodies may play an important role in this regard, either by facilitating significant cases being brought before the domestic courts so that questions can be referred by the latter to the CJEU or by directly or indirectly participating in the procedure before the CJEU.[67] Some NEBs effectively deployed their potential in this respect. It happened, for

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[65] Coomber, supra n. 62, 17.

[66] See, for example, *Eweida and Others v the United Kingdom* App nos 48420/10, 59842/10, 51671/10 and 36516/10 (ECHR, 15 January 2013), concerning cases of alleged discrimination on grounds of religion (particularly para. 77); *Bah v The United Kingdom* App no 56328/07 (ECHR, 27 September 2011) on housing for immigrants; *Hode and Abdi v The United Kingdom* App no 22341/09 (ECHR, 6 February 2013) on rights of spouses to join refugee partners on non-discriminatory basis; *O'Donoghue v The United Kingdom* App no 34848/07 (ECHR, 14 December 2010), on discriminatory marriage certificates of approval scheme for immigrants.

[67] For a more detailed analysis of the role potentially played by NEBs in the CJEU's proceedings, see 'Influencing the Law through Legal Proceedings: The Powers and Practices of Equality Bodies', Equinet Report. September 2010, <http://www.equineteurope.org/IMG/pdf/EN_-_Influencing_the_law_through_legal_proceedings.pdf> accessed 31 January 2017.

example, in the *Coleman* case where the CJEU could clarify the scope of the protection afforded by Community law against discrimination on grounds of disability[68] as a result of a preliminary reference procedure ultimately triggered by the above mentioned British Commission when supporting the case before the domestic court. Similarly, the previous Equal Opportunities Commission for Northern Ireland (now Equality Commission for Northern Ireland) supported complainants in bringing the very famous *Johnston* case on sex discrimination before the CJEU;[69] and the former Jämställdhetsombudsmannen (the Equal Opportunities Ombudsman, now Swedish Equality Ombudsman) initiated a case concerning difference in salary between men and women, later referred by the domestic Arbetsdomstolen (the Swedish Labour court) to the CJEU.[70] However, the most relevant contribution due to an NEB to the development of EU anti-discrimination law may probably be found in the well-known *Firma Feryn* Judgment,[71] initiated by the Belgian Centre for Equal Opportunities and Opposition to Racism, in which the CJEU stated that when an employer declares publicly that it will not recruit employees

[68] Case C-303/06 *Coleman v Attridge Law* [2008] ECR I-05603. The CJEU established that the prohibition against discrimination also protects against discrimination by association. In other words, the Court stated that the objectives of the Directive and its effectiveness would be undermined if an employee in the situation of the claimant in the main proceeding cannot rely on the prohibition of direct discrimination laid down in the Directive where it is proven that he has been treated less favourably than another employee in a comparable situation on the grounds of his child's disability, and this is the case even though that employee is not himself disabled. See also Case C-388/07 *The Incorporated Trustees of the National Council on Ageing (Age Concern England) v Secretary of State for Business, Enterprise and Regulatory Reform* [2009] ECR I-01569 on discrimination on grounds of age; and Case C-44/12 *Andrius Kulikauskas v Macduff Shellfish Limited, Duncan Watt* on an alleged discrimination on the grounds of the pregnancy, which was however removed from the register [2013] OJ C108/18, having the referring Scottish Court withdrawn its request for a preliminary ruling.

[69] Case C-222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 01651. Here the CJEU established that it was in violation of EU law to deprive the complainant of the possibility of asserting her right to not be discriminated against under the principle of equal treatment by judicial process. See also Case C-342/93 *Gillespie v Northern Health and Social Services Board* [1996] ECR I-00475.

[70] Case C-236/98 *Jämställdhetsombudsmannen v Örebro läns landsting* [2000] ECR I-02189.

[71] Case C-54/07 *Centruum vor Gelijkheid van Kansen en voor Racismebestridjing v Firma Feryn* NV [2008] ECR I-05187.

of a certain ethnic or racial origin, this constitutes direct discrimination under the Race Equality Directive, regardless of whether there is an identifiable victim.[72]

It is obvious that NEBs could play an even more relevant role by directly referring preliminary questions before the CJEU. However, although perhaps this would in theory seem possible – particularly with regard to tribunal-type NEBs that have been given power to hear individual complaints and issue legally binding decisions about whether discrimination has taken place – the CJEU answered in the negative. When the Bulgarian Commission for Protection Against Discrimination (KZD) – an independent and impartial NEB, capable of issuing judicial and compulsory decisions – raised several preliminary questions concerning a case of discrimination against Roma[73] in the *Belov* case,[74] the CJEU decided not to enter into the merit of the case, holding that the KZD was not a court or tribunal which had the right to refer preliminary questions, as the activities performed were administrative – and not judicial – in nature. In doing so, the Court also rejected the solution proposed by the Advocate General Kokott in her Opinion, reaching a diametrically opposed conclusion.[75] Although it was observed that "legally speaking, both solutions are equally plausible and motivated",[76]

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[72] Very peculiar was the Case C-81/12 *Asociația Accept v Consiliul Național pentru Combaterea Discriminării* [2013] OJ C171/14, concerning public statements ruling out the recruitment of a footballer presented as being homosexual. Here, an action brought against the decision of the Romanian the National Council for Combating Discrimination (NCCD) – which, according to the national legislation, could merely give a "warning" where there is a finding of discrimination on grounds of sexual orientation – gave the domestic Court the opportunity to question the compatibility of the domestic legislation with the EU equality directive. The CJEU clarified that the directive precludes national rules like the Romanian ones, if the penalty provided therein is not effective, proportionate and dissuasive. In fact, the Equality directive precisely requires that the sanctions at the disposal of equality bodies are to be effective, proportionate and dissuasive.

[73] A Bulgarian electricity company had installed electricity meters at a height of 7 m (instead of the usual height of 1.70 m) in two neighbourhoods known to be Roma districts.

[74] Case C-394/11 *Valeri Hariev Belov v CHEZ Elektro Balgaria AD and Others* [2013] OJ C86/4.

[75] Case C-394/11 *Valeri Hariev Belov v CHEZ Elektro Balgaria AD and Others* AG Opinion [2012] Digital reports (Court Reports – general) ECLI identifier: ECLI:EU:C:2012:585.

[76] Mathias Möschel, 'Race Discrimination and Access to the European Court of Justice: *Belov*', [2013] 50 CMLR 1433, 1442.

the *Belov* Judgment of the Court was nonetheless strongly criticised[77] on the ground that it "further weakens national equality bodies' position".[78]

The approach taken by the CJEU in the *Belov* case was probably an umpteenth lost opportunity to furthermore strengthen the NEBs' role at European level. However it is worth considering that, as the European Commission and Member States are entitled to submit statements to the CJEU on EU legal issues in dispute, NEBs can still submit their observations on the interpretation of the Directives to either the European Commission or their government with the request that they communicate these viewpoints to the CJEU.[79]

Additionally, NEBs can actively play a role at European level through mutual cooperation involving information exchange between different NEBs, through working together in order to develop common strategies to combat discrimination, or through networking. In this latter regard, the most notable example is the European Network of Equality Bodies (Equinet) that brings together 46 organizations from 34 European countries and whose aim is also to support "equality bodies to be independent and effective as valuable catalysts for more equal societies".[80] Equinet is not only a forum where NEBs can exchange information and good practices on the implementation of the anti-discrimination directives in their respective Member States; it also "seeks to engage in advancing equality in practice by facilitating the contributions and a stronger voice

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[77] See also Tamás Kádár, 'The Standing of National Equality Bodies before the European Union Court of Justice: The Implications of the *Belov* Judgment', [2013] 11 The Equal Rights Review 13.

[78] Möschel, supra n. 76, 1444. It is also worth mentioning that in the following Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia* [2015] OJ C311/8, where the same discriminatory behaviour was at stake, the Court entered into the merit, being the preliminary question referred by the Administrative Tribunal of Sofia, and clarified that "the concept of 'discrimination on the grounds of ethnic origin', for the purpose of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and, in particular, of Articles 1 and 2(1) thereof, must be interpreted as being intended to apply in circumstances such as those at issue before the referring court".

[79] It happened for example in France and in Sweden, while in Belgium and Romania NEBs were requested by their governments to provide points of view as experts in regard to specific preliminary rulings.

[80] More detailed information about Equinet is available on the network website <http://www.equineteurope.org/> accessed 20 January 2017.

of national equality bodies to the *wider European debate*".[81] At this aim, the Equinet structure includes specific working groups which are involved in presenting policy initiatives, addressing suggestions to policy makers and proposing strategies to support equality more effectively. Among such working groups, the most remarkable for strengthening the NEBs' participation in the "wider European debate" is obviously the Working Group Policy Formation, a fundamental platform enabling a constructive dialogue between NEBs and the EU institutions, with the purpose of contributing to the development of anti-discriminatory policies through the preparation of Equinet "perspectives". Developing from the work and experience of NEBs at Member State level, such "perspectives" are fact-based and seek to influence current policy-making within the EU institutions in the area of equality and non-discrimination.[82]

The role of Equinet as NEBs' spokesperson before the EU institution was, for example, evident in its "Response to the European Commission's Public Consultation on the First Preliminary Outline of a European Pillar of Social Rights", delivered in December 2016,[83] in which, based on its recent publication "Equality Bodies Contributing to the Protection, Respect and Fulfilment of Economic and Social Rights",[84] Equinet highlighted the need for attention to be paid to equality and non-discrimination concerns in all proposed policy domains, and to consider

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[81] See <http://www.equineteurope.org/Equinet-at-a-Glance> accessed 15 September 2017.

[82] See for example, among many, the Equinet perspective 'Equality Bodies Promoting Equality & Non-Discrimination For LGBTI People', <http://www.equineteurope.org/Equality-Bodies-Promoting-Equality> accessed 18 June 2017, which explored the legal work, policy initiatives, communication activities, good practice support and research work by NEBs on LGBTI issues; or 'Equality Bodies Promoting a Better Work-Life Balance for All', <http://www.equineteurope.org/Equality-Bodies-promoting-a-better-work-life-balance-for-all> accessed 18 June 2017, which focused on pregnancy related discrimination highlighting the importance that policy makers establish legal duties on employers to consider or make accommodations for reconciliation of work and family life and work-life balance; or, again, 'Realising Rights: Equality Bodies and People with Disabilities. Supporting the Review of The European Union Disability Strategy 2010–2020', <http://www.equineteurope.org/Realising-Rights-Equality-Bodies-and-People-with-Disabilities-Supporting-the> accessed 18 June 2017 to contribute to such review and to the renewal of the list of actions to be taken therein, etc.

[83] <http://www.equineteurope.org/Equinet-Response-to-the-European-Commission-s-public-consultation-on-the-First> accessed 20 September 2017.

