

# *Introduction—A Matter for Two Courts: The Fundamental Rights Question for the EU*

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**T**HE EU IS one of the oldest and most successful projects of economic integration at the regional level. However, its legal system has grown well beyond the boundaries set by the original treaties, both in terms of competences and supremacy over national laws.

The EU governing institutions have gradually and steadily increased their reach over time. In particular, the doctrine of supremacy and direct effect developed by the Court of Justice of the European Union (CJEU) have created a supranational entity where private litigants can invoke EU rules to challenge national laws conflicting with Union law. Both implicit or explicit extensions of the competences set out in the original treaties, have modified the architecture of the Union.<sup>1</sup> Thus, elements of supranationality have ‘spilled over’ into areas such as for example asylum and immigration that were, until recently, firmly managed through inter-governmental mechanisms. Moreover, parallel processes of policymaking, the so-called soft law tools, ie the Open Method of Coordination (OMC), voluntary exchange of good practices across the Member States, and involvement of the civil society, industrial and social partners in standard setting have been instilling elements of *Europeanisation* in areas traditionally controlled at national level.<sup>2</sup>

Although this increase in supranationality has been in evidence for some time, most recently it has been argued that the EU has entered a new era of integration inaugurated by the Lisbon Treaty and based on human rights.<sup>3</sup> The post-Lisbon era

<sup>1</sup> S Morano-Foadi, ‘Fundamental Rights in Europe: “Constitutional” Dialogue between the Court of Justice of the EU and the European Court of Human Rights’ (2013) 5(1) *Oñati Journal of Emergent Socio-Legal Studies* 64, at 64–88, at <http://www.sortuz.org/content/pdfs2013/4%20Morano%20-%20human%20rights.pdf>.

<sup>2</sup> S Morano-Foadi and F Duina, ‘The Institutionalisation of Regional Trade Agreements Worldwide: New Dynamics and Future Perspectives’ (2011) 17 *European Law Journal* 5, at 561–67.

<sup>3</sup> S Morano-Foadi and S Andreadakis, ‘Reflection on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights’ (2011) 17 *European Law Journal* 595, at 599.

is characterised by two developmental stages. The first stage is influenced by, on the one hand, the Charter of Fundamental Rights (the Charter) having a binding nature, as set out by Article 6(1) Treaty on European Union (TEU); and, on the other hand, by the extension of the CJEU's jurisdiction in areas such as asylum, immigration, judicial cooperation in civil affairs and criminal matters. The second stage might witness the EU's accession to the European Convention on Human Rights (ECHR), as the legal basis for accession is included in the Treaty.<sup>4</sup> This process is now on hold as the CJEU has declared, in its recent ruling, that the Accession Agreement is incompatible with EU law.<sup>5</sup>

Nonetheless, despite this setback in the process of accession, the two courts retain significant potential for dealing in a mutually compatible manner with the range of issues over which they both share concern. Thus, via the Charter, the CJEU retains a concern with human rights. Although the Charter states that it does not broaden the competences of the EU, its binding effect and the increase in human rights claims in the CJEU post-Lisbon case law, clearly offer the opportunity for a shift of the EU towards integration based on rights. The Court, in its role as 'a hero who has greatly advanced the cause of integration',<sup>6</sup> and in general, the EU institutions could contribute to this process.

As for the Council of Europe, in the fundamental rights realm, an institutional overlap between the EU and the Council of Europe can be seen. The original scope of the Council of Europe, an international organisation regulated by international law, has expanded covering political and civil rights included in the ECHR and economic and social rights contemplated in the Social Charter. The work of the European Court of Human Rights (ECtHR) in interpreting the Convention and having a final word in Europe on the violation of human rights raised by individuals against the States, undoubtedly introduces a significant supranational element to the nation state's dimension. As well as increasing the integration of the two European legal frameworks by joining the EU and Council of Europe's projects, and thus accepting *Europeanisation*, the implementation of the Lisbon Treaty also offered an impact on nation states, in particular by challenging their traditional autonomy and integrity. The new architecture of Europe has meant that there are now multiple agents at national and European levels claiming legal authority within the same geographical area. This raises questions around the *judiciary institutionalisation* itself and the *legitimacy and supremacy* of the competing autonomous legal systems.

