

**COURT OF JUSTICE OF THE EUROPEAN UNION
AS A HUMAN RIGHTS' COURT**

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Abstract

With the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, the Court of Justice of the European Union would become a human rights' court. Moreover, the legally binding Charter of Fundamental Rights of the European Union has already contributed to such an entitlement of the CJEU.

The thesis concentrates on what role the CJEU would serve within the European human rights system, by protecting fundamental rights both within the Charter of Fundamental Rights of the EU and the ECHR. The thesis also addresses some new competences of the CJEU in the field of protection of fundamental rights and other selective aspects defining the CJEU as the human rights' court.

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INTRODUCTION

The Lisbon Treaty¹ brought significant changes to protection of human rights in the European Union (EU). The most significant changes lie in the amendments of Article 6 of Treaty on European Union (TEU). The EU has already its own legally binding bill of rights – the Charter of Fundamental Rights of the European Union (Charter or CFR) with the same legal value as the Founding Treaties. And secondly, the European Union should accede to the European Convention on Human Rights (ECHR).

The Treaty establishing the European Economic Community² did not include provisions for the protection of fundamental rights, except of the principle of non-discrimination on the basis of nationality (Article 7) and the principle of equal pay for men and women (Article 119). The Founders' goal was to establish a Community based on economic integration. Moreover, the Council of Europe³ already served the purpose of the protection of human rights in Europe.

The European Union is now “founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights...”⁴ This devotion is only left to the compliance of the Member States. In conjunction with Article 7, which embrace sanctions procedure, a Member State's rights can be suspended in cases when they engage in a “serious and persistent breach... of the values referred to in Article 2.”⁵

Till the entry into force of the Lisbon Treaty, the lack of any bill of rights did not mean that there was no protection of fundamental rights in the European Communities

¹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on 13 December 2007, entered into force on 1 December 2009. Official Journal C 306 of 17 December 2007

² Signed in Rome on 25 March 1957, entered into force on 1 January 1958.

³ The Council of Europe was founded by the Treaty of London, on 5 May 1949.

⁴ Article 2 of the Treaty on European Union.

⁵ Article 7 was never applied before, however, the current situation in Hungary involving a new Constitution which entered into force on 1 January 2012, and introduced statutes. See Euractiv. EU Parliament places Hungary under scrutiny. 17 February 2012. Available at <http://www.euractiv.com/central-europe/eu-parliament-places-hungary-scrutiny-news-510938>.

whatsoever. The European Court of Justice (ECJ), now the Court of Justice of the European Union (CJEU), held in the landmark judgment of *Stauder*⁶ that fundamental human rights are “enshrined in the general principles of community law and protected by the Court,”⁷ and by that falling under the primary law of the Community legal order. From that moment, the ECJ has the European Community’s measures interpreted and reviewed in the light of fundamental rights.⁸ It was through a case-to-case basis how the fundamental rights were protected.

As a result of this long-year struggle, Member States’ politicians came to agreement and adopted the Charter of Fundamental Rights of the European Union on 7 December 2000.⁹ Despite its political and non-binding character, the ECJ referred to it as the EU bill of rights. The Charter was amended and adopted by the Lisbon Treaty. Having the same legal value as the Founding Treaties, it is said that the CFR “has now become a cardinal element of the Union’s body of ‘primary... constitutional’ rules” and as being “equivalent to any legally binding national bill of rights.”¹⁰ However, the Charter is only one step towards higher protection of fundamental rights. The other is the EU accession to the ECHR.

Already in 1979, the European Community’s accession to the European Convention on Human Rights (ECHR) was an issue of the European Commission in its memorandum.¹¹ The ECJ addressed the accession issue in its Opinion 2/94¹² concluding that European Community had no competences to accede to such international instrument and, in order to

⁶ *Erich Stauder v City of Ulm – Sozialamt*, Case 29/69, judgment of 12 November 1969.

⁷ Par. 7 of the judgment: “Interpreted in this way the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of community law and protected by the Court.”

⁸ Xavier Groussot, Laurent Pech. “Fundamental Rights Protection in the European Union post Lisbon Treaty.” *Foundation Robert Schuman Policy Paper*, European Issue no. 173, 14 June 2010. p. 1.

⁹ Charter of Fundamental Rights of the European Union, 7 December 2000, 2000 O.J. (C 364) 1.

¹⁰ Xavier Groussot, Laurent Pech. “Fundamental Rights Protection in the European Union post Lisbon Treaty.” *Foundation Robert Schuman Policy Paper*, European Issue no. 173, 14 June 2010. p. 2 and 9.

¹¹ Memorandum on the Accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms. COM (79) 210 final, 2 May 1979. Bulletin of the European Communities, Supplement 2/79. Available at <http://aei.pitt.edu/6356/1/6356.pdf>.

¹² Opinion 2/94, 1996, ECR I-1759.

accede, amendment to the Founding Treaties would be required. This finally happened with the Lisbon Treaty anchored in Article 6 par. 2 TEU.¹³

The fact that the EU is not a signing party to the ECHR does not stop the ECJ from relying on its provisions and on the case law of the European Court of Human Rights (ECtHR) when through general principles of law developing its fundamental rights jurisprudence.¹⁴ With the EU accession to the ECHR, the judgments of CJEU and the EU measures will be subject to review of a specialized body outside the EU structure. This would lead the CJEU to being more cautious of possible discrepancies with the later ECtHR rulings on the issue.¹⁵

The literature does not focus on the Court of Justice of the European Union. It focuses mainly on topics either of the Charter of Fundamental Rights of the European Union, or the EU accession to the ECHR, considering their historical developments, their structures, procedural issues. The Charter is discussed in the intentions of its historical development, its change of legal character and the provision themselves with comparison with the ECHR. The EU accession is mostly discussed as being long-year struggle, concentrating on its procedural aspect, concluding the accession agreement.¹⁶ However, the literature is mainly omitting the role of CJEU in both areas, not paying that much attention to the CJEU in enhancing the protection of fundamental rights by current Treaties' developments after the Lisbon Treaty.

The main focus of this thesis is the Court of Justice of European Union and its role in the protection of fundamental rights in European Union. By focusing on the Treaties'

¹³ ECHR was amended as well by Protocol no. 14 allowing accession of EU to ECHR in Article 59 par. 2.

¹⁴ Xavier Groussot, Laurent Pech. "Fundamental Rights Protection in the European Union post Lisbon Treaty." *Foundation Robert Schuman Policy Paper*, European Issue no. 173, 14 June 2010. p. 3.

¹⁵ Rick Lawson. "Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg." *In* : Matthijs De Blois, Henry G. Schermers, Rick Lawson. *The Dynamics of the Protection of Human Rights in Europe: Essays in Honour of Henry G. Schermers*. Kluwer Academic Publishers, 1994. p. 234.

¹⁶ See for example Xavier Groussot, Tobias Lock and Laurent Pech. "EU Accession to the European Convention on Human Rights: a Legal Assessment of the Draft Accession Agreement of 14th October 2011." *Foundation Robert Schuman Policy Paper*, European Issues no. 218, 7 November 2011. Available at http://www.robert-schuman.eu/doc/questions_europe/qe-218-en.pdf.

changes, it shall display the increasing trend in strengthening the CJEU position in the area in the protection of fundamental rights. The second part of the thesis provides some selective aspects in which the of Justice of European Union plays the role of being the human rights' court. This thesis provides insight how and to what extend the Court of Justice of European Union was, currently is and will be even stronger a human rights' court after the EU accession to the European Convention on Human Rights. To this respect, it is discussed how the amendments to the Treaty on European Union and Treaty on the Functioning of the European Union strengthen this assumption.