[84] Crowley, supra n. 59.

throughout the policy design the request for progressive, and not retrogressive, realisation of social and economic rights. More specifically, while considering that the approach taken by the Commission's proposal merely aimed at formal – and not substantial – equality, Equinet recommended pursuing full equality mainstreaming in the fields covered by the European Pillar of Social Rights, with a view to integrating these principles with the governance structures of the European Union.[85]

4. NEBS AS "ONE-STOP SHOPS OF EQUALITY" FOR EUROPE? A PICTURE OF LIGHT AND SHADOW

From the analysis conducted above, might we thus infer that NEBs are by now a sort of "one-stop shops of equality" for Europe, intended as fora that are readily accessible to the wide public and effectively capable of spreading a culture of equality and combating all forms of discrimination?

Actually, all the examples reported above are consistent in revealing that NEBs do really have a strong potential for fostering equality both at domestic and European levels. On the one hand, they can be uniquely placed at national level to deal with all forms of discrimination, including structural discrimination, and to take a leadership role in crucial issues. They can also be key actors offering effective pathways to justice in a context where legal aid provided by the state is not or not sufficiently available, and can even become "institutions of trust" at the intersections between the state and vulnerable groups.[86] On the other hand, their activity could also impact the European level, contributing to a better understanding of EU anti-discrimination legislation and to the development of more equality-oriented judicial approaches and policies. In this sense, we might say that NEBs are at the intersections between states and Europe as well.

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[85] Such suggestion was later taken into account by the Commission Staff Working Document *Report of the Public Consultation Accompanying the Document 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Establishing a European Pillar of Social Rights',* SWD (2017) 206 final, 26 April 2017, 11.

[86] See also 'Strengthening the Effectiveness of European Equal Treatment Legislation' (Equinet Conference, 16 June 2016), <http://www.equineteurope.org/Strengthening-the-effectiveness-of-European-Equal-Treatment-Legislation> accessed 25 June 2017.

The unique position of NEBs at the crossroads between legal orders can first and foremost allow a mutual exchange between different layers, potentially resulting in a sort of virtuous circle empowering equality. Additionally, it can also foster integration. It is as if the initial "domestication" of EU law – due to the fact that the "innovative nature of European norms [were] 'tamed' by national political and legal actors", whose domestic preferences heavily affected nature and characters of NEBs[87] – could turn in a further "Europeanisation" of national orders *through* equality bodies,[88] and the initial divergence between equality bodies due to the different legislative frameworks could transform itself into convergence[89] as a result of the activity of NEBs transnational networking, mutual cooperation and information exchange.

Therefore, it is clear that NEBs have an excellent potential as "one-stop shops of equality". However, may we also say that such potential can be put into practice and implemented accordingly and, therefore, that NEBs *are really and throughout Europe* "one-stop shops of equality"? Here the answer is more nuanced, because if we look behind some positive achievements and, vice versa, consider the overall NEBs' European landscape, a much more puzzling scenario arises. In fact, a picture of light and shadow appears, where next to some shining good practices, many black holes still persist. Indeed, as mentioned above,[90] many are the obstacles – of legal, political and economic nature – that NEBs often have to confront in carrying out their activity and which prevent them from fully deploying their abstract potential in practice.

Firstly, there are legislative constraints. NEBs with their own legal personality and established as independent institutions could prove more incisive in systematically tackling discrimination and in achieving expected outcomes than NEBs which are embedded within the structure of state organisations. The Italian experience seems to reveal this quite clearly. The domestic UNAR was set up within the Department of Equal Opportunities of the Presidency of the Council of Ministers, and the director is appointed by the president of the Council of Ministers or by a minister on their behalf. UNAR is, therefore, part of the national government, and changes in the latter might lead to changes in UNAR key staff at the expense of the continuity of its action. Additionally,

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[87] De Witte, supra n. 9, 171–172.

[88] See more diffusely Laura Asarite, *Europeanization through Equality Bodies: A Baltic Sea Region Perspective* (Nomos 2015).

[89] For similar considerations, although referred to NHRI, see Violini, supra n. 15.

[90] See Section 3 of this contribution.

political pressure might occasionally persuade the government to interfere in UNAR activities. This happened for instance in 2014 when the government stopped an educational campaign aiming to improve knowledge about sexual orientation promoted under the UNAR strategy to fight against discrimination on sexual orientation and gender identity;[91] and again in 2015, when UNAR Director De Giorgi was removed from his office after he sent a letter to a member of Parliament exhorting her to use non-discriminatory language.[92] Not only do these episodes clearly provide evidence of a lack of independence of UNAR,[93] they also partially explain a certain ineffectiveness of UNAR that recently seems less and less actively engaged in combating discrimination.[94]

Secondly, even where NEBs are given specific competences by law, sometimes these are not secured in practice.[95]

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[91] When Members of the Parliament and Catholic Associations complained against the Government, the latter "declined any responsibility regarding the publications, ascribing the initiative to UNAR's director, who was addressed with a dishonourable mention. Then the Government took the decision to stop the educational campaign". See Favilli, supra n. 37, 76.

[92] More precisely, the UNAR Director had addressed a letter to the MP Giorgia Meloni, who had publicly exhorted to close national borders to aliens from Muslim countries – being the latter more violent and incline to terrorism – kindly inviting her to avoid making use of such stereotypes in future. For further details, Ibid.

[93] See ECRI*, Conclusions on the Implementation of the Recommendations in Respect of Italy Subject to Interim Follow-Up*, 9 December 2014, <https://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/Italy/ITA-IFU-IV-2015-004-ENG.pdf> accessed 30 September 2017. ECRI also regrets that, despite the widening of the grounds of discrimination covered by UNAR, "no legislation has yet been enacted to extend formally UNAR's competence". See Favilli, supra n. 37, 76.

[94] Browsing the UNAR web site, <http://www.unar.it/> accessed 15 May 2017, we can notice that the last Annual Report to the Parliament concerning the activity carried out in 2012 (supra n. 56) seems to date back to 2014 and that no relevant data or public record concerning the strategies adopted were uploaded after 2015. After all, as Favilli, supra n. 37, 76 highlighted, "the contracts with the 15 external experts of the Equality Body have not been renewed, resulting in a weakening of the body's capacity to carry on its activities". It is, however, also worth mentioning that the position of the UNAR Director is still open. The Director Speno, who had replaced De Giorgi, resigned in February 2017, too, as a result of a scandal concerning the distribution of funds to LGBT associations.

[95] It was, for example, the case of the Hungarian Commissioner for Fundamental Rights, As we read in the *Hungarian Report,* supra n. 50, 37, in 2016, the Commissioner for Fundamental Rights provided his opinion on 212 draft legal regulations, upon request. The ministries sent several of the motions to

Thirdly, the NEBs' mandate does not very often cover all grounds of discrimination. Rather, many NEBs are only charged with the task of combating discrimination on specific grounds. However, as multiple discrimination and even intersectionality – intended as the situation where different grounds of discrimination are not only combined, but also interact in a manner that makes them inseparable – have become key issues in the field of equality, NEBs having sectorial competences and merely focusing on a specific ground of discrimination[96] could approach discrimination in a too fragmented – and ultimately ineffective – way. Not coincidentally it is a shared concern that "equality bodies with responsibilities for individual strands of discrimination are detrimental to the aim of addressing multiple discrimination" and intersectionality.[97]

Fourthly, the competence with regard to equality issues that NEBs have acquired at national level is not fully enhanced at European level and sometimes their position is even weakened by the very same European institutions, as the *Belov* decision from the CJEU, which declared the inadmissibility of a preliminary reference raised by a NEB,[98] seems to confirm.

And last but not least, economic constraints can further weaken NEBs. It is well known that budget cuts due to the current economic crisis and

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the Ombudsman; however, they did not fully satisfy their obligation to ask for an opinion. On occasion, they did not ask for the Ombudsman's opinion on draft legal regulations important from the aspect of fundamental rights. Similarly to the previous years, they sent the motions to the Ombudsman with characteristically very short deadlines, which made it difficult to provide meaningful opinions.

[96] See extensively Sandra Fredman, 'Intersectional Discrimination in EU Gender Equality and Non-Discrimination Law', European Network of Legal Experts in Gender Equality and Non-Discrimination, European Commission, 2016, <http://ec.europa.eu/justice/gender-equality/document/files/intersectionality.pdf> accessed 1 September 2017; and 'Innovating at the Intersections. Equality Bodies Tackling Intersectional Discrimination: An Equinet Perspective', 2016, <http://www.equineteurope.org/IMG/pdf/equinet_perspective_2016_-_intersectionality_final_web.pdf> accessed 3 September 2017.

[97] Susanne Burri and Dagmar Schiek, 'Multiple Discrimination in EU Law: Opportunities for Legal Responses to Intersectional Gender Discrimination?', European Network of Legal Experts in the Field of Gender Equality, European Commission, Luxembourg, 2009, 24, <http://ec.europa.eu/justice/gender-equality/files/multiplediscriminationfinal7september2009_en.pdf> accessed 3 September 2017.

[98] See Sub-Section 3.2. of this contribution.

resulting from austerity measures have also targeted NEBs and other structures set up to monitor human rights, despite the fact that just these bodies are particularly crucial in crisis periods, as they are able to assess the impact of proposed austerity policies and budget cut decisions on the most vulnerable groups and individuals more properly than other institutions.

If the latter is sometimes the dark reality some equality bodies unfortunately have to deal with – a reality of subordination to political pressure, of violated competences, of fragmented action, of scarce resources – it is not surprising that often equality is still very far from being a reality. Underreporting is still the most typical reaction among victims of discrimination; and, with some due, commended and remarkable exceptions, NEBs can perform their tasks only in a partial and incomplete way.

This is the reason why, if we look at Europe in its entirety, the answer to the opening question should be still in the negative. Are NEBs "one-stop shops of equality" for Europe? No, they are not yet.

They may become so in the future though, if the European institutions, the states and the NEBs themselves are jointly willing to make a serious commitment to this purpose. NEBs should gain in visibility and improve their accessibility. A legislative framework extending their competences should be provided in order to make their action more effective and coherent, and such competences should be concretely secured. Appropriate indicators for measuring the impact of NEBs should be identified.[99] And – above all – NEBs should be given sufficient funding and resources to perform their tasks properly.