This volume collates papers presented at two conferences,<sup>7</sup> which brought together scholars, judges and policymakers coming from different European

<sup>4</sup> See Art 6(2) TEU.

<sup>5</sup> Opinion of the Court (Full Court) of 18 December 2014 pursuant to Article 218(11) TFEU on the compatibility of the draft agreement with the EU and FEU Treaties, available at <http://curia.europa.eu/juris/liste.jsf?num=C-2/13>

<sup>6</sup> K Alter and S Meunier-Aitsahalia, 'Judicial Politics in the European Community' (1994) 26 *Comparative Political Studies* 535–61, 535–36.

<sup>7</sup> The first conference entitled 'Fundamental Rights in Europe: A Matter For Two Courts' held in Oxford on Friday 18 January 2013. As a follow-up activity a second dissemination event was held

countries to discuss the legal framework for the protection of fundamental rights in Europe and reflect on the relationship between the CJEU in Luxembourg and the ECtHR in Strasbourg. It examined the state of accession of the EU to the ECHR and considered the legal implications of the accession for the protection of the fundamental rights of EU citizens and legally residing individuals in Europe. This topic was explored, focusing on equality rights in employment law, citizenship and migration, fundamental freedom and access to justice.

The chapters in this collection address the above pressing challenges, and question whether the changes introduced by the Lisbon Treaty will affect institutional dynamics within the two European Courts similar in nature and extent to those found in the jurisprudence of the CJEU. They explore whether the changes will align the CJEU to the ECtHR's interpretation and methods triggering different processes of institutionalisation within a coherent European system.

The chapters also raise concerns in relation to the working of the Lisbon Treaty in paving the way for a dialectic adjustment to the EU human rights regime oscillating between continuity and change. They analyse the variety of judicial approaches used by the European Courts in specific human rights fields to predict the future rights regime in Europe.

In order to understand the background to the likely changes that would be required following accession, the EU's accession conditions to the ECHR are explored and an attempt made to trace the likely trajectory Europe is taking to strengthen human rights protection. Moreover, some of the chapters question how the EU itself is evolving in this new environment. These are more than academic questions as they point to dynamics that are bound to shape economic, political, and social realities affecting life in Europe.

The authors in this volume address a number of important and exciting themes and arguments. In particular the interaction between the two Courts in Europe; the fundamental rights quest in relation to equality in employment law; migration and citizenship, computer law, access to justice, judicial cooperation in civil and commercial matters and projections about whether the EU's accession to the ECHR is likely to happen. The following questions are considered in turn.

## I. THE INTERACTIONS BETWEEN THE TWO COURTS IN EUROPE

In line with some institutionalist theorists' view,<sup>8</sup> the interactions between existing legislative and judicial bodies within the EU and the network of actors at both national and supranational levels generate more institutionalisation.<sup>9</sup> Hence, the

in Strasbourg on Friday 13 June 2014, at the seat of the Council of Europe. Some of the chapters in this volume also reflect on the findings emerging in a project funded by the British Academy (Small Research Grants (SRG) 2011 Round).

<sup>8</sup> See, for instance, JL Campbell, *Institutional Change and Globalization* (Princeton, Princeton University Press, 2004).

<sup>9</sup> Morano-Foadi and Duina, 'The Institutionalisation of Regional Trade Agreements Worldwide' (n 2) at 562.

role of the two European Courts in shaping the architecture of Europe in the protection of fundamental rights is pivotal.