1 AMENDMENTS TO ARTICLE 6 OF TREATY ON EUROPEAN UNION

Although the Preamble of the Single European Act¹⁷ included the European Community's determination to promote democracy on the basis of the fundamental rights, in order to "to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality, and social justice." It was only until the Maastricht Treaty when the respect for the fundamental rights was anchored in the Founding Treaties. The Stauder¹⁸ case and the following case law of the ECJ were finally codified and it was provided that the respect for fundamental rights is part of the general principles of EU law. In the wording of the Amsterdam Treaty, Article 6 par. 2 TEU provided that the "EU is based inter alia on the principle of respect for fundamental rights."

Article 6 of the "new" TEU is a "key treaty provision as far as EU respect for fundamental rights is concerned."¹⁹ The wording has prescribed the Charter as a legally binding document. The importance of the Charter as a legally binding document underlines a Joint Communication from Presidents Costa and Skouris,²⁰ where is stated that the Charter became "of primary importance" in the recent CJEU case law. Another change lies in the EU obligation to accede to the ECHR (Article 6 par. 2 TEU). General principles of EU law should continue in providing the protection of fundamental rights, plus serving as a protection of fundamental rights when the Charter is silent.

¹⁷ Single European Act, 1986, Official Journal L 169 of 29 June 1987.

¹⁸ Erich Stauder v City of Ulm – Sozialamt, Case 29/69, judgment of 12 November 1969.

¹⁹ Xavier Groussot, Laurent Pech. "Fundamental Rights Protection in the European Union post Lisbon Treaty." *Foundation Robert Schuman Policy Paper*, European Issue no. 173, 14 June 2010. p. 1.

²⁰ Joint communication from Presidents Costa and Skouris. Luxembourg, 17 January 2011.

The following subchapters are dedicated to the respective paragraphs of Article 6 of the Treaty on European Union in this order: Article 6 par. 1 dealing with the Charter of Fundamental Rights of the European Union; Article 6 par. 2 with the EU accession to the ECHR; and Article 6 par. 3 with fundamental rights as the general principles of EU law. The subchapters does not intend to give an exhaustive description, rather to reflect the changes in Article 6 TEU with respect to the increased role of the Court of Justice of the European Union in the protection of fundamental rights in the European Union.

1.1 Charter of Fundamental Rights of the European Union

The Lisbon Treaty amended Article 6 TEU and has finally changed the Charter in a legally binding document. According to Article 6 par. 1 first sentence the EU “recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.” It did not become a part of the text of the Founding Treaties, as it was proposed to be incorporated within the Constitutional Treaty as Part II. However, its character as a stand-alone document does not lower its legal value, since it possesses “the same legal value as the Treaties.”²¹

The Charter is an important development in the EU’s human rights framework, including 16 substantive articles of the ECHR and actually goes beyond the range of rights recognized in the ECHR.²² It is said to be a far more up-to-date catalogue, however the Charter does still afford protection to a “smaller range of rights than the UN human rights treaties.”²³ On the other hand, the Charter rights are only the same as laid by the ECHR, but

²¹ Article 6 par. 1 first sentence.

²² Office of the High Commissioner for Human Rights. “The European Union and International Human Rights Law.” Regional Office for Europe, p. 13.

²³ *Ibid.* p. 14.

under Article 52 par. 3 of the Charter, EU law will not be prevented from providing more extensive protection than the ECHR.²⁴

Despite the fact that the Charter of Fundamental Rights of the EU was not a binding document, it did not preclude the ECJ to rely on it in its case law.²⁵ As the Advocate General Kokott put it, the Charter “does not produce binding legal effects comparable to primary law, it does, *as a material legal source*, shed light on the fundamental rights which are protected by the Community legal order”²⁶ (emphasis added). The ECJ referred to the Charter as a “substantive point of reference”²⁷ to assist its interpretation.

The Charter itself limits its scope of application. Article 53 constitutes that the Charter “shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised... by Union law and international law and by international agreements to which the Union or all the Member States are party, including [ECHR], and by the Member States' constitutions.” This provision is said to be possibly interpreted by the CJEU as allowing recognition of human rights that are contained in United Nations human rights treaties, which are not included in the Charter.²⁸ However, the ECJ’s attitude towards the UN human rights system is considered to be ambiguous and such interpretation of the CJEU is not likely to happen.

The interpretation of the Charter is helped by the official explanations. Despite their non-binding status, under Article 52 par. 7 of the Charter, the explanations “shall be given due regard by the Courts of the Union and the Member States” when interpreting the Charter. On

²⁴ Sionaidh Douglas-Scott. “The European Union and Human Rights after the Treaty of Lisbon.” *Human Rights Law Review*, 11:4, 2011, p. 658.

²⁵ Xavier Groussot, Laurent Pech. “Fundamental Rights Protection in the European Union post Lisbon Treaty.” *Foundation Robert Schuman Policy Paper*, European Issue no. 173, 14 June 2010. p. 2.

²⁶ Opinion in Case C-540/03, par. 108.

²⁷ E.g. *Z v. Parliament*, C-270/99, judgment of 22 March 2001, ECR p. I-09197, par. 40; *Baumbast and R.*, C-413/99, judgment of 5 July 2001; *Überseering*, C-208/00, judgment of 4 December 2001, par. 59; *Unión de Pequeños Agricultores*, C-50/00 P, judgment of 21 March 2002, par. 39.

²⁸ Office of the High Commissioner for Human Rights. “The European Union and International Human Rights Law.” Regional Office for Europe, p. 14.

the other hand, the explanations lack the scope and the content of each right, and are rather informative.

Protocols for Poland and UK

The Lisbon Treaty's Protocol no. 30²⁹ on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom limits the jurisdiction of the CJEU with respect to Poland and the United Kingdom, or at least it was supposed to. The Charter shall not extend the ability of the CJEU, or "any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms."³⁰ Both States were intending to prevent the Charter "from being interpreted in a way that creates new rights to those already provided for in British or Polish law."³¹

Article 1 par. 2, in order to avoid doubts, constitutes that nothing in Title IV³² of the Charter "creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law." The goal was to ensure that these solidarity rights will be not directly applicable in these Member States. However, as Douglas-Scott points out, most of these rights are already recognized as being a part of the general principles of EU law, and therefore national courts can already rely on them, and the CJEU already protects these rights.

²⁹ Protocol no. 30 on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom [2010] OJ C 83/313.

³⁰ Article 1 of the Protocol no. 30.

³¹ Sionaidh Douglas-Scott. "The European Union and Human Rights after the Treaty of Lisbon." *Human Rights Law Review*, 11:4, 2011, p. 654.

³² With the title Solidarity, Articles 27-38, including Right of collective bargaining and action, Social security and social assistance.