Some initiatives have already been undertaken in the right direction. Some NEBs are endeavouring to enhance their image, improving the

[99] See Niall Crowley, 'Processes and Indicators for Measuring the Impact of Equality Bodies', 2013, <http://www.equineteurope.org/IMG/pdf/indicators_paper_merged_.pdf> accessed 22 June 2017. On this crucial issue, see also the parliamentary question submitted in February 2017 by Agnieszka Kozłowska-Rajewicz (PPE) to the European Commission regarding the performance of national equality bodies in promoting and strengthening equal treatment (written question E-001025-17). The text of the question as well as the reply given by Ms Jourová on behalf of the Commission on 22 May 2017 (E-001025/2017) are available at <http://www.equineteurope.org/Parliamentary-Question-The-performance-of-national-equality-bodies-in-promoting> accessed 25 July 2017.

website[100] or developing other information tools.[101] To counter fragmentation and ineffectiveness, some national legal orders are merging mandates of equality bodies and NHRIs, and their experience seems to provide positive results, with the newly established integrated institution being more comprehensive and coherent in approaching equality issues.[102] Not coincidentally, where such integration between NEBs and NHRIs has been already completed, on the one hand, the human rights and equality institutions prove to be particularly active in ensuring equality mainstreaming and, as a consequence, in effectively integrating equality into social rights protection; on the other, "a human rights based approach to equality/non-discrimination can ensure that the promotion of equality is rights based and advances the fulfilment of human rights",[103]

[100] See, for example, the initiative 'Making Information on Human Rights and Equality Accessible and Engaging. Redevelopment of the Commission's website, <www.ihrec.ie>', launched by the Irish Human Rights and Equality Commission, with the purpose of providing more accessible information and redesigning a website which could house a comprehensive set of resources related to equality and human rights, and useful guidance material for groups who are seeking to embed human rights and equality in their place of work or business. The Commission reported that the new site has seen a significant increase in visitor traffic, with nearly 130,000 visits in 2016. See *Report,* supra n. 56, 30.

[101] Taking into account the diverse needs and technical accessibility of the younger generation, the Hungarian Deputy Commissioner launched her independent Facebook profile (/ombudsmanhelyettes) in March 2016, and as a next step, her Twitter account in December (@MinorityOmbudsman), which are primarily targeted at the international partners and visitors. Both platforms lived up to the expectations, which is confirmed not only by the users' activity but also, by other measurable indicators: more complainants contacted the secretariat than before, and the requests for participation in professional forums, as well the as applications for internship also grew. See *Report,* supra n. 50, 46.

[102] See the insightful analysis carried out by Neil Crowther and Colm O'Cinneide, 'Bridging the Divide? Integrating the Functions of National Equality Bodies and National Human Rights Institutions in the European Union', October 2013, <https://www.ucl.ac.uk/laws/sites/laws/files/btd-report.pdf> accessed 30 March 2017; or with regard to the Dutch system, Jenny Goldschmidt, 'Protecting Equality as a Human Right in the Netherlands: From Specialised Equality Body to Human Right Institute', [2012] 8 The Equal Rights Review 32.

[103] 'Equality Bodies and National Human Rights Institutions – Making the Link to Maximise Impact: An Equinet Perspective', 2011, 6, <http://www.equineteurope.org/IMG/pdf/EN_-_Equality_Bodies_and_National_Human_Rights_Institutions.pdf> accessed 20 February 2017.

as the experience of managing the current emergency of massive migration clearly reveals.[104] Additionally, a process to develop standards for equality bodies, which could empower NEBs, as well as assist the European Commission in monitoring their performance and the national governments in establishing suitable conditions for their activity, is currently ongoing.[105]

Is Europe prepared to take up the challenge, intensify their effort and work towards the full implementation of these initiatives? If at least this answer is positive, "one-stop shops of equality" will become a reality. Soon or later we do not know yet. But they certainly will.

[104] See, for example, the Equinet Conference, 'Inclusion of and Discrimination against Migrants in Europe – The Contribution of Equality Bodies', which was held in Bruxelles on 7 December 2017. Information is available at <http://www.equineteurope.org/Register-to-Equinet-conference-Inclusion-of-and-discrimination-against-migrants> accessed 26 October 2017.

[105] See 'Developing Standards for Equality Bodies: An Equinet Working Paper', 2016, <http://www.equineteurope.org/IMG/pdf/equinet_workingpaper_standardsnebs.pdf> accessed 31 July 2017. This Working Paper was recently presented at the meeting of the European Commission's High Level Group on Non-discrimination, Equality and Diversity, which took place on 24 October 2017. Information is available at <http://www.equineteurope.org/Standards-for-Equality-Bodies-presented-to-Member-State-representatives> accessed 25 October 2017.

10. The evolving paradigm of human rights protection as interpreted and influenced by the Venice Commission

Simona Granata-Menghini and Stefania Ninatti*

1. INTRODUCTION: RETURNING TO EUROPE AND BEYOND …

The European Commission for Democracy through Law – also known as the Venice Commission – is an institution of the Council of Europe including all its 47 member states and, currently, 14 further states. It was established by this latter as an independent advisory body on constitutional matters. Over the years its functions and relevance have gradually increased, becoming an essential point of reference for advice in constitution making.

In order to trace back the fundamental elements and the key issues of the special nature of the above international body so as to grasp its leading traits, it is worthwhile to recall that the idea was conceived in the late 1980s by the then Italian Minister for European Affairs, Antonio La Pergola. He actually "inspired the notion of a body composed of experts in constitutional law, to help build institutions furthering democracy and the rule of law in Europe".[1]

* Albeit the unitary conception of the manuscript, Stefania Ninatti drafted Sections 1, 2 and 3; Simona Granata-Menghini drafted Section 4.

[1] J. Jowell, *The Venice Commission: Disseminating Democracy through Law* (Public Law, 2001) 675: the author pinpoints also that "La Pergola's foresight was remarkable given that the Soviet Union was then still intact and it was by no means a foregone conclusion that Marxist totalitarianism would wither away as it did." On the essential role played by La Pergola on the Venice Commission's foundation, one can read *Atti della giornata in ricordo del Presidente emerito*

From a historical point of view, the Venice Commission was founded after the collapse of the Soviet Union in the two-year period of 1989–1991 and originally aimed at supporting the transition phase of the post-Communist countries with a well-established source of assistance in setting conditions for their new democracies. Since the end of the Cold War in fact there has been a new wave of constitution making (not only) in Europe, characterized by a process of interchange between international institutions and national authorities.[2] The Venice Commission was actually conceived by La Pergola before the fall of the Berlin Wall as a scientific support to promote studies and research in the framework of cooperating activities among the member states of the Council of Europe, with particular attention to the enlargement of Europe and to relations with Latin America. The Commission was thus at the center of the transformation process of the former communist states of Central and Eastern Europe to conform to the principles of the rule of law, democracy and freedom. Accordingly, the focus of the Venice Commission was, in its first steps, the constitutional reforms and the implementation of constitutional laws in those states previously members of the Warsaw Pact. As a matter of fact, "the first requests came largely from those countries wishing to build new democracies in Central and Eastern Europe, starting with the Russian constitution, as part of that country's accession process to the Council of Europe".[3]

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della Corte costituzionale Antonio La Pergola, Palazzo della Consulta, 17 December 2008, at www.cortecostituzionale.it. Regarding the complex nature of supporting local actors on constitutional issues, see more generally M. Tushnet, 'Observation on the Politics of "Best Practices" in Constitutional Advice Giving' [2015] Wake Forest L. Rev. 843, recalling that "the practice of employing nondomestic actors to assist in crafting domestic constitutions goes back a long way in the Western tradition".

[2] G. Nolte, *The International Influences on National Constitutional Law in States in Transition: Introductory Remark*, (ASIL Proceeding, 2002) 389, recalling also the UN 2001 resolution (GA Res 56/96, Dec 14, 2001: "Support by the UN system of the efforts of governments to promote and consolidate new restored democracies") which recognizes as task of the UN to support, inter alia, the idea of fostering constitutionalism, justice and the rule of law in new or restored democracies.

[3] More precisely, see J. Jowell, *The Venice Commission: Disseminating Democracy through Law*, supra n. 1, 676 ff. Regarding the Russian Constitution, this request came from the Council of Europe's Committee of Ministers, see *Opinion on the Constitution of the Russian Federation adopted by popular vote on 12 December 1993* (CDL 1994, 11).

For this reason the grammar of "returning to Europe" of the Eastern European countries after the fall of the Berlin Wall accompanied the Venice Commission's first steps. It has been noted that – particularly for these European countries – the retrieval of the European founding values became strategic in order to trace back the genesis of their constitutionalism.[4]

Over time the expansion of membership and activities transformed step by step the Commission "from a European club into a global, transnational, constitutional forum (…) involved with constitutional issues and developments transcending the boundaries of Europe".[5] Day by day, the Venice Commission "moved beyond its original goal of assisting new democracies in Central and Eastern Europe to fostering a more general understanding (and perhaps, thereby, prodding the emergence) of what might be seen as a distinctively European approach to constitutionalism".[6] In fact, the Commission fulfills its tasks relying on the gradual identification of the so-called European constitutional heritage that derives from the constitutional culture developed in this region since the dawn of modern constitutionalism.

Yet, once that first wave of constitutionalization after the Cold War ended and its legal landscape has stretched from South America to North Africa, from some Asian countries to the United States of America and so on, is this grammar still fit? Certainly it is turning into a broader and open-ended framework: if, in a nutshell, we can identify from the very beginning the foundations of this new international institution in the

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[4] L. Lacchè, 'Between Traditions and Change' [2015] Giornale di Storia Costituzionale 5. For the phraseology of "returning to Europe", see H. Suchocka, 'Constitutional Heritage and the Form of Government', paper presented at the conference *Global Constitutional Discourse and Transnational Constitutional Activity*, Venice, 7 December 2016, at http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2016)017-e, p. 4.

[5] K. Tuori, 'From a European to a Universal Constitutional Heritage?', paper presented at the conference *Global Constitutional Discourse and Transnational Constitutional Activity*, Venice, 7 December 2016, in http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2016)015-e, p. 2. Interestingly, W. Hoffmann-Riem, 'The Venice Commission of the European Council – Standards and Impact' [2014] EJIL 583, observes that "the broader the VC's scope of action and its membership becomes, the more generous it will have to be in acknowledging the features unique to the respective cultures in other relevant societies and when undertaking modelling".

[6] D. Halberstam, 'Desperately Seeking Europe: On Comparative Methodology and the Conception of Rights' [2007] I●CON 166.

entrenchment of democracy, law and transition,[7] the nature and the borders of its activity are nowadays not yet entirely drawn and still to be discovered.

2. AT THE CROSSROAD OF CONSTITUTIONAL AND INTERNATIONAL LAW: THE EUROPEAN CONTEXT

The special task conferred to the Venice Commission was clearly acknowledged in the first act recognizing its statute.[8] While adopting the "Partial Agreement Establishing the European Commission for Democracy through Law" (1990), the Committee of Ministers of the Council of Europe started sanctioning that "the Commission will constitute a fundamental instrument for the development of democracy in Europe".[9]

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[7] S. Bartole, 'Final Remarks: The Role of Venice Commission' [2000] Rev. Central and East European Law 351.

[8] The European Commission for Democracy through Law was officially founded at the Conference of Ministers of foreign affairs of the Council of Europe members on 19–20 January 1990, in Venice; on 10 May 1990, it was adopted by the Committee of Ministers at its 86th Session the resolution "On a Partial Agreement Establishing the European Commission for Democracy through Law". It is important to pinpoint that even before 1990 debates were conducted in order to push forward this idea, under the initiative of the Italian Government: a first *ad hoc* Conference on the institution of the Venice Commission has actually been held in Venice on the first of April 1989, promoted by the Italian Government and chaired by the Italian Minister La Pergola, who has to be considered the scientific founding father of this initiative: see G. Buquicchio and S. Granata-Menghini, *Conseil de l'Europe: Commission de Venise, Répertoire Européen* (Dalloz, April 2017) para. 3.