Member States through the Lisbon Treaty were committed in an unprecedented way to uphold respect for human rights, while implementing EU law, through the binding effect of the Charter. Yet, the actual interpretation of the Charter by the CJEU seems heavily influenced by the jurisprudence of the ECHR. Although the Convention lies outside of the domain of the EU, Article 52 of the Charter makes it necessary to respect it. The EU's future accession to the ECHR aims to close the circle, as the EU would be subject to the external scrutiny of the ECtHR. However, the recent Opinion of the CJEU has made the EU's accession to the ECHR a more remote possibility as it is not currently possible on the basis of the current draft Agreement. However, even without imminent accession, the interplay between the Courts and the use of the Convention is likely to continue and guide EU jurisprudence, constituting the minimum standard of protection in Europe. At EU level, in the absence of accession, a more extensive protection might be guaranteed by the application of the Charter.

The chapters attempt to assess the path taken by each of the two Courts to guarantee an effective protection of rights in Europe. Weiss argues that whilst the ECtHR was already a human rights court by virtue of its intensified proportionality control, the CJEU has tentatively taken first steps on this path but it is still tempted to continue traditional interpretive approaches due to its structural characteristics. The CJEU's recent ruling signals a period of crisis in relation to accession. The CJEU appears to have cautiously considered the implication in relation to autonomy of EU law by disregarding the fundamental values upon which the Union was founded.

In her contribution, Raba argues that conflicts between the Strasbourg Court and the Luxembourg Court concerning the implementation of ECHR cannot in principle be ruled out. Member States are bound to respect the ECHR as interpreted by the Strasbourg Court and at the same time have to observe Union law as interpreted by the Luxembourg Court. Thus, she concludes that a more complete recognition and protection of human rights for people in Europe will be achieved, when it occurs, via the EU accession to the ECHR. She also provides some insight in relation to the CJEU's ruling and the actual status of the negotiations, calling for a pragmatic approach to consider the CJEU opinion in the light of broader questions of EU post-Lisbon fundamental rights architecture.

In a similar vein, Polakiewicz in his prologue underlines the importance and urgency of accession, now temporarily on hold, to obtain legal certainty and enhance consistency in the application of human rights, fostering a harmonious development of the relevant case law of the ECtHR and the CJEU.

Based on empirical findings, Andreadakis argues that the two Courts have adopted a totally different approach towards accession and thus any post-accession relationship will represent one of the most controversial issues to be resolved in any future Accession Agreement. He provides a critical review of the whole process following the CJEU's Opinion of December 2015.

II. THE FUNDAMENTAL RIGHTS QUEST: EQUALITY IN  
EMPLOYMENT LAW, COMPUTER LAW, CITIZENSHIP  
AND MIGRATION, ACCESS TO JUSTICE AND JUDICIAL  
COOPERATION IN CIVIL MATTERS

In his chapter Wintemute attempts to answer the question of which European Court is procedurally 'fitter' to handle novel rights cases with a focus on sexual orientation or gender identity discrimination. He argues that, despite the fact that the CJEU has produced many valuable and influential human rights judgments, especially in the area of sex discrimination law, its tendency is to be substantively cautious. This, combined with the rigidity in its procedures, reduces its procedural 'fitness', and makes it a risky choice of forum for a novel human rights issue. However, Wintemute concludes that the CJEU could become substantively 'braver' if takes seriously Article 52(3) of the Charter conferring a more extensive protection. He then suggests some recommendations to assist the Court to become procedurally 'fitter'.

Following a similar line of argument, Loenen and Vickers argue in the context of the regulation of religious expression in the public sphere and its balance with other equality rights, that if the CJEU accepts a wide margin of appreciation in the level of protection afforded to these human rights, moving to a position equivalent to the ECtHR, then there is the risk that some majorities will not hesitate to use this flexibility and deference to limit the human rights of minority groups.

In balancing economic interests and social policy choices, as suggested by Weiss, the CJEU appears much more rigorous with regard to Member States' measures impeding the exercise of fundamental freedoms, rather than when reviewing the legality of EU institutions' acts. In pre-Lisbon cases, a strong bias in favour of promoting European integration and of preferring EU fundamental freedoms over EU fundamental rights is evident. Even in post-Lisbon cases, the CJEU, when reviewing the proportionality of EU acts, in many cases first of all restates the traditional judicial approach of underscoring the leeway of the EU legislature and of confining itself to a review of whether that measure was not manifestly inappropriate to reach the aim.