In the most recent Saeedi³³ case from 2011, the UK court referred to the CJEU with preliminary reference, among others, on application of the Protocol no. 30. The Court followed the argumentation of the Advocate General Trstenjak's opinion, stating that "Article 1(1) of Protocol (No 30) explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions."³⁴ The Court therefore left the issue of the ruling on the interpretation of Article 2 par. 1. Furthermore, Douglas-Scott, referring only to the Advocate General's opinion, concludes that "the Protocol appears to lack any impact as an effective opt-out."³⁵

Relationship between the Charter with the ECHR

As earlier discussed, Article 6 par. 3 provides the existing EU's dedication to guaranteeing 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." These rights "shall constitute general principles of the Union's law" as adjudicated already in the Stauder³⁶ case. By being part of the general principles, they belong to the primary sources of the EU law and are fully protected by the CJEU.

The Charter sets up the "minimum standard" rule in protection of fundamental rights in relation to the ECHR.³⁷ Article 52 par. 3 of the Charter again reiterates EU dedication to the protection of fundamental rights, stating that if the rights contained in the Charter

³³ Joined Cases C-411/10 N.S. v Secretary of State for the Home Department and C-493/10 M.E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform [2011] ECR 000, Judgment of the Court (Grand Chamber) of 21 December 2011.

³⁴ Par. 120 of the judgement.

³⁵ Sionaidh Douglas-Scott. "The European Union and Human Rights after the Treaty of Lisbon." *Human Rights Law Review*, 11:4, 2011, p. 655.

³⁶ Case 29/69, Erich Stauder v City of Ulm – Sozialamt, judgment of 12 November 1969. Reiterated in following judgments of ECJ, e.g. Internationale Handelsgesellschaft, 11/70, [1970] ECR 1125.

³⁷ Sionaidh Douglas-Scott. "The European Union and Human Rights after the Treaty of Lisbon." *Human Rights Law Review*, 11:4, 2011, p. 655.

correspond to rights guaranteed by the ECHR, “the meaning and scope of those rights shall be the same as those laid down” by the ECHR. As a minimum standard rule, the provision also constitutes that this shall not prevent EU law from providing more extensive protection to fundamental rights.

Since Article 52 par. 3 of the Charter does not mention the ECtHR’s case law, and only the ECHR, the CJEU had the opportunity to address this issue in the *J.McB. v L.E.* case.³⁸ It concluded that where the Charter rights are the same as those in the ECHR, the CJEU “should follow the clear and consistent jurisprudence of the ECtHR.”³⁹ By this ruling, the CJEU has extended the Charter provision, recognizing the case law of the ECtHR being on the same level as the ECHR provisions, when the Charters rights are the same as anchored in the ECHR.

By the above mentioned arguments, it is argued that despite the change of the legal status of the Charter, it will not have a “detrimental impact” on the relationship between the EU and Council of Europe’s fundamental rights’ protection systems. At the same time, there is no reason to expect ECJ diversion from the ECtHR case law when developing its own fundamental rights jurisprudence.⁴⁰

1.2 European Union Accession to the European Convention on Human Rights

The long-year struggle of the European Community and now the European Union, whether to accede to the European Convention of Human Rights, is more or less over. Art. 6

³⁸ *J. McB. v L. E.*, Case C-400/10 PPU, judgement of 5 October 2010.

³⁹ Sionaidh Douglas-Scott. “The European Union and Human Rights after the Treaty of Lisbon.” *Human Rights Law Review*, 11:4, 2011, p. 655.

⁴⁰ Xavier Groussot, Laurent Pech. “Fundamental Rights Protection in the European Union post Lisbon Treaty.” *Foundation Robert Schuman Policy Paper*, European Issue no. 173, 14 June 2010. p. 9.

par. 2 TEU constitutes an obligation of the EU to accede to ECHR using the words “shall accede” not giving any other alternative. Yet, the accession agreement has not been concluded.

The European Community accession to the ECHR was already considered by the European Commission in its memorandum in 1979.⁴¹ The ECJ adopted its Opinion 2/94⁴² concluding that the European Community had no such competences and an amendment to the Treaties would be needed. The Lisbon Treaty has finally anchored this competence-obligation of the EU in Article 6 par. 2 TEU.⁴³

Groussot and Pech offer several very significant arguments in favour of the EU accession to the ECHR. The accession to the ECHR is widely supported on arguments that it should symbolises the EU’s commitment to the protection of fundamental rights within the EU but also symbolise externally. It should represent coherence on the EU level and the Member States’ level in the protection of fundamental rights. Not only that, it should also bring the possibility to EU citizens to be protected against EU measures, as they are enjoying it within their Member States against national measures.

The EU accession to the ECHR would also contribute to situations when the EU institutions breach rights anchored in the ECHR towards individuals, since the current status there is no possibility for remedy by the Strasbourg Court unless the EU law was implemented in the Member States’ legal order.

⁴¹ Memorandum on the Accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms. COM (79) 210 final, 2 May 1979. Bulletin of the European Communities, Supplement 2/79, available at <http://aei.pitt.edu/6356/1/6356.pdf>.

⁴² Opinion 2/94, 1996, ECR I-1759.

⁴³ ECHR was amended, as well, by Protocol no. 14 allowing accession of EU to ECHR in Article 59 par. 2.

EU legal order and the interpretative authority of the CJEU

Since the *Van Gend en Loos*⁴⁴ case, the EU law is perceived as an autonomous legal order of international law with *sui generis* nature. The ECJ in this respect ruled in Opinion 1/91 and Opinion 1/00⁴⁵ that the EU has no competence to sign an international agreement that would allow a court other than the ECJ to make binding determinations about the content or validity of EU law.⁴⁶

The CJEU possesses the interpretive monopoly based on the *Foto Frost*⁴⁷ case. Also according to Article 19 par. 1 TEU, the CJEU shall include the Court of Justice, the General Court and specialized courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.” By the CJEU jurisprudence, supported by the Treaty provision, is to guarantee the autonomy of EU law and the CJEU’s supervision over EU law. It is said to be of big importance that prior to the proceeding before the ECtHR, as representing an external review of EU measures, should be carried out first by the CJEU. However, it is still not clear what form it will take.

For the sake of reviewing the validity of EU measures by the CJEU before any other court, the accession to the ECHR should not affect the authority of the CJEU and it is said that the accession agreement should pay attention to this. One way is to make referral to the CJEU as compulsory prior to any ruling of the ECtHR. However, it has been argued that this would lead to additional not desired delays by either of the Courts, and this could also lead to open conflicts between the Courts.

⁴⁴ NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration, Case 26-62, judgment of the Court of 5 February 1963.

⁴⁵ Opinion 1/91 [1991] ECR I-6079; and Opinion 1/00 [2002] ECR I-3493.

⁴⁶ Sionaidh Douglas-Scott. “The European Union and Human Rights after the Treaty of Lisbon.” *Human Rights Law Review*, 11:4, 2011, p. 662.

⁴⁷ *Foto Frost*, Case 314/85, 1987, ECR 1129.