[9] If we have to consider this latter as the general objective of the Venice Commission, art. 1 of the Statute helps us to capture more precisely the legal landscape in which the Venice Commission works. Its specific competence, "the guarantees offered by law in the service of democracy", aims at "strengthening the understanding of the legal systems of the participating states, notably with a view to bringing these systems closer; – promoting the rule of law and democracy; – examining the problems raised by the working of democratic institutions and their reinforcement and development." The Venice Commission priorities will thus be defined by fixing: "a) the constitutional, legislative and administrative principles and technique which serve the efficiency of democratic institutions and their strengthening, as well as the principle of the rule of law; b) the fundamental rights and freedoms, notably those that involve the participation of citizens in the life of the institutions; c) the contribution of local and

The project underlying the institution of the Venice Commission was therefore extremely ambitious and it is no surprise that several member states of the Council of Europe did not agree to its creation. At a first glance, the establishment of such an international institution implied the verification of the stand of democracy, the rule of law and respect for fundamental rights in their own countries thus jeopardizing their autonomy and sovereignty.[10] A more thorough analysis highlights, however, that these criteria were not only the yardstick that measured the democratic status of those potential states aspiring to become new members of the Council of Europe as well as of the actual member states. These were also the cornerstones of an increasingly democratic "Europe". Accordingly, the Venice Commission has become in time a point of reference for both the states and the relevant international organizations. Indeed, today fruitful collaborations have been permanently established with the European Union, the Organization for Security and Cooperation in Europe and its Office for Democratic Institutions and Human Rights and so on. Therefore, we could maintain that the Venice Commission is a two-face institution, which, on one hand, deals with the

regional self-government to the development of democracy". As it is well known, *de facto* the Venice Commission's activities are divided in three broad areas: democratic institutions and fundamental rights, constitutional justice and elections, referendums and political parties.

[10] This context explains the peculiar choice of a "*partial* agreement" (see note 1) which involved accession of just a certain number of Council of Europe member states but not all (on this point, see G. Tesauro, in *Atti della giornata in ricordo del Presidente emerito della Corte costituzionale Antonio La Pergola*, supra n. 1, 57). The Commission was set up for a transitional period of two years in the form of a Partial Agreement (see Resolution adopted by the Conference for the constitution of the Commission for Democracy through Law, Venice 19–20 January 1990 and Resolution (90)6 on a Partial Agreement Establishing the European Commission for Democracy through Law adopted by the Committee of Ministers on 10 May 1990). In time, all Council of Europe member states ratified the Agreement; the current statute dates from 2002 and, on that occasion, the *partial agreement* was transformed into an *enlarged agreement* (adopted by the Committee of Ministers on 21 February 2002 at the 784th meeting of the Ministers' Deputies), allowing also third countries to accede and participate in the work of the Commission on an equal footing with Council of Europe member states (see, however, Article 2.5 of the Statute) and thus confirming the success of this initiative: see G. Buquicchio and S. Granata-Menghini, supra n. 8, paras. 4 and 5.

national states and their constitutional issues and, on the other, works side by side with other international organizations active in the region.[11]

To make a long story short, a further step towards the foundation of a region rooted on democracy, rule of law, protection of human rights was achieved and another expression of the growing intertwining between constitutional and international law established.

On this latter issue, there is not much need to recall the lively debate on the constitutionalization of international law and the internationalization of constitutional law: generally speaking, the consideration according to which constitutional law has become an international concern is not new to the legal scholars. At the same time, legal scholars are well aware that "to challenge a constitution by reference to international law is a demanding task", since it implies assumptions on the nature and functions of international law and on the openness of the domestic legal orders that cannot be easily made.[12]

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[11] This latter aspect is actually underlined also in the last comma of art. 1, stating that "with a view to spreading the fundamental values of the rule of law, human rights and democracy, the Commission encourages the setting up of similar bodies in other regions of the world and may establish links with them and run joint programmes within its field of activity".

[12] T. Altwicker, 'Convention's Rights as Minimum Constitutional Guarantees? The Conflict between Domestic Constitutional Law and the European Convention on Human Rights', in A. von Bogdandy and P. Sonnenvend, *Constitutional Crisis in the European Constitutional Area* (Hart Publishing, 2015) 330. The author observes sharply that this emerging phenomenon is due, from one side, to the new ambitions of international law that create "an increasing overlap regarding the content of domestic constitutional norms and international norms" and, on the other side, to the proactive role of the international judiciary (p. 331). More generally on the point of the relevance of the international judiciary, see Y. Shany, 'No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary' [2009] EJIL 90: "The dramatic growth in the number of international courts, the expansion of their jurisdictional powers and dockets, and the renewed interest in the application of international law by some national courts (processes which have considerably accelerated in the last 20 years) have introduced to the world a reinvigorated international judiciary with unprecedented levels of power and influence".

The effects of these developments, as M. Rosenfeld and A. Sajó, 'Constitutionalism: Foundations for the New Millennium', in G. G. Harutyunyan (ed.), *New Millennium Constituionalism: Paradigms of Reality and Challenges* (NJHAR, Yerevan, 2013) 11, is that "constitutional decision-makers are 'internationalizing', increasingly looking to internationally shared principles and foreign sources when setting up institutions and interpreting constitutional texts. One reason is domestic diversity, another one is increased international interdependence".

Yet it is important to highlight that scholars have identified in the European legal space an essential laboratory for the study of this special mixture. As a matter of fact, both the common origins of the two main European organizations (the European Union and the Council of Europe), firmly established in that wake of constitutionalism after the Second World War, and their relevant contribution to the formation and development of international constitutionalism, support this observation.[13] Not surprisingly, its origin has to be identified in the aforementioned post World War II period, since after this dreadful experience a "counter-majoritarian" demand to check any possible democratic excess clearly emerged and the establishment of the Council of Europe and of the European Union were in part an answer to this need. Starting from this point of view, the doctrine inquired the possibility not only of a "Euro-constitutionalism" but also of constitutions that might be unconstitutional within the EU.[14] The core element of this theoretical framework lies in the assumption that constitutions themselves have to respect a certain set of fundamental criteria or, more precisely, conditionality, as

[13] Not surprisingly, one of the first landmark decisions of the European Court of Justice stated that the EU law represents "a new legal order of international law", thus highlighting the on-going transformation in this area (Case C-26/62, *Van Gend en Loos* [1963] para. 12). The EU, furthermore, represents an exemplary case of "international/supranational laboratory" – if we may use this expression – in which the public authority has to be exercised respecting limits and controls similar to those existing at the national level. As R. Arnold, 'National and Supranational Constitutionalism in Europe', in G. G. Harutyunyan (ed.), *New Millennium Constitutionalism: Paradigms of Reality and Challenges,* supra n. 12, 126, confirms, "while the process of constitutionalization on the international level is slowly proceeding, this process is much more dynamic in Europe, in particular in the community of the 27 member states of the EU. Besides the EU such a process is going on specifically within the Council of Europe where the European Convention of Human Rights has grown up into a sort of Constitutional Charter." On this latter issue, see also M. Arcari and S. Ninatti, 'Narratives of Constitutionalization in the European Union Court of Justice and in the European Court of Human Rights Case Law' [2017] ICL Journal 11 ff.

[14] See for all C. Dupré, 'The Unconstitutional Constitution: A Timely Concept', in A. von Bogdandy and P. Sonnenvend, *Constitutional Crisis in the European Constitutional Area*, supra n. 12, 353, stating also that "this apparently shocking oxymoron is arguably vital to thinking about constitutionalism in Europe, as it makes explicit the connections existing between democracy and constitutionalism".

we could actually experience in the post-1989 Eastern European constitution making. This new turn of events have thus enriched the international constitutional debate and the echoes of this latter reached the setting of the relations between the states and international institutions.

Moreover, the different constitutional crises that European and extra-European countries are facing nowadays raises new questions for the Venice Commission. In fact in the recent times Europe witnessed the recurrence of constitutional crises, and even if the relevance of this international body is gradually – but steadily – emerging, the question about its future role is still blurred: "to a certain extent, this depends on how the European Commission, the European Council and other EU institutions will deal with"[15] the abovementioned constitutional crises. In other words, the future role of the Venice Commission is closely intertwined in another set of conditions: on one hand, the depth of the constitutional crisis of the countries involved and, on the other, the position the international actors will take facing these latter (*in primis* the Council of Europe and the European Union).

3. SOFT LAW AND SOFT INSTRUMENTS: THE OTHER SIDE OF THE MARGIN OF APPRECIATION DOCTRINE?

The European Commission for Democracy through Law is part of the abovementioned evolutionary frame,[16] given that not only it has to work within a strict legal framework mainly constituted by principles of constitutional and international law, but also proves the unprecedented influence exercised by an international organization in assisting national states on fundamental constitutional issues. Furthermore, it also witnesses

[15] J. Nergelius, 'The Role of the Venice Commission in Maintaining the Rule of Law in Hungary and in Romania', in A. von Bogdandy and P. Sonnenvend, *Constitutional Crisis in the European Constitutional Area*, supra n. 12, 308. The author observes that "if the EU continues its cautious policy of the last few years (…) this influence is likely to be very limited. But on the other hand, if real legal, economic or political sanctions will be on the agenda, decisions from the EU are unlikely to be made without taking opinions of the Venice Commission into account".

[16] More specifically, on the countermajoritarian role of the Venice Commission, read V. Volpe, 'Drafting Counter-Majoritarian Democracy. The Venice Commission's Constitutional Assistance' [2016] ZaöRV. 811 ff.

the coming into being of a transnational network of different bodies working on constitutional-international law issues.

The system just depicted is thus at the heart of the development of international constitutionalism and as such raises many questions to the legal scholars. On one side its main task is to support the constitution making activity of the state so that the key principles of the rule of law, democracy and protection of human rights are respected. On the other, this support must pay close attention not to go to the point of replacing the internal activity of the state in its most essential function, such as the drafting and interpretation of its constitution. In this delicate and not easy identifiable function, authoritative doctrine has indicated the demarcation line between international constitutionalism and national constitutional law, so that it is not "merely of the former's influence on the latter but its displacement of the latter".[17]

Consequently, the fundamental question to address now is the nature of this international engagement between the supranational organization, i.e. the Venice Commission, and the national state. From this perspective we will initially observe the instruments and powers of the Venice Commission and later, more broadly, we will look at the European constitutional heritage as gradually identified by the same body.

Reading art. 1, c.1, of the 2002 revised statute, we can immediately grasp the novelty of the institution of the European Commission for Democracy through Law, defined as "an independent consultative body which co-operates with the member states of the Council of Europe, as well as with interested non-member states and interested international organizations and bodies".