As affirmed by Pollicino, the new area of internet law provides the platform to challenge the two Courts' approaches of balancing contrasting fundamental rights, such as, for example, copyright and freedom of expression.

In the context of migration, Morano-Foadi offers a contextual analysis of the various categories of non-EU nationals legally resident within the EU, reflecting on the convergent approaches adopted by the two Courts in migration law cases dealing with a fundamental rights issue. Velluti reflects on the extent to which European Courts are attempting to reduce the present gap between fundamental rights and legal remedies to ensure better protection of asylum-seekers.

Interesting convergences arise in the final pair of chapters which consider the role of both Courts as human rights adjudicators. Gillies notes the development of an increasingly particularised EU jurisprudential framework for the

autonomous interpretation of EU private international laws. In his chapter on the recent judgments of the Grand Chamber on access to justice, Popović considers the expansion of the ECHR's protection under Article 6, both by way of giving greater precision to the requirements of the application of Article 6(1) of the Convention and by extending the protection of Article 6 to certain additional classes of cases.

### III. THE FUTURE OF FUNDAMENTAL RIGHTS PROTECTION IN EUROPE: THE EU'S ACCESSION TO THE ECHR

A number of questions recur throughout the chapters in this volume, relating to the future of fundamental rights in Europe. Perhaps the most important insight about the future rights' framework emerging from the chapters in the volume will depend on the role taken by the Courts and in particular by the CJEU. Convergences, divergences and common trends between the two Courts in safeguarding fundamental rights represent the conundrum of the future.

The shift from the CJEU's conservative approach, even prior to accession, towards a more progressive and creative jurisprudence will advance integration. This swing, together with the EU's accession, when and if it occurs, will represent further evidence of the EU's move away from the Free Trade Area. This is also confirmed by the role of the Charter within the EU legal system. As suggested by Jääskinen, we can now rely upon the Charter as an instrument that continues a certain tradition in fundamental and human rights law, and which at the same time combines the different currents of protection of rights into a legally binding, unified single instrument.

By contrast, opting for a pluralistic vision of Europe where the two complex and multifaceted European entities grow without particular attention to each other, having a separate scope and adopting diverging tools, will slow down the integration process moving towards a more intergovernmentalist view of Europe. For the time being, this seems to be the case as the accession process now appears to be stalled. The CJEU's ruling has questioned issues which lie at the heart of the EU legal system, even though it is likely that the two Courts will still look at each other's case law. Consequently, the approach now being taken by the CJEU arguably ignores certain broad patterns that are already discernible.

The first pattern considers the fact that the EU, as all organisations, exhibits a tendency to expand, whether in its formal architecture and mandates or in its everyday, informal practices and reach. Thus, this expansion has already witnessed more rights-based protection. Also the Council of Europe has made a small movement towards supranationality for the purposes of achieving greater protection of human rights. This is visible in the work of the ECtHR in interpreting the Convention and having a final word in Europe, which undoubtedly introduces a significant supranational element to the national dimension.

A second pattern concerns the difference between formal arrangements and *de facto* operational realities. There is often a split between Member States' or institutional objectives and procedures and practical achievements, due to the change of policy priorities or administrative and financial constraints. Chapters in this volume have invoked solutions addressing specific human rights fields, suggesting a number of significant recommendations to officials, judiciary and member states alike.

This leads to the third pattern. It is quite clear that deeper protection of human rights depends on political and institutional will. In relation to the draft Accession Agreement, as Raba argues, despite the long-term slow pace of negotiation and the fact that the EU political agenda has been 'high jacked' by more pressing issues, impressive progress had been made in the last three years. Nonetheless the CJEU's ruling has temporarily stopped the process. Further legal and political obstacles need to be overcome before accession becomes a reality. In this process it is important not to lose sight of the ultimate purpose of EU accession to the ECHR, that is to enhance fundamental rights protection for the individual.

We hope the chapters in this volume will offer useful insights contributing to the debate on the future architecture of Europe.