The European Parliament considered a possible solution to this situation and concluded in its resolution⁴⁸ that “that it would be unwise to formalize relations between” the CJEU and the ECtHR “by establishing a preliminary ruling procedure before the latter or by creating a body or panel which would take decisions when one of the two courts intended to adopt an interpretation of the ECHR which differed from that adopted by the other.” The preliminary ruling as an integral part of internal system of legal remedies will still have to be exhausted before any Strasbourg Court ruling on the same matter.⁴⁹

Article 6 par. 2 TEU provides that the accession shall not affect the EU’s competences as defined in the Treaties, in order to safeguard the autonomy and unity of EU legal order. The Protocol no. 8 relating to Article 6 (2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms provides in Article 1 that the accession agreement shall “make provision for preserving the specific characteristics of the Union and Union law.” Article 2 then prescribes that the accession “shall not affect the competences of the Union or the powers of its institutions,” obviously including also the CJEU’s competences. Article 344 TFEU constitutes an obligation of the Member States not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided within the EU framework. The Member States will not be entitled to bring application to the Strasbourg Court against the EU to the ECtHR. At the same time, these doubts should be dismissed based on the character of the ECtHR competence of ruling on national laws compatibility with the ECHR in a concrete case, and not on the validity of

⁴⁸ European Parliament resolution of 19 May 2010 on the institutional aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (2009/2241(INI). par. 15.

⁴⁹ Xavier Groussot, Laurent Pech. “Fundamental Rights Protection in the European Union post Lisbon Treaty.” *Foundation Robert Schuman Policy Paper*, European Issue no. 173, 14 June 2010. p. 12.

national law. Therefore as Douglas-Scott concludes, the CJEU interpretative authority, in theory, should not be threatened.⁵⁰

1.3 Fundamental Rights as General Principles of European Union Law

Article 6 par. 3 reformulates the previous Article 6 par. 2 that the EU “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.” This provision acknowledges the result of the ECJ’s jurisprudence from the Stauder case⁵¹ and the following judgments stating that the Court protects fundamental rights as an integral part of the general principles of law.

By referring to constitutional traditions to Member States⁵² by which the protection of the ECJ was inspired, ensuring that the protection must be within the framework of the structure and objectives of the Community.⁵³ Besides that, reference is also made to the international human rights treaties,⁵⁴ by which the ECJ identifies fundamental rights and interprets their content. Although the European Communities were not a party to ECHR or other international human rights treaties, the ECJ relied on such international instruments when the Member States were the parties.⁵⁵

The particular place for identifying human rights was and still is the ECHR. Despite its non-binding character for the EU, the ECJ has heavily referred to it in order to interpret EU

⁵⁰ Sionaidh Douglas-Scott. “The European Union and Human Rights after the Treaty of Lisbon.” *Human Rights Law Review*, 11:4, 2011, p. 663.

⁵¹ Erich Stauder v City of Ulm – Sozialamt, Case 29/69, judgment of 12 November 1969.

⁵² Internationale Handelsgesellschaft, Case 11/70, judgment of 17 December 1970.

⁵³ Case 11/70 Internationale Handelsgesellschaft [1970] ECR 1125, par. 4.

⁵⁴ J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities, Case 4/73, judgment of 14 May 1974.

⁵⁵ Office of the High Commissioner for Human Rights. “The European Union and International Human Rights Law.” Regional Office for Europe. p. 6.

human rights standards. By this practice, the ECJ created some protection of fundamental rights, but it could not be compared to the existence of an EU bill of rights. However, the Charter, as legally binding document, of course changed this.

The new development shows that the CJEU is applying fundamental rights as general principles of EU law in a new and radical ways,⁵⁶ when for example applying the principle of non-discrimination on the grounds of age, as already applied by current judgments in the *Mangold* and *Kükükdeveci* cases.⁵⁷

Summary

The Lisbon Treaty brought significant changes to the protection of fundamental rights in the European Union. These changes lie in the amendments to Article 6 TEU. The Charter of Fundamental Rights of the European Union is a legally binding document and became a cardinal element of the EU's body of 'primary constitutional' rules.⁵⁸ Secondly, Article 6 par. 2 constitutes the EU obligation to accede to the European Convention on Human Rights. Both these changes widen and extend the protection of fundamental rights, and the actor in the protection definitely is, for now at least, on the side of the Charter, the Court of Justice of the European Union. However, not only amendments to Article 6 TEU contributed to the enhancement of the role of the CJEU, but also other treaty changes, doctrines and principles to which the second chapter is dedicated.

⁵⁶ Sionaidh Douglas-Scott. "The European Union and Human Rights after the Treaty of Lisbon." *Human Rights Law Review*, 11:4, 2011, p. 658.

⁵⁷ *Mangold v Helm*, Case C-144/04, 2005, ECR I-09981; *Seda Kükükdeveci*, Case C-555/07, 2010, ECR.

⁵⁸ Xavier Groussot, Laurent Pech. "Fundamental Rights Protection in the European Union post Lisbon Treaty." *Foundation Robert Schuman Policy Paper*, European Issue no. 173, 14 June 2010. p. 2.

2 SELECTIVE ASPECTS OF THE ROLE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION IN THE PROTECTION OF FUNDAMENTAL RIGHTS

European Union residents have three possibilities on how to have their fundamental rights protected. The first is to search for a remedy through the national courts, relying on domestic constitutional provisions, such as the German Basic Law, the Slovak Constitution or the Czech Charter of Fundamental Rights and Freedoms. Secondly, after exhaustion of all effective domestic remedies, persons can apply to the ECtHR. The ECtHR does not rule on the validity of national laws but on their compatibility with the ECHR on a case by case basis. Not lastly and for us, but most importantly, during the national proceedings, the domestic courts can deal with issues under EU law or they can, and the highest instances shall, refer to the CJEU preliminary reference.⁵⁹

As former Judge Mancini wrote, “reading an unwritten bill of rights into Community law” was the most striking contribution of the ECJ, which was forced on the Court from outside, by the German and the Italian Constitutional Courts.⁶⁰ To the contrary, it was claimed that ECJ “has used fundamental rights as a means to strengthen the autonomy, supremacy and legitimacy of EU law, rather than for their own sakes, a critique which continues to this day.”⁶¹

This chapter’s subchapters will discuss, first, the position of the CJEU considered as being a lawful judge in the national legal orders of some Member States. Secondly, the

⁵⁹ For the role of the CJEU in the European integration, see Henri de Waele. “The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment.” *Hanse Law Review*, 2010, Vol. 6, no. 1. Available at <http://www.hanselawreview.org/pdf9/Vol6No01Art01.pdf>.

⁶⁰ G. Federico Mancini. “The Making of a Constitution for Europe.” *Common Market Law Review*, 26, 1989, p. 611.

⁶¹ Sionaidh Douglas-Scott. “The European Union and Human Rights after the Treaty of Lisbon.” *Human Rights Law Review*, 11:4, 2011, p. 649.

relationship between CJEU and ECtHR will be considered, focusing mainly on the changes brought by the Lisbon Treaty. The more extensive part will be dedicated to the rule of law as the EU constitutional principle. It include the possibility of natural and legal persons to challenge legality of any EU measure affecting their rights and obligations, as well as the ‘urgent preliminary ruling’ procedure, as well as changing to the judicial review of the EU acts by the CJEU. The last subchapter will focus on the issue of the supremacy of EU law. First, it will be the view from the standpoint of the CJEU towards the legal orders of the Member States and their compliance with the supremacy principle. And furthermore, it is impossible to omit and not to mention the Kadi case, where the ECJ touched upon the relationship of EU law and international law, considering the EU law primacy over the international law as well.