Given its nature of advisory technical body entrusted to support and enforce democracy, rule of law and fundamental rights, the Commission uses both hard law, principally in the area of human rights, and soft law, which in the areas of democracy and the rule of law is effectively its principal working tool. It is not surprising that soft law is its principal

[17] According to J. Rubenfeld, *Two Conceptions of Constitutionalism* (ASIL Proceedings, 2002) 394 ff., while the acknowledgment of the international constitutionalism is very dominant in Europe, it is lacking in the experience of American constitutionalism. More deeply, the author observes that "From the start, the post-war boom in international and constitutional law had had different meanings in America and Europe – because the war itself meant different things in America and Europe" (J. Rubenfeld, 'The Two World Orders', in *European and U.S. Constitutionalism* (2003) 37 Science and technique of democracy CDL-STD202, UniDem Seminar, 23–24 May 2003, http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(2003)037-e.

working tool, even if – as we just mentioned – one has to take into account that as far as fundamental rights' issues are concerned, hard law exists for ECHR member states. Legal opinions on draft legislation or legislation already in force, studies and reports on topical issues are the main instruments used by the Commission in order to accomplish its tasks. In order to underline this working method, the Venice Commission insists that, pursuant to its own statute, its opinions and guidelines are "intended to be suggestive rather than prescriptive";[18] the post-Communist countries' experiences showed as well that ultimately the function of international influences that really mattered in Central and Eastern Europe was "inspirational" rather than "coercive".[19] In other words, "the compliance with the opinions is at the basis of the final production of the law making effects"[20] or, in simpler terms, states still matter.

Indeed, the Commission's analysis looks at the classical instruments of hard law (as the ECHR and its case law), but also makes an extensive use of the soft law (created by the Council of Europe, the OSCE/ODIHR and so on). Simultaneously comparative constitutional law represents an essential element of the Commission working tools too: as it has been observed, "the Venice Commission's business is comparative constitutional engineering, which is a very complex and delicate exercise".[21] In

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[18] M. De Visser, 'A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform' [2015] Am. J. Comp. L. 992.

[19] L. Garlich, 'Democracy and International Influences', in *European and U.S. Constitutionalism*, 188, observes that "in this perspective, 'international influences' can be associated with attempts of the new democracies to identify and to follow solutions which had already proven their effectiveness in the developed democracies. While there was some 'wishful thinking' in the belief that what has been successful elsewhere, would – by definition – fit the political and social situation of the post-Communist countries, the opening towards Western constitutional institutions constituted one of the most visible features of the constitution-writing in the 1990s".

[20] S. Bartole, 'The Experience of the Venice Commission: Sources and Materials of its Elaboration of the International Constitutional Law', paper presented at the conference *Global Constitutional Discourse and Transnational Constitutional Activity*, Venice, 7 December 2016, http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2016)016-e, p. 2.

[21] G. Buquicchio and S. Granata-Menghini, 'The Venice Commission Twenty Years On: Challenges Met but New Challenges Ahead', in M. van Roosmalen, B. Vermeulen, F. van Hoof and M. Oosting (eds), *Fundamental Rights and Principles – Liber Amicorum Piet van Dijk* (Cambridge-Antwerp-Portland, Intersentia, 2013) 246.

this sense, we have to highlight that the perspective used by the Commission is still Europe-centered, pertaining by and large to the developments of the so-called European constitutionalism.[22]

The advisory nature of the Commission's work and its subsequent possibility of extensively using soft law, including its own precedent work, and its own experience and "wisdom" coupled with a participatory working method based on exchanges and dialogue with the authorities and all the other stakeholders, matches particularly well the special attention this institution pays to the differing situations of the countries involved. In other words, the aim of the Commission is not the promotion of an abstract constitutional model to export in the different countries, but the moulding of state structures along the lines of democracy, rule of law and human rights.[23] As it is well acknowledged by political and legal scholars, democracy needs a special sensitivity to the variations of culture and context in which it has to be placed.[24]

By and large, the delicate balance to establish between international/supranational and national orders echoes the well-known issue both at EU level on the respect of the national constitutional identities, ex art. 4, c. 2, TEU, and at international level, as in the famous 2009 UN note requiring that "the options and advice provided must be carefully tailored

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[22] See for all K. Tuori, 'From a European to a Universal Constitutional Heritage?', supra n. 5, fn. 5.

[23] As A. von Bogdandy, 'Comment', in Science and technique of democracy, in *European and U.S. Constitutionalism*, cit supra n. 17, 213–214, underlines, this discourse has not "ended up in one single form of European constitutionalism, and in particular not in one single model regarding how to relate courts and political institutions – as any comparison between Sweden, the Netherlands, Great Britain, Switzerland, Germany or France easily proves." The author supports this thesis also referring to the relevance of the Strasbourg jurisprudence for the domestic political process and to the doctrine of the margin of appreciation: "furthermore, it should be recalled that the Strasbourg jurisprudence does not enjoy direct effect in most domestic legal orders. If it is nevertheless followed by national courts – which is not always the case – it is because it presents convincing legal arguments".

[24] In the words of the Venice Commission's website, it "does not seek to impose the solution set out in its opinions. Rather, it adopts a non-directive approach based on dialogue and shares member states' experience and practices. For this reason, a working group visits the country concerned to meet the various stakeholders and to assess the situation as objectively as possible. The authorities are also able to submit comments on the draft opinions to the Commission" (http://venice.coe.int/WebForms/pages/?p=01_activities&lang=EN).

to the local context, recognizing that there is no 'one size fits all' constitutional model or process".[25]

Be that as it may, not only are these tools best suited to respecting the distinguishing characters of the countries, but they also reflect the awareness that these kinds of structural changes are not expected to happen overnight and that time is an essential requirement needed for any constitutional transition. Accordingly, as it has been observed, the channels used for these long-term transformations are manifold: "it can also be fostered through other activities, including training of personnel, engagement with judges and conferences".[26] And looking at this last two decades, we have to recognize that the Venice Commission "has been in the position of taking part in a process which is connected with the national process of law making of many different States even if it does not exercise formal normative powers".[27]

Soft law and soft instruments, coupled with extensive exchanges with the authorities and consultation of all the relevant stakeholders within flexible timeframes, characterize thus the working methods of the Venice Commission: actually this feature strongly contributed to its success, considering that often the European Commission and the European Council asked the Venice Commission "to solve problems that might otherwise lead to a formal actions/sanctions by the EU or the Council".[28] So – especially in cases where a state is grappling with the adoption of a new constitutional text – the opinion of the Venice Commission is almost invariably requested by either the state itself or by a statutory body of the Council of Europe, mainly the Parliamentary Assembly or the Secretary General. Somewhat unexpectedly, requests not only for cooperation but for opinions also come from countries far from the borders of Europe. It should not be forgotten that opinion requests often aim at obtaining from the Venice Commission not only a support on the subject of democratic

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[25] U.N. Secretary-General, *Guidance Note on United Nations Assistance to Constitution-Making Processes* (2009) 4.

[26] P. Craig, 'Transnational Constitution-Making: the Contribution of the Venice Commission on Law and Democracy' [2017] UC Irvine Journal of International, Transnational and Comparative Law 83, who is also pinpointing that "although it is difficult to assess their precise impact, it would misguided to ignore or undervalue such initiatives".

[27] S. Bartole, *International Constitutionalism and Conditionality. The Experience of the Venice Commission* (AIC, 2014) 6.

[28] W. Hoffmann-Riem, 'The Venice Commission of the European Council – Standards and Impact', supra n. 5, 597, thus identifying – well aware of its ambivalence – the role of "facilitator" of this institution.

constitution making but also an authoritative acknowledgment of "democratic accountability" in front of the international community: asking advice might confer domestic legitimacy on the project (as well as conferring some international legitimacy on it)".[29] The flexibility of the Commission's working methods, announced by the preamble of its own statute and preserved despite repeated amendments to the rules of procedure, has been instrumental to ensuring its success and enabling it to develop into a well-established and well-reputed international organization which deals authoritatively with constitutional issues of European and extra-European states, although it might be argued that it is time to formalize several well-established working practices.[30]

In conclusion, if constitutions are traditionally known as the yardstick for identifying the fundamental identity of a national legal order, the analysis of the Venice Commission's activities confirms clearly that the same constitutions are also becoming – somehow unexpectedly – "arenas for transnational actors to advance legal norms and structures".[31]

4. THE VENICE COMMISSION IN ACTION

Human rights protection has been at the heart of the activity of the Venice Commission from the very beginning of its existence. Work on fundamental rights and freedoms, notably on those involving the participation of citizens in public life, is indeed a statutory priority for the Commission.[32] The role of the Venice Commission in human rights

[29] More precisely, M. Tushnet, 'Observation on the Politics of "Best Practices" in Constitutional Advice Giving', supra n. 1, 852: "domestic actors might solicit outside advice because doing so might be thought of today as a good practice in constitution-making, and simply showing that advice was sought might be thought of as a method of increasing the chance that revision will be accepted domestically." Likewise F. Duranti, 'La Commissione di Venezia e il diritto comparato' [2017] 2DPCE 249; G. Buquicchio and S. Granata-Menghini, 'The Venice Commission Twenty Years On: Challenges Met but New Challenges Ahead', in M. van Roosmalen, B. Vermeulen, F. van Hoof and M. Oosting (eds), *Fundamental Rights and Principles – Liber amicorum Pieter van Dijk*, (Cambridge-Antwerp-Portland, Intersentia, 2013) 249 ff.

[30] For all, see M. De Visser, 'A Critical Assessment of the Role of the Venice Commission', supra n. 18, *passim.*

[31] G. Shaffer, 'Introduction: Transnational Elements of Constitution-Making' [2017] U.C. Irvine J.Int.'l Transnat'l & Comp. L., 3.

[32] Committee of Ministers' Resolution RES (2002) 3 adopting the revised statute of the European Commission for Democracy through Law, Article 1.

protection in Europe in the last three decades has expanded and developed. The Commission has provided its assistance in constitution drafting in some 40 states and in legislation drafting to even more states. The manner in which the Commission has endeavored to strengthen human rights protection has been manifold: from the constitutional entrenchment of standards-compliant human rights catalogues and of provisions on the protection of national minorities; to the promotion of constitutional justice, including of the right to individual complaint; to the enactment of liberal legislation on the exercise of fundamental rights and freedoms, notably freedom of assembly and association;[33] to the constitutionalization and legal implementation of guarantees to achieve an independent judiciary; to the strengthening of the rule of law.[34]

4.1 1990s: Multiple Issues on the Human Rights Agenda of Europe

The core area of intervention of the Venice Commission, upon its creation in 1990, was the preparation of several new democratic constitutions, especially for ex-Soviet countries. This work is commonly referred to as constitutional assistance or constitution building. In the 1990s, it was pioneer work: no one had done this in Europe before. There were no clear indications of what it involved,[35] no clear boundaries of how far it could stretch, no limits on the expectations, no clear idea of the impact that it would have.

