Accession of the EU to the ECHR: A more developed fundamental rights low for the EU after the Lisbon Treaty?

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Abstract The Treaty of Lisbon introduced important changes in the protection of human rights in the EU, the most important of which lie in the changes in Article 6 of the Treaty on the European Union. These provisions indicate that the EU Charter of Fundamental Rights is now legally binding, having the same status as primary EU law, and that the EU "shall accede" to the European Convention on Human Rights (