2.1 Court of Justice of the European Union as Lawful Judge

Under Article 267 TFEU, the CJEU is entitled to give preliminary rulings in cases involving the interpretation of the Treaties, or the validity and interpretation of acts of the institutions, bodies, offices or agencies of the EU. In such cases, the Member States’ courts or tribunals, if they consider that a decision on the question is necessary to allow them to give judgment, may request the Court to give a preliminary ruling. However, the courts and tribunals should refer such question before the CJEU where there is no judicial remedy available under the domestic law.

The lawful judge doctrine was for the first time formulated by the German Federal Constitutional Court.⁶² In cases when the court of last instance fails to consider the obligation to refer a question to the CJEU under Article 267 par. 3 TFEU, it violates the guarantee of a

⁶² Matthias Herdegen. *Europarecht*. Munich : C. H. Beck, 2010, 12th edition.

lawful judge under Article 101 par. 1 sentence 2 of the German Basic Law, in the wording: “No one may be removed from the jurisdiction of his lawful judge.” The same approach was adopted by Austria⁶³ after its accession to the EU, as well as by the Czech and Slovak Constitutional Courts.⁶⁴

In the landmark finding of the Czech Constitutional Court,⁶⁵ nonfulfillment of the obligation to refer the preliminary reference to the CJEU by the Highest Administrative Court, as a court of the last instance, is a breach of the fundamental rights of an applicant on lawful judge, guaranteed under Article 38 par. 1 of the Charter of Fundamental Rights and Freedoms (No. 2/1993 Coll.). The Court concluded that the right was violated also in cases when a court does not even consider referral to the CJEU and it does not give reasons for not doing so.

This doctrine is not unconditionally perceived by all Member States. As Bobek recognises, there are three conditions under which such perception of the CJEU is possible.⁶⁶ First, a separate and specialized constitutional jurisdiction should be present. Second, the right to a lawful judge or fair trial should be guaranteed. And third, the constitutional courts should have jurisdiction to try individual constitutional complaints allowing reviewing constitutionality of individual judicial decision.

The preliminary reference has its weakness, when compared to the ECtHR procedure and the scope of the review. Both procedures originate from domestic courts, however, the

⁶³ See Tanja Marktler. “Constitutional Developments in Austria. The European Court of Justice as lawful Judge.” Austrian Constitutional Court, Judgement from December 11th, 1995, VfSlg. 14.390, Vol. 2, 4/2008, 294. Available at <http://www.internationalconstitutionallaw.net/download/5076fae7c6dcfd3418cf83c6de9824ca/Marktler.pdf>.

⁶⁴ See Michal Bobek and David Kosař. “The Application of European Union Law and the Law of the European Convention of Human Rights in the the Czech Republic and Slovakia - an Overview.” *Eric Stein Working Paper*, no. 2/2010. Available at http://www.ericsteinpapers.eu/images/doc/eswp-2010-02-bobek_kosar.pdf. See also Václav Stehlík and Robert Zbíral. “EU procedural rules and Czech Constitutional Order: The Case of Preliminary Ruling procedure.” VIII. World Congress of the International Association of Constitutional Law, Mexico, 6-10 December 2010. Available at <http://www.juridicas.unam.mx/wccl/ponencias/18/327.pdf>.

⁶⁵ Finding of the Czech Constitutional Court, 2009/114 of 8 January 2009, II. ÚS 1009/08.

⁶⁶ Broberg Morten and Niels Fenger. “Preliminary References to the European Court of Justice.” Oxford University Press, USA, 2010. p. 6.

preliminary references coming from the national courts are only dealing with certain aspects of a case, and fundamental rights are often pleaded in a collateral or tangential manner.⁶⁷ On the other hand, it must be also said that the ECtHR rules on national laws' compatibility with the ECHR *in concreto*, and not on the validity of national laws.

2.2 Relationship Between the Court of Justice of the European Union and the European Court of Human Rights

Both the reform of the ECHR system by the Protocol no. 14⁶⁸ and the EU dedication to accede to the ECHR,⁶⁹ are closely connected. Protocol no. 14 made the ECHR control system more effective by providing mechanisms enabling the Strasbourg Court to deal with clearly inadmissible applications more promptly, e.g. the establishment of single-judge formation of the Court and the establishment of committees of three judges (Article 26 ECHR), with the result of the speeding up of the ECtHR decision-making.

The EU accession to the ECHR will constitute a direct, external and specialised judicial supervision of the CJEU under the ECtHR, as it is now by the national courts of the Council of Europe. By EU accession to ECHR, the Strasbourg Court will have the competence to review EU measures by natural and legal persons through the applications, after they exhaust the domestic remedies.⁷⁰

Till the EU accession to ECHR, the *status quo* is that the ECtHR cannot review EU measures directly, however, it can review acts of Member States implementing EU secondary

⁶⁷ Sionaidh Douglas-Scott. "The European Union and Human Rights after the Treaty of Lisbon." *Human Rights Law Review*, 11:4, 2011, p. 680.

⁶⁸ Entered into force on 1 June 2010.

⁶⁹ Article 6 par. 2 TEU.

⁷⁰ Xavier Groussot, Laurent Pech. "Fundamental Rights Protection in the European Union post Lisbon Treaty." *Foundation Robert Schuman Policy Paper*, European Issue no. 173, 14 June 2010. p. 10.

legislation. The Strasbourg Court itself held in 1978⁷¹ that it is lacking jurisdiction to examine proceedings before the organs of the EC or their decisions, since the EC is not a party to the ECHR.⁷² The change was brought by Matthews case⁷³ where the ECtHR concluded that in principle it can review national measures applying or implementing EU law.

The approach of the ECtHR, however, shows that it possesses a high degree of deference when exercising its control over the ECHR towards EU.⁷⁴

In the *Bosphorus*⁷⁵ case, the ECtHR does it on the basis of the presumption that the EU fundamental rights protection “can be considered at least equivalent to that for which the Convention provides.” The ECtHR has defined that in paragraph 155 that “[S]tate action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides.” This *Bosphorus* test provides a “low threshold when compared to the usual standard of supervision the ECtHR normally exercises.”⁷⁶

⁷¹ Applications against the European Communities were to be declared inadmissible as being directed against a “person” not a Party to the Convention. *Confédération Française Démocratique du Travail (CFDT) v. the European Communities*, application no. 8030/77, decision of 10 July 1978.

⁷² Henry G. Schermers, Denis F. Waelbroeck. “Judicial protection in the European Union.” Hague : Kluwer Law International, 2001, p. 42.

⁷³ *Matthews v. the United Kingdom*, application no. 24833/94, judgment of 18 February 1999.

⁷⁴ Xavier Groussot, Laurent Pech. “Fundamental Rights Protection in the European Union post Lisbon Treaty.” *Foundation Robert Schuman Policy Paper*, European Issue no. 173, 14 June 2010. p. 10.

⁷⁵ *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland*, application no. 45036/98, judgment of 30 June 2005.

See also Frank Schorkopf. “The European Court of Human Rights' Judgment in the Case of *Bosphorus Hava Yollari Turizm v. Ireland*.” *German Law Journal*, Vol. 06 No. 09. Available at http://www.germanlawjournal.com/pdfs/Vol06No09/PDF_Vol_06_No_09_1255-1264_Developments_Schorkopf.pdf.

⁷⁶ Xavier Groussot, Laurent Pech. “Fundamental Rights Protection in the European Union post Lisbon Treaty.” *Foundation Robert Schuman Policy Paper*, European Issue no. 173, 14 June 2010. p. 10.