The Commission was immediately confronted with several and different aspects that required attention from a human rights perspective. They

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[33] See F. Flanagan, 'The Venice Commission and the Protection of Human Rights', in M. van Roosmalen et al. (eds), *Fundamental Rights and Principles – Liber amicorum Pieter van Dijk* (Cambridge-Antwerp-Portland, Intersentia, 2013) 255.

[34] G. Malinverni, 'The Contribution of the European Commission for Democracy through Law (Venice Commission)', in L. Sicilianos, *The Prevention of Human Rights Violations* (2001).

[35] The Statute of the Venice Commission did not explicitly define the Commission's task of constitutional assistance; it defined its specific field of action as "the guarantees offered by law in the service of democracy", and stipulated that the Commission would give priority to work concerning "the constitutional, legislative and administrative principles and technique which serve the efficiency of democratic institutions and their strengthening as well as the principle of the rule of law" (Committee of Ministers Resolution (90)6, Statute of the European Commission for Democracy through Law, Article 1).

cannot be exhaustively examined in this paper. Only some of them, presenting a particular interest, will be described here.

The very first issue to be tackled was the compilation of an appropriate catalogue of fundamental rights and freedoms. The European Convention on Human Rights was the first obvious reference within the European Constitutional Heritage,[36] together with the UN Covenants and later also the European Union Charter of Fundamental Rights,[37] in terms of lists of guaranteed rights in the first place. Civil and political rights were thus entrenched in the constitutions of those days. As the Commission put it, "The exercise of fundamental rights and freedoms is a constitutional matter par excellence and, as such, should be governed in principle primarily by the Constitution".[38] The Commission considered that "fundamental rights should, insofar as possible, be allowed to be exercised without regulation, except where their exercise would pose a threat to public order and where necessity would demand state intervention":[39] in other words, legislative basis for any interference with fundamental rights such as the right of peaceful assembly required by the Convention should focus on what is forbidden rather than on what is allowed, acknowledging that all that is not forbidden is permissible, and not vice-versa. The importance of extensive protection of qualified fundamental rights, especially political freedoms, at the constitutional level became evident.[40]

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[36] On this concept, see amongst others: K. Tuori, 'From a European to a Universal Constitutional Heritage?', supra n. 5, fn. 35; S. Bartole, 'The Experience of the Venice Commission: Sources and Materials of Its Elaboration of the International Constitutional Law' (CDL-PI(2016)016); and H. Suchocka, 'Constitutional heritage and the form of government' (CDL-PI(2016)017).

[37] Not only for EU member states: see for Armenia CDL-AD(2015)037, § 18.

[38] CDL-AD(2004)039, Opinion on the Law on Conducting Meetings, Assemblies, Rallies and Demonstrations of the Republic of Armenia, §14 and CDL-AD(2006)034, Opinion on the Law on Freedom of Assembly in Azerbaijan, §8 CDL-AD(2008)025, Joint Opinion on the Amendments to the Law on the Right of Citizens to Assemble Peaceably, Without Weapons, to Freely Hold Rallies and Demonstrations of the Kyrgyz Republic by the Venice Commission and OSCE/ODIHR, §8; CDL-AD(2009)035, Opinion on the Draft Law on Meetings, Rallies and Manifestations of Bulgaria, §6.

[39] CDL-AD(2006)034, Opinion on the Law on Freedom of Assembly in Azerbaijan, §8; CDL-AD(2004)039, Opinion on the Law on Conducting Meetings, Assemblies, Rallies and Demonstrations of the Republic of Armenia, §14.

[40] The Commission accepted that specific legislation on the exercise of fundamental rights such as the freedoms of assembly and association may serve the purpose of better protecting the individuals from an unduly restrictive

The question arose as to whether only civil and political rights or also socio-economic rights merited constitutional recognition. The tendency of these new constitutions was indeed to include also the latter category of rights, to ensure their protection now that the state would lose its primary role in the creation and definition of the parameters of human rights. The Venice Commission, however, expressed reservations as to the wisdom of including socio-economic rights in constitutions, unless they are formulated not as individual rights but as state goals.[41] The Commission has on its mind the risk of dilution of the protection of civil and political rights, which would result from the – necessarily artificial – denomination of socio-economic rights as "triable" (in French: "justiciable").[42]

The abolition of capital punishment was another priority of those hectic years. It had been strongly advocated by the Council of Europe since the early 1980s.[43] In 1982, Protocol No. 6 to the ECHR, the first

interpretation of the Constitution by the authorities and the courts, in countries where there lacks a democratic tradition of unhindered exercise of human rights; it may also encourage individuals to exercise their right in diverse ways. The Commission, however, recommended that such legislation be drafted in a manner that does not restrict unduly the exercise or preclude wider or evolving interpretations of the right: for example, the Commission criticized an excessive differentiation between categories of event and asked that all types of gatherings, meetings, marches, demonstrations and picketing which are all public assemblies be recognized as permitted subject to specific lawful exclusions based on the restrictions provided for in Article 11(2) ECHR (Joint opinion on the law on peaceful assemblies of Ukraine by the Venice Commission and OSCE/ODIHR, CDL-AD(2010)033-e, §§14–16).

[41] For example: Opinion on the Draft Amendments to the Constitution of the Republic of Hungary, CDL-INF(1995)045; Opinion on the Regulatory Concept of the Constitution of the Republic of Hungary, CDL-INF (96)2, p. 8; Opinion on the Constitution of Ukraine, CDL-INF(97)2, p. 3; Opinion on the Constitution of the Russian Federation as adopted by popular vote on 12 December 1993, CDL(1994)011.

[42] CDL-INF(97)2, p. 3. This recommendation has recently been followed by Armenia (and welcomed by the Venice Commission): CDL-AD(2015)037, §§15, 62–64.

[43] Also the European Union has a strong and unequivocal opposition to the death penalty in all times and in all circumstances (EU Guidelines on Death Penalty, originally adopted in 1998 and subsequently revised in 2001, 2008 and 2013). Article 2 of the EU Charter of Fundamental Rights provides that "no one shall be condemned to the death penalty, or executed".

legally-binding instrument abolishing the death penalty in peacetime,[44] was adopted, and in 1989, abolition of the death penalty was made a condition of accession for all new member states. At the October 1997 Council of Europe Summit, heads of government, including all EU member states, called for universal abolition of the death penalty. In full agreement with the Parliamentary Assembly's position as stated in Resolutions 727(1980) and 1044(1994), the Venice Commission had also consistently advocated the abolition of the death penalty. The impact of its institutionalized involvement in the abolition of this punishment in some of the new Council of Europe member states was remarkable.[45] Indeed, upon joining the Council of Europe these states had committed not only to introducing an immediate moratorium on the executions, but also to ratifying Protocol 6. This ratification, however, was not always immediately possible, primarily for political reasons but also on account of constitutional hurdles: the capital punishment was often explicitly provided in the constitution, which made ratification of Protocol 6 subordinate to constitutional amendments – or to the adoption of a new constitution, when the process was underway. Now, the notorious difficulty and unpredictability of constitutional reform processes, especially when a referendum is required, cast doubts on the prospects of a speedy abolition of the death penalty. The Parliamentary Assembly and the Venice Commission formed an effective tandem in deconstructing, respectively, the political and constitutional difficulties.

In both Ukraine and Albania,[46] the Council of Europe's Parliamentary Assembly had applied strong political pressure on the authorities to obtain the abrogation of the capital punishment, and had sought the opinion of the Venice Commission on the compatibility of the death penalty with the respective constitutions. The Commission, during its work on the draft constitutions of Ukraine and Albania, had already proposed the adoption of a constitutional provision explicitly abolishing the death penalty: while this proposal had not been followed as such, the possibility of imposing the death penalty had nonetheless not been explicitly mentioned in the constitution.[47] In its subsequent

[44] In 2002, Protocol No. 13 to the ECHR was adopted, which requires the complete abolition of capital punishment – even for acts committed in time of war. It has now been ratified by 44 Council of Europe member states.

[45] See J. Raue and P. Sutter, 'Facets and Practices of State-Building' (2009).

[46] They became members of the Council of Europe on 9 November 1995 and 13 July 1995 respectively.

[47] Opinion on the Constitution of Ukraine, CDL-INF(97)2.

opinions,[48] the Commission interpreted the new constitutional provisions on the right to life in the light of the European standards and of comparative constitutional material, and stressing the evolution of the European public order towards the abolition of death penalty, it concluded that capital punishment could not be deemed consistent with the constitutions of Ukraine and of Albania. Relying on the Venice Commission's reasoning, the Constitutional Court of Ukraine in early 2000 and the Constitutional Court of Albania in December 1999 declared it unconstitutional. The formal abolition of capital punishment followed shortly.[49]

As for Armenia, which became a member of the Council of Europe on 25 January 2001, the question which was put to the Venice Commission was whether there were any non-reconcilable contradictions between the European Convention and its Protocols on the one side, and the Armenian Constitution on the other side, which would prevent Armenia from ratifying the said international instruments without waiting for the constitutional reform scheduled for 2002 (which later failed at the referendum). Regarding the death penalty, the Commission considered[50] that because the constitution was silent about the form in which the said abolition must be done, it could be achieved through ratification of Protocol 6 that, in the light of the Armenian system of hierarchy of norms, would prevent the legislator from reintroducing the death penalty. By a judgment of 15 July 2003, relying on the Venice Commission's reasoning, the Constitutional Court of Armenia declared that the obligations arising out of the ratification of the ECHR and of its Protocol 6 were compatible with the Armenian Constitution. Armenia subsequently ratified Protocol No. 6 on 29 September 2003.[51]

The successful dialogue between the Venice Commission and the Constitutional Courts of Albania, Ukraine and Armenia testifies of the value of this unique method of interaction, which the Commission initiated, fostered and developed on the basis on the one hand of

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[48] Opinion of the Venice Commission on the Constitutional Aspects of the Death Penalty in Ukraine, CDL- INF(1998)001rev; Opinion on the Compatibility of the Death Penalty with the Constitution of Albania, CDL-INF(99)4.

[49] Ukraine ratified Protocol 6 on 4 April 2000 and Albania on 21 September 2000.

[50] Opinion on the Ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms under the Constitution of the Republic of Armenia of 1995, CDL-INF(2001)025.

[51] Armenian Constitution (as revised in 2015) art. 24: "No one shall be condemned to the death penalty, or executed".

the strong belief in the absolute value of the constitution and on the other hand of the refusal to impose external, ready-made solutions on the authorities seeking its help. The Commission therefore has always supported the essential role of the Constitutional Courts in the development and improvement of constitutions and, through individual access, in the protection of fundamental rights.[52]

Another aspect which required particular attention when the new constitutions were being drafted, and later reformed, was the need for them to contain the guiding ECHR standards on interference with qualified rights: the need for a qualitative legal basis, a legitimate aim, proportionality and necessity in a democratic society. At that time, these principles were unknown to those legal cultures and it appeared clear, from the very beginning, that their practical implementation would not be easy. Still, their constitutionalization was a *conditio sine qua non*, an indispensable first step, and the Commission was mostly successful in ensuring that it happened. In subsequent years, the Commission devoted a lot of energy to ensuring that these principles – notably as declined by the European Court of Human Rights in its case law – be duly reflected in the implementing legislation. In addition to legislative expertise in several countries,[53] this involved an exercise, which the Venice Commission carried out jointly with the OSCE/ODIHR, of translation of the Strasbourg case law into legislative principles and good techniques and practices. This exercise culminated into the adoption of guidelines on freedom of assembly, on freedom of association, on freedom of religion and on political parties, which have since become a reference for European law-makers and have been cited by the European Court of Human Rights in its judgments.[54]

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[52] On the important role of the Venice Commission in the affirmation of constitutional justice in Europe, see amongst others S. Dürr, 'Individual Access to Constitutional Courts as an Effective Remedy against Human Rights Violations in Europe – The Contribution of the Venice Commission' (2014) 258 Nagoya University Journal of Law and Politics 67–89. The Commission and its President have also supported constitutional courts when they suffered attacks on their independence or smooth functioning: http://www.venice.coe.int/WebForms/pages/?p=01_02_STATEMENTS_GB&lang=EN (accessed on 4 January 2017).

[53] Armenia, Azerbaijan, Russian Federation, Ukraine, Georgia, Serbia, Bosnia and Herzegovina, Bulgaria, Moldova, Kosovo, Hungary, Turkey, Albania, Romania, Poland, Italy: see http://www.venice.coe.int/WebForms/documents/by_topic.aspx?lang=EN.

[54] OSCE/ODIHR – Venice Commission Guidelines on Freedom of Peaceful Assembly (2nd edition), CDL-AD(2010)020; Joint Guidelines of the Venice Commission and OSCE Office for Democratic Institutions and Human Rights

A further source of concern, which the Commission has been trying to counter, was and still is the limitation of fundamental rights to citizens only. Several draft constitutions[55] presented this limitation, which runs counter – with the general exception of electoral rights[56] – to the principle that, under the European Convention on Human Rights, fundamental rights are recognized to "everyone within the jurisdiction" of the state, be they citizens or not.[57]

An additional feature of modern constitutionalism, which the Venice Commission has encouraged and supported, is the primacy of international law (in both monist and dualist systems).[58] The extent to which such primacy has been recognized in the new constitutions varies: from superiority of ratified treaties only, to superiority of customary international law and generally accepted norms and principles of international law, to even the case law of the European Court of Human Rights.[59]

(OSCE/ODIHR) on Freedom of Association, CDL-AD(2014)046; Joint Guidelines on the Legal Personality of Religious or Belief Communities, CDL-AD(2014)023; Guidelines on Political Party Regulation, by OSCE/ODIHR and Venice Commission, CDL-AD(2010)024. See, as recent reference, ECtHR, Lashmankin and Others v. Russia, 57818/09 et al., judgment 7.2.2017 [Section III], where the Court refers to both the Guidelines and to the Venice Commission's findings in relation to domestic legislation.

[55] For example, this problem was raised not so long ago by the Venice Commission in relation to Bulgaria, although the authorities claimed that it was terminological and not substantive: Opinion on the Constitution of Bulgaria, CDL-AD(2009)009, §§55 seq.

[56] Besides the right of EU citizens to vote in municipal elections in the Member State in which they reside (Article 22 EU Treaty).

[57] Commentaires sur les libertés et droits fondamentaux contenus dans le projet de constitution de la République de Moldova, CDL(1993)053; Opinion on the Constitution of the Russian Federation as adopted by popular vote on 12 December 1993, CDL(1994)011.

[58] Opinion on the Constitution of the Russian Federation as adopted by popular vote on 12 December 1993, CDL(1994)011; Commentary on the draft Albanian constitution as submitted for popular approval on 6 November 1994, CDL(1995)005e; Opinion on the Regulatory Concept of the Constitution of the Republic of Hungary, CDL-INF(96)2, p. 10.

[59] Armenia CONST art. 81 "Fundamental Rights and Freedoms and the International Legal Practice: 1. The practice of bodies operating on the basis of international human rights treaties, which have been ratified by the Republic of Armenia, shall be taken into account when interpreting the provisions of the Constitution on fundamental rights and freedoms. 2. The restrictions of fundamental rights and freedoms may not exceed the restrictions stipulated by the international treaties of the Republic of Armenia".

While all these features are important, probably the most essential condition of effective human rights protection is the direct effect of provisions on human rights and, consequently, their justiciability. Direct applicability also found its way, at least in principle, into the constitutions of those years.[60] Justiciability, however, is heavily conditioned by the existence of an independent and impartial judiciary. The most complete and sophisticated catalogue of fundamental rights and freedoms is devoid of meaning if these rights and freedoms cannot be enforced through fair judicial decisions.

4.2 Strengthening the Rule of Law

This indispensable association between human rights protection and the rule of law has been one of the focuses of the Venice Commission from the very beginning. The Commission has therefore relentlessly issued clear and detailed recommendations aimed at setting appropriate constitutional (and subsequently legal) guarantees of judicial independence,[61] while acknowledging that some flexibility might be necessary in the transitional phases.[62] These recommendations included: merit-based appointment

[60] At least in principle. For Russia: Opinion on the constitution of the Russian Federation as adopted by popular vote on 12 December 1993, CDL(1994)011. For Ukraine: Opinion on the constitution of Ukraine, CDL-INF(97)2, p. 2.

[61] Recommendations on the independence of the judiciary are contained in all opinions on general constitutional reforms (http://www.venice.coe.int/WebForms/pages/?p=02_Reforms&lang=EN, see also Compilation of Venice Commission Opinions and Reports concerning Courts and Judges CDL-PI(2015)001). The Commission's recommendations in this area have subsequently been codified and developed in two general reports: Report on the independence of the Judicial System Part I: The Independence of Judges, CDL-AD(2010)004 and Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service, CDL-AD(2010)040.

[62] In relation to the problem of independence of the Judiciary and its relations with political power in Montenegro, the Venice Commission in its Opinion of 2007 took into account "that Montenegro has experienced very acute problems relating to the effectiveness and impartiality of the judiciary", and that "the Montenegrin political class is firmly convinced that these difficulties can be overcome only through oversight of the judiciary by parliament". The Commission, therefore, in the light of the peculiar situation of the Montenegrin judiciary, considered that the power given to parliament by the 2007 Constitution to elect the President of the Supreme Court, the President of the Constitutional Court, and the Supreme State Prosecutor and State Prosecutors were to be considered,

shielded from the influence of the executive and the parliament; professional career with an indefinite mandate until retirement; the establishment of an independent body, composed in substantial numbers by professional judges, the body of which would be solely responsible for deciding on career advancements and for applying disciplinary sanctions, including, importantly, dismissal of judges; provision of exclusively functional immunity for judges. In substance, this means that access to the judicial career must be based solely on professional competence, and that after such appointment, judges must be protected from political pressure and undue influence through immovability. Most constitutions written in the 1990s tackled these issues. The Venice Commission insisted on professional appointment and immovability, which, however, are principles that allow for many different manners of interpretation and implementation, and indeed the solutions adopted by the states were extremely diverse. As concerns, in particular, the composition of the judicial councils, finding the appropriate balance between self-regulation and corporatism has been the object of complex and lengthy reflections, including on the part of the Venice Commission.[63]

But despite the adoption of constitutional guarantees and globally standard-compliant implementing laws, the lack of judicial independence has become increasingly problematic in recent times, when more and more states have been confronted with a politicized, biased and corrupt judiciary. It has become evident, then, that the mere adoption of constitutional guarantees of judicial independence is not sufficient, in the absence of a prevailing corresponding legal and political culture.[64]

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in a certain sense, as transitional, temporary provisions. Their aim was to give the Montenegrin political authorities the time and the possibility to "overcome their difficulties in achieving an effective and impartial judiciary; these constitutional provisions would then need to be amended in order to guarantee the full independence of the judiciary" (Opinion on the Draft Amendments to the Constitution of Montenegro, CDL-AD(2007)047, §§79–81). Four years later, the Venice Commission considered that "the time had come for the Montenegrin authorities to accomplish the target of guaranteeing full independence to the judiciary and to the Constitutional Court, according to the European standards and the suggestions of the 2007 Venice Commission Opinion (Opinion on the Draft Amendments to the Law on Courts, the Law on the State Prosecutor's Office and the Law on the Judicial Council of Montenegro, CDL-AD(2011)010, §§72–74).

[63] See for Montenegro, for example: CDL-AD(2011)010, §§18–22.

[64] S. Bartole, 'Final Remarks: The Role of the Venice Commission' (2000) 26 Review of Central and East European Law 356.

Acquiring this culture is a long-term, tortuous but indispensable process, which has proved to be one of the most challenging for contemporary Europe.[65]

The adoption of constitutional guarantees of judicial independence has been even, in some cases, counterproductive. The removal of political influence on the appointment of judges may not be dissociated from the removal of political influence during the exercise of the mandate: the first without the second is useless, and the second without the first is dangerous. The guarantees of judicial independence have in some cases been bestowed, through the adoption of the new constitutions, upon judiciaries which were not mature enough or were not sufficiently independent at the outset. The legacy of the former communist regimes was not automatically discontinued. Judges who had remained loyal to the previous regimes, or who had been appointed in a political tradeoff, or who were permeable to corruption were thus provided with formidable protection against sanctions and dismissals, shielded by high judicial bodies which they themselves dominated and by over-extensive immunities, a remnant of the previous regimes.[66]

Numerous European states have initiated ambitious structural reforms of their judicial systems,[67] often in the context of the Stabilisation and Association Process of the European Union.[68] The European Commission has kept a vigilant eye and maintained relentless pressure on these reforms and has sought close cooperation with the Venice Commission.[69]

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[65] The Venice Commission has stressed the issue of the lack of democratic culture and the subsequent need for specific constitutional and legal guarantees in several of its reports, mostly in relation to the younger democracies: see, amongst others, Report on judicial appointments (CDL-AD(2007)028); Report on the rule of law (CDL-AD(2011)003rev); Report on the role of the opposition in a democratic parliament (CDL-AD(2010)025); Code of good practice in electoral matters: guidelines and explanatory report (CDL-AD(2002) 23 rev).

[66] The Venice Commission has strongly advocated the removal of general immunities for judges, to be replaced by merely functional immunity.

[67] The Venice Commission's assistance has been sought in relation to these reforms in Montenegro, Bulgaria, Georgia, Ukraine, Serbia, "the former Yugoslav Republic of Macedonia", Bosnia and Herzegovina, Hungary, Turkey, Albania.