The relationship between the ECtHR and the CJEU underlines their mutual recognition of the case law. The ECtHR has clearly recognized the growing competence of the EU in human rights, citing the CJEU case law in its judgments.”⁷⁷

By the change of the legal status of the Charter, Groussot and Pech argue that it will not have a “detrimental impact” on the relationship between the EU and the Council of Europe’s fundamental rights’ protection systems. At the same time, there is no reason to expect CJEU diversion from the ECtHR jurisprudence when developing its own fundamental rights case law.⁷⁸

2.3 Rule of Law as European Union Constitutional Principle

Article 2 of TEU constitutes that the EU is “founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”

The European Union is based on the founding principles as constitutional principles,⁷⁹ as cited above, on the rule of law which is said to be common to the Member States. The EU institutions and the Member States, where applicable, should adopt measures according to the EU’s constitutional rules to “ensure a complete set of legal remedies and procedures.”⁸⁰

⁷⁷ Sionaidh Douglas-Scott. “The European Union and Human Rights after the Treaty of Lisbon.” *Human Rights Law Review*, 11:4, 2011, p. 657.

⁷⁸ Xavier Groussot, Laurent Pech. “Fundamental Rights Protection in the European Union post Lisbon Treaty.” *Foundation Robert Schuman Policy Paper*, European Issue no. 173, 14 June 2010. p. 9.

⁷⁹ Armin Von Bogdandy. “Founding Principles of EU Law: A Theoretical and Doctrinal Sketch.” *European Law Journal*, Vol. 16, no. 2, March 2010, p. 106.

⁸⁰ Xavier Groussot, Laurent Pech. “Fundamental Rights Protection in the European Union post Lisbon Treaty.” *Foundation Robert Schuman Policy Paper*, European Issue no. 173, 14 June 2010. p. 4.

The Lisbon Treaty brought a new development to the competences of the CJEU. It has gained momentum towards the EU, as well as towards the Member States. While by the three-pillar structure, which was established by the Maastricht Treaty,⁸¹ not all the EU measures could be reviewed by the ECJ, the Lisbon Treaty in this respect made it easier. It did also bring improvements of the preliminary reference system, offering ‘urgent preliminary reference’ when the person is kept in the custody.

The EU’s devotion to comply with its own rules is expected and if not, the CJEU has the role of oversight. Whereas the Member States are required to do so according to the principle of loyalty. Under Article 4 TEU, it also called the principle of sincere cooperation, including full mutual respect of the Union and the Member States, requiring assistance to each other in carrying out tasks which flow from the Treaties. The Member States should “take any appropriate measure, general or particular, to ensure fulfillment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.” At the same time, the Member States should “facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardize the attainment of the Union’s objectives.” In the case of the Member States’ failure to comply, the Commission as the Treaty guardian has the right to bring a suit before the CJEU under Article 258 TFEU.

The rule of law as a general principle of law includes the possibility of natural and legal persons to challenge the legality of any EU measure affecting their rights and obligations, as well as a judicial review of the EU acts by the CJEU. Both issues were positively changed by the Lisbon Treaty.

The Lisbon Treaty has amended the annulment procedure by adding legal standing to private parties under certain conditions.⁸² The ECJ held in its case law that the rule of law at the same time means that “natural and legal person must be able to challenge the legality of

⁸¹ Treaty on European Union (1992), Official Journal C 191 of 29 July 1992.

⁸² Xavier Groussot, Laurent Pech. “Fundamental Rights Protection in the European Union post Lisbon Treaty.” *Foundation Robert Schuman Policy Paper*, European Issue no. 173, 14 June 2010. p. 4.

any act that affects their EU rights and obligations.”⁸³ In addition to the previous possibility to initiate “proceedings against an act addressed to that person or which is of direct and individual concern to them”, from entry into force of the Lisbon Treaty, the private parties for the first time are able to challenge the legality of “regulatory act which is of direct concern to them and does not entail implementing measures.”⁸⁴ This *novum* allows the natural and legal persons to challenge such measure without proving the person’s individual concern. The European Union Agency for Fundamental Rights⁸⁵ can play an important role in protection of fundamental rights as having the right to bring the suit for annulment before the CJEU.

The Lisbon Treaty brought changes to the jurisdiction of the CJEU in the area of Freedom, Security and Justice.⁸⁶ Measures adopted in this area fall under the general jurisdiction of the CJEU, e.g. preliminary rulings related to asylum, immigration and civil matters,⁸⁷ including police and judicial cooperation in criminal matters formerly falling under the third pillar structure. After a 5-year transitional period, the full review over this field will be effective from December 2014 onwards.⁸⁸

It is worth mentioning the new “urgent preliminary ruling” procedure, governed by Article 23a of the Protocol on the Statute of the Court of Justice and Article 104b of its Rules of Procedure (OJ 2008 L 24), for cases involve individuals in custody and “where it is absolutely necessary for the Court to give its ruling on the reference as quickly as possible.”⁸⁹

The CJEU should act with a minimal delay in cases when a court or tribunal of a Member

⁸³ *Ibid.* p. 4.

⁸⁴ Article 263 par. 4 TFEU.

⁸⁵ Established by the Council Regulation (EC) No 168/2007 of 15 February 2007.

⁸⁶ Title V, Part III of TFEU.

⁸⁷ Xavier Groussot, Laurent Pech. “Fundamental Rights Protection in the European Union post Lisbon Treaty.” *Foundation Robert Schuman Policy Paper*, European Issue no. 173, 14 June 2010. p. 4.

⁸⁸ See Art. 10 of the Protocol no. 36 Treaty on Transitional Provisions.

⁸⁹ Court of Justice. Information Note on references from national courts for a preliminary ruling. Supplement following the implementation of the urgent preliminary ruling procedure applicable to references concerning the area of freedom, security and justice. (2008/C 64/01). par. 7.

State refers to it within the preliminary ruling with a case involving an individual in custody.⁹⁰ It is applicable in the areas concerning police and judicial cooperation in criminal matters⁹¹ and concerning visas, asylum, immigration and other policies related to free movement of persons, including judicial cooperation in civil matters.⁹² In 2010, the urgent preliminary ruling procedure was requested in six cases and the conditions were met in five of them. The average period of complete cases was 2.1 months,⁹³ when in comparison, the ordinary preliminary ruling procedure in the same year took 16.1 months.⁹⁴

2.4 Supremacy of European Union Law and Fundamental Rights

The supremacy of the European Community law, nowadays European Union law, is a long life principle since the decision of *Costa v. ENEL*.⁹⁵ In the *Internationale Handelsgesellschaft* case,⁹⁶ the ECJ had adjudicated that the supremacy of EU law applies also towards constitutions and constitutional statutes of the Member States. It is considered as one of the principles of the European Union law that European Union law's functioning is based on⁹⁷ and it should serve as a rule to solve conflicts when they occur between national law and EU law. However, the approach of some Member States for a long time indicates this principle as not always applicable. The constitutional courts of some Member States, e.g. of Germany, Italy, France, have created exceptions from this supremacy principle.

⁹⁰ Article 267 par. 4 TFEU: "If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."

⁹¹ Chapter 4 and 5 of Title V of the TFEU, Articles 82-89.

⁹² Chapter 2 of the Title V of the TFEU, Articles 77- 81.