[68] This was the case for Montenegro, Serbia, Albania, Bosnia and Herzegovina, and the former Yugoslav Republic of Macedonia.

[69] See, in particular, the Interim Opinion on the draft decisions of the High Judicial Council and of the State Prosecutorial Council on the implementation of the laws on the amendments to the laws on judges and on the public prosecution of Serbia, (CDL-AD(2011)015), where the Venice Commission and the European

In some countries, however, structural reforms of the judiciary have not appeared sufficient; the government has considered that more drastic measures were required[70] in order to overcome the problems of corruption, affiliation with previous regimes and incompetence. In Serbia, after the adoption of reforms carried out with the assistance of the Venice Commission, in 2009 the Serbian authorities introduced a reappointment procedure for all existing judges (and prosecutors) in the country. The Venice Commission, echoed by the European Commission, expressed serious concerns about this procedure, which was carried out by decisions of the High Judicial Council which, in case of non-reappointment, amounted to dismissals and did not provide sufficient reasons in each individual case. The Serbian Constitutional Court, competent to review these decisions, indeed annulled them, which led to the reinstatement of practically all the judges (and prosecutors), while new ones had already been appointed. The Venice Commission then recommended that the judicial reform be completed (including through the amendment of the Constitution) and that a clear, comprehensive concept be developed by the authorities.[71] This was done and constitutional amendments are now finally envisaged.

In Albania, in parallel with a constitutional reform, a vetting process of the whole judiciary was planned on account of its dramatic level of corruption. The European Commission has supported this process. The

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Commission express common concerns. Also note that the Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of "the former Yugoslav Republic of Macedonia" (CDL-AD(2015)042) was requested directly by the Directorate of Neighbourhood and Enlargement Negotiations (DG NEAR) of the European Commission, as was the Opinion on Legal Certainty and the Independence of the Judiciary in Bosnia and Herzegovina (CDL-AD(2012)014-e).

[70] A reflection towards an increased accountability of individual judges has also been launched in some countries; the Venice Commission has adopted a cautious approach recalling Recommendation 2010(12) of the Committee of Ministers of the Council of Europe and Opinion 6(2004) of the CCJE and stressing that "Judges should not be personally accountable where their decision is overruled or modified on appeal" (see, for example, the Opinion on the Laws on the Disciplinary Liability and Evaluation of Judges of the former Yugoslav Republic of Macedonia, (CDL-AD(2015)042-e); see also the Amicus curiae Brief for the Constitutional Court of Moldova on the Right of Recourse by the State against Judges (CDL-AD(2016)015) and the Amicus curiae Brief for the Constitutional Court of Moldova on the Criminal Liability of Judges, (CDL-AD(2017)002).

[71] Opinion on Draft Amendments to Laws on the Judiciary of Serbia, (CDL-AD(2013)005), §§6–16; Opinion on the Draft Amendments to the Law on the High Judicial Council of Serbia, (CDL-AD(2014)028).

Venice Commission, which was required to assist in devising both the constitutional and the lustration process, underlined that such radical solution would be ill-advised in normal conditions, "since it creates enormous tension within the judiciary and in particular, creates a risk of the capture of the judiciary by the political force which controls the process"; it agreed, however, that such drastic remedy may be seen as appropriate in the Albanian context, as long as it remains an extraordinary and a strictly temporary measure.[72] After the Venice Commission delivered a reassuring amicus curiae brief,[73] the Constitutional Court of Albania finally gave its green light to the subsequent Vetting Law.[74]

4.3 Support to the Monitoring by Political Bodies of International Commitments of States

The Venice Commission is not an island; its work and its success depend in the first place on its fruitful interaction with the domestic authorities and stakeholders. The Commission's authority rests in the first place on the degree of willingness of the states to conform to its advice. A state's request for assistance presupposes, in most cases at least, an interest in the Commission's expertise and willingness to cooperate with it. The domestic authorities and stakeholders, in particular the constitutional courts, and civil society, provide an extremely valuable and indeed indispensable input to the Commission's findings. This input makes the Commission's advice not abstract but tailor-made to the specific domestic context. This helps ensuring meaningful follow-up to the Commission's recommendations. The impact of the Commission's work is also facilitated by recognition of its authority through references and support by the constitutional courts and highest judicial authorities and by the academia. But the Commission's impact also depends on its political partners: at both the initial and last phases of the process, the Council of Europe's statutory bodies as well as "the international organizations or

[72] Interim and Final Opinions on the Draft Constitutional Amendments on the Judiciary of Albania (CDL-AD(2015)045 and CDL-AD(2016)009). With a similar reasoning, the Venice Commission accepted the principle of the lustration of the judiciary in Ukraine, although with several important caveats: Interim Opinion on the Law on Government Cleansing (Lustration Law) of Ukraine, (CDL-AD(2014)044).

[73] Amicus Curiae Brief for the Constitutional Court of Albania on the Law on the Transitional Re-evaluation of Judges and Prosecutors (The Vetting Law), (CDL-AD(2016)036).

[74] Statement of EU Delegation in Albania (23 December 2016), https://europeanwesternbalkans.com/2016/12/23/statement-of-eu-delegation-to-albania/.

bodies participating in the work of the Venice Commission"[75] may be key to providing the impulse to have recourse to the Commission and the motivation to follow its recommendations.

The Commission's role of pure cooperation has coexisted since the beginning of its existence, with the Commission's indirect participation, through the preparation of opinions at their request, in the monitoring procedures of political bodies such as the Parliamentary Assembly of the Council of Europe: indeed, a significant number of opinion requests have come from the Parliamentary Assembly (over one hundred, more than half coming from its Monitoring Committee), and have often been made despite the reluctance of the relevant state, in the context of political debates about the state's commitment to Council of Europe values. The Venice Commission's opinions aims at providing a professional, objective assessment of the issues and viable proposals for solving such issues. The Parliamentary Assembly then relies on this assessment to address with the state the question of implementation of the Commission's recommendations. As the original enthusiasm about embracing Council of Europe values which existed in the 1990s has somewhat faded away, in recent times Council of Europe member states have been more inclined and have felt more free to express their disagreement with the Assembly's concerns, and even with the organization's values: as a consequence, the political pressure exercised by the Parliamentary Assembly is, or is perceived as being, higher. The Venice Commission's – indirect – involvement in these monitoring procedures is also perceived as being more prominent.

Requests for opinions and for cooperation have been encouraged or have even directly come also from the European Commission, notably in the context of accession or stabilisation and association processes. The Commission's opinions have provided Brussels with an essential legal assessment of the situation. Through the increasing importance which the European Commission has attributed to its work and opinions, the Venice Commission has significantly contributed to the definition of the yardstick of political conditionality, which in turn has had a direct impact on the shaping of the internal organization of the aspiring European Union member states.[76]

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[75] Statute, Article 3.2.

[76] See S. Bartole, *International Constitutionalism and Conditionality – The Experience of the Venice Commission*, supra n. 27,; see also G. Lazarova-Déchaux, 'Doctrine de droit européen – L'exigence de qualité de la justice dans la nouvelle stratégie d'élargissement de l'Union Européenne' (2015) 3 Revue du droit public 729-60.

The Venice Commission's importance has been recently stressed by the European Commission in its framework to strengthen the rule of law, where the Venice Commission's opinions are cited as a basis for the European Commission's dialogue with the respondent state.[77] Indeed, on 20 December 2017 the European Commission concluded that there is a clear risk of a serious breach of the rule of law in Poland and proposed to the European Council to adopt a decision under article 7(1) of the Treaty on European Union.[78] The Commission largely based its assessment on the Venice Commission's opinions on the constitutional tribunal,[79] on laws reforming the judiciary[80] and on the reform of the Public Prosecutor's Office.[81] Within the framework of the Cooperation and Verification Mechanism for Romania and Bulgaria, the European Commission has recommended to draw on the support of the Venice Commission and to carry out reforms with its assistance.[82]

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[77] European Commission, 'A New EU Framework to Strengthen the Rule of Law, a New EU Framework to Strengthen the Rule of Law' Communication (11 March 2014), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014DC0158: "From a broader European perspective, the framework is meant to contribute to reaching the objectives of the Council of Europe, including on the basis of the expertise of the European Commission for Democracy through Law (Venice Commission)" (p. 2); "The Commission will, as a rule and in appropriate cases, seek the advice of the Council of Europe and/or its Venice Commission, and will coordinate its analysis with them in all cases where the matter is also under their consideration and analysis" (p. 9).

[78] European Commission, press release of 20 December 2017, 'Rule of Law: European Commission Acts to Defend Judicial Independence in Poland'; European Commission, Fourth Rule of Law Recommendation, http://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=49107.

[79] Venice Commission, Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, (CDL-AD(2016)001-e), §135,8; Opinion on the Act on the Constitutional Tribunal of Poland, (CDL-AD(2016)026).

[80] Venice Commission, Opinion on the Draft Act Amending the Act on the National Council of the Judiciary; on the Draft Act Amending the Act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts (CDL-AD(2017)031).

[81] Venice Commission, Opinion on the Act on the Public Prosecutor's Office (CDL-AD(2017)028).

[82] See for example 'Cooperation and Verification Mechanism Reports on Bulgaria and Romania', 15 November 2017, http://europa.eu/rapid/press-release_MEMO-17-4613_en.htm. The European Commission's first Vice President Timmermans in relation to draft laws amending the judiciary system of Romania "recalled the value of submitting the laws to the Venice Commission for their opinion": https://www.politico.eu/article/brussels-wants-experts-to-vet-romanian-legal-changes/.

In its efforts to strengthen the rule of law and to make it a pragmatic and operational rather than an abstract academic topic, the Venice Commission has also prepared a "rule of law checklist",[83] which contains a set of parameters enabling a thorough, transparent and equal assessment the level of respect of the rule of law in a given country. Such assessment may be carried out equally by parliaments and other state authorities, civil society and international organizations. This pragmatic tool has been endorsed by the Council of Europe's Committee of Ministers, by the Congress of Local and Regional Authorities and by the Parliamentary Assembly. It has also been referred to by the European Parliament.[84]

In a way, through the function played by its opinions in the work of political bodies such as the Parliamentary Assembly of the CoE and the European Commission, the Venice Commission's recommendations, while they are still formally advisory, have somewhat lost their genuinely "non-binding" nature. Nevertheless, the strength of the Venice Commission and the primary reason for its successful impact is its capacity to build relations of trust and constructive cooperation with the states, irrespective of whether or not the opinion request comes directly from them.

A last short note to conclude: the reluctance of some European states, in very recent times, to accept the Venice Commission's advice has regrettably more to do with their general questioning of European values than with a crisis in the relationship with the Commission. Even if the golden era of transnational constitutional advice may appear to have dawned, the support of international actors and expert bodies such as the Venice Commission has perhaps never been more necessary.

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[83] http://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf.

[84] European Parliament, Report with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (10 0ctober 2016), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2016-0283+0+DOC+XML+V0//EN.