⁹³ Court of Justice of the European Union. Statistics concerning judicial activity in 2011: new record in the number of actions brought before and disposed of by the three judicial organs of the Court of Justice of the European Union. Press Release No 14/12. Luxembourg, 17 February 2012.

⁹⁴ Court of Justice of the European Union. Statistics concerning judicial activity in 2010: references for a preliminary ruling have never been dealt with so quickly. Press Release No 13/11, Luxembourg, 2 March 2011. p. 1.

⁹⁵ *Costa v ENEL* [1964] ECR 125.

⁹⁶ *Internationale Handelsgesellschaft* 11/70 [1970] ECR 1125.

⁹⁷ *Variola* 34/73 [1973] ECR 981.

The ECJ refused to be satisfied with the monistic or dualistic approach to the Public international law, which differs in the countries of the European Union, applicable to EU law. The ECJ adopted the concept of the supremacy of EU law driven by the EU law itself. According to many Member States' constitutions, the primacy of international law towards the domestic laws is directly anchored. It is left then to the states to apply them themselves.⁹⁸

The Treaties still do not include explicit provisions constituting the EU law supremacy. However, the seventeenth declaration annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon includes such a reference. Although only as a political document with no binding character, it does finally mention supremacy over the law of Member States “under the conditions with well settled case law of the Court of Justice of the European Union.” The mentioned conditions were constituted namely in the landmark decision of *Costa v. ENEL*.⁹⁹ Among others, the ECJ stated that the Member States did permanently limit their sovereignty by delegating them to the European Communities/European Union, at the supranational level.¹⁰⁰

When Member States' courts are not willing to uphold cases, e.g. of the validity of Member States' implementing measures¹⁰¹ or the measures related to EU arrest warrant,¹⁰²

⁹⁸ Michael Siman and Miroslav Slašťan. “Primárne právo Európskej únie (aplikácia a výklad práva Únie s judikatúrou) [Primary law of European Union (application and interpretation of Union law with the case law)]. Bratislava : EUROIURIS, 2010, 3rd edition. p. 186.

⁹⁹ *Costa v ENEL* [1964] ECR 125.

¹⁰⁰ These three paragraphs of the subchapter are largely drawn from my previous thesis proposal submitted to the Legal Department at the CEU with the title: Supremacy of EU law over national law – comparison of constitutional provisions and decisions of constitutional courts of selected Member States.

¹⁰¹ E.g. Constitutional Court of Hungary, Decision 17/2004, (V. 25) AB – see László Blutman, Nóra Chronowski. Hungarian Constitutional Court: Keeping Aloof from European Union Law. *Vienna Journal on International Constitutional Law*, Vol. 5, 3/2011, 329-348. Available at http://www.internationalconstitutionallaw.net/download/e31eb083ca4c5aa70873e5740bd3b46f/Blutman_-_Chronowski.pdf.

¹⁰² Solange I, BVerfG, 37, 271, 1974; Solange II, BVerfG, 73, 339, 1986; Constitutional Tribunal of Poland, P 1/05, decision of 27 April 2005; See also Oreste Pollicino. “European Arrest Warrant and Constitutional Principles of the Member States: a Case Law-Based Outline in the Attempt to Strike the Right Balance between Interacting Legal Systems.” *German Law Journal*, Vol. 09, no. 10. p. 1313-1355. Available at http://www.germanlawjournal.com/pdfs/Vol09No10/PDF_Vol_09_No_10_1313-1354_Developments_Pollicino.pdf

based on arguments of failure to sufficiently protect fundamental rights. This represents a threat to the authority of the CJEU, to European integration and to the EU as a whole.¹⁰³

In 2009, the German Federal Constitutional Court adjudicated the Lisbon case¹⁰⁴ dealing with the compatibility of the Lisbon Treaty with German law.¹⁰⁵ The Court basically followed its earlier decision in the Maastricht II case, repeating its “theory of conditional acceptance of EU law” developed by its Solange I, Solange II and Maastricht¹⁰⁶ judgments. According to the jurisprudence of the German Constitutional Court “Germany only accepts the supremacy of EU law ‘so long’ as EU law guarantees the fundamental rights laid down in the German Basic Law.”¹⁰⁷ The German Court reiterated its previous decisions stating, among others, that the EU has deepened its political identity mainly by increasing its powers, and mostly importantly that the EU matters are still under the Federal Constitutional Court’s supervision.¹⁰⁸

The practices mentioned above underline that Member States’ courts will “continue to reaffirm their own role in policing the observance of fundamental rights in the EU” and therefore the “multilevel and complex structures of fundamental rights protection in the EU will continue.”¹⁰⁹ This also indicates that the EU accession to the ECHR is crucial and that at the same time that the CJEU will conform its case law with the ECtHR jurisprudence, or to maintain the minimal standard, as has been established by the Bosphorus case, in order to

¹⁰³ Sionaidh Douglas-Scott. “The European Union and Human Rights after the Treaty of Lisbon.” *Human Rights Law Review*, 11:4, 2011, p. 680.

¹⁰⁴ Lisbon Case, BVerfG, 2 BvE 2/08, judgment of 30 June 2009. Available at http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html.

¹⁰⁵ The German Federal Constitutional Court, decision of 30 June 2009, 210 (F.R.G.) 67.

¹⁰⁶ Brunner v. European Union Treaty [1994] I CMLR 57, on the compatibility of the Maastricht Treaty with the German Basic Law, the German Constitutional Court held that it retained the competence to review EU measures which violate fundamental rights.

¹⁰⁷ Sionaidh Douglas-Scott. “The European Union and Human Rights after the Treaty of Lisbon.” *Human Rights Law Review*, 11:4, 2011, p. 680-681.

¹⁰⁸ Frank Schorkopf. “The European Union as An Association of Sovereign States: Karlsruhe’s Ruling on the Treaty of Lisbon.” *German Law Journal*, Vol. 10 No. 08. p. 1220.

¹⁰⁹ Sionaidh Douglas-Scott. The European Union and Human Rights after the Treaty of Lisbon. *Human Rights Law Review* 11:4 (2011), p. 681.

protect the fundamental rights at minimum and allay the challenges of the Member States' courts.

Supremacy of EU law over international law?

The Kadi¹¹⁰ case is considered to be one of the five most important cases of the CJEU jurisprudence. The Court of First Instance (CFI) ruled in the cases of Kadi¹¹¹ and Yusuf,¹¹² where both were by the Court of Justice overruled under the Kadi judgment. The case concerned the Council Regulation 881/2002 imposing certain specific restrictive measures, e.g. freezing funds and other financial sources of private persons, directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban.

The EC regulation intended to adopt the UN Security Council resolutions.¹¹³ The CFI refused to rule in these cases, arguing that it had no jurisdiction to review the lawfulness of the decision of the Council of the EU, when it was adopting the UN resolutions. The CFI felt it was acting under "circumscribed powers, with the result that they had no autonomous discretion."¹¹⁴ However, the CFI considered the lawfulness of the resolutions according to the *ius cogens* concluding that there was violation.

The Court of Justice emphasized in the Kadi judgment that it has to "ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations" (par. 326). Such review must be done in the light of

¹¹⁰ Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities, Joined Cases C-402/05 P and C-415/05 P.

¹¹¹ Kadi v. Council & Commission, Case T-315/01, 2005, ECR II-3649.

¹¹² Yusuf & Al Barakaat International Foundation v. Council and Commission, Case T-306/01, 2005, ECR II-3533.

¹¹³ UN Security Council Resolution 1267 (1999), U.N. Doc. S/RES/1267 and UN Security Council Resolution 1333 (2000), U.N. Doc. S/RES/1333 (Dec. 13, 2000).

¹¹⁴ Kadi v. Council & Commission, Case T-315/01, 2005, ECR II-3649, par. 214.

Yusuf & Al Barakaat International Foundation v. Council and Commission, Case T-306/01, 2005, ECR II-3533, par. 265.

fundamental rights and must be “considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement” (par. 316).

The Court of Justice repeated itself when stating that the two courts of the European Union, i.e. the Court of Justice and the Court of First Instance, have no jurisdiction to review validity of resolutions adopted by the UN Security Council under Chapter VII of the UN Charter, “even if that review were to be limited to the examination of the compatibility of that resolution with *jus cogens*” (par. 287). Moreover, the Court of Justice emphasized the primacy of obligations arising out the UN Charter, and stated a “Community measure intended to give effect to resolution is contrary to a higher rule of law in the Community legal order [this] would not entail any challenge to the primacy of that resolution in international law” (par. 288). The Court of Justice found several breaches of fundamental rights, e.g. the right to be heard, the right to effective judicial review and unjustified restriction of his right to property.

Leaving the whole argumentation of the CJEU behind,¹¹⁵ the most important issues regarding the Kadi case are as follows. The CJEU highlighted the character of EU law as an autonomous legal order, particularly when the CJEU reviews compliance of international law with fundamental rights. The CJEU did not rule on the primacy of EU law over international law, but emphasized the primacy of obligations under the UN Charter. The CJEU concluded that its judicial review competences covers all Community acts, also in cases when adopting resolutions of the UN Security Council. Critics say that the judgment leaves opened questions of the relationship of EU law within the international legal order.

¹¹⁵ For this, see Albert Posch. “The Kadi Case: Rethinking the Relationship Between EU Law and International Law?” *The Columbia Journal of European Law Online*, Vol. 15, 2009.

Summary

Under several Member States' constitutional orders, the Court of Justice of the European Union is considered to play the role of a lawful judge. It constitutes that the preliminary reference is one of the person's human rights, not being removed from the jurisdiction of persons' lawful judge. Protocol no. 14 to the ECHR and the Lisbon Treaty represent new developments in the protection of fundamental rights in both systems, of the Council of Europe and the European Union. The European Court of Human Rights and the Court of Justice of the European Union are ever closer institutions, respecting their jurisprudence and competences, prepared together to safeguard and enhance the protection of fundamental rights.

Rule of law is one of the EU constitutional principles, said to be common to the Member States. It consists of the EU institutions and the Member States obligation to comply with the EU's constitutional rules to ensure a complete set of legal remedies and procedures. Supremacy of EU law over national laws, especially in the area of arguments lacking the protection of fundamental rights, is a long lasting story, where some Member States' constitutional courts still refrain from accepting full supremacy over their constitutional orders. But it is argued that when the EU with the EU Bill of Rights already and bound by the ECHR in the future, the constitutional courts' doubts shall vanish once and for all. Kadi case, shortly said, represents a strong commitment of the CJEU to protection of the fundamental rights and the rule of law as general principle of EU law.

CONCLUSION

A short answer whether the Court of Justice of the European Union is or is not a human rights' court and to what extent could be: yes – partly, no – not yet fully.

With the entry into force of the Lisbon Treaty on 1 December 2009, provisions for the protection of fundamental rights were introduced and enhanced which strengthen the protection of fundamental rights in the European Union. The most significant changes were anchored in Article 6 of Treaty on European Union.

The Charter of Fundamental Rights of European Union finally became a legally binding document. It will be serving “as the primary source of human rights in the EU”¹¹⁶ with a “clear list of rights through the CFR that is binding on the institutions and the Member States when they are applying EU Law.”¹¹⁷ Thus, while the CFR may represent an improvement in some respects over the ‘general principles’, the CFR still affords protection to a smaller range of rights than the UN human rights treaties.”¹¹⁸

The EU accession will provide a “greater protection of individuals’ rights, the guarantee of a coherent Europe-wide system of human-rights protection, and reinforcement of legal certainty.”¹¹⁹ It will also guarantee a consistent development of the jurisprudence of the ECtHR and the CJEU in the area of fundamental rights.”¹²⁰

Secondly, the EU should accede to the European Convention on Human Rights. After the EU accession to the ECHR, the European Court of Human Rights will be finally able to

¹¹⁶ Sionaidh Douglas-Scott. “The European Union and Human Rights after the Treaty of Lisbon.” *Human Rights Law Review*, 11:4, 2011, p. 645.

¹¹⁷ Office of the High Commissioner for Human Rights. “The European Union and International Human Rights Law.” Regional Office for Europe, p. 21.

¹¹⁸ Office of the High Commissioner for Human Rights. “The European Union and International Human Rights Law.” Regional Office for Europe, p. 14.

¹¹⁹ Parliamentary Assembly. “The accession of the European Union/European Community to the European Convention on Human Rights.” Doc. 11533, 18 March 2008, Report Committee on Legal Affairs and Human Rights.

¹²⁰ Xavier Groussot, Laurent Pech. “Fundamental Rights Protection in the European Union post Lisbon Treaty.” *Foundation Robert Schuman Policy Paper*, European Issue no. 173, 14 June 2010. p. 10.

review EU measures directly, when natural and legal persons will be able to apply to the ECtHR after exhaustion of all domestic remedies as now against national authorities.¹²¹

At the same time, EU will be able to defend itself before the ECtHR, as well as being represented by one EU judge as other Parties to the ECHR.

The CJEU's portfolio was increased in the fundamental rights field. It was enhanced in its competences, among others, in judicial review in the area of police and judicial cooperation in criminal law formerly belonging under the third pillar. As already existed before, the CJEU uses the general principles of EU law in order to incorporate human rights into the system of judicial review as a condition of the legality of EU law. And the general principles of EU law should be relied on when there is "a need to remedy the Charter's eventual lacunae."¹²²

The Court of Justice of the European Union will become the court being applied to with human rights cases. The CJEU will represent easier way to sought a remedy to a violation of the fundamental rights. First of all, because of its relative quickness of its decision-making. In general, it takes approximately 20 months for the CJEU to adjudicate the preliminary ruling. Secondly, since applying to the ECtHR, the applicant has to exhaust all the effective domestic remedies, which is time and money consuming. The CJEU provides a faster legal remedy than the ECtHR offers. The advantage of the CJEU lies in its preliminary reference procedure, already possible from the first instance Member State's court or tribunal. According to some constitutional orders, e.g. Germany, Austria, Slovakia and Czech Republic, the position of the CJEU is amplified by its nature being a lawful judge. Last but absolutely not least, the rights and freedoms anchored in the ECHR and the developed, as well as developing, jurisprudence of the ECtHR will be, after the EU accession, strengthened by their nature of being a part of the fundamental rights of the EU within the Member States.

¹²¹ Xavier Groussot, Laurent Pech. "Fundamental Rights Protection in the European Union post Lisbon Treaty." *Foundation Robert Schuman Policy Paper*, European Issue no. 173, 14 June 2010. p. 10.

¹²² *Ibid.*, p. 4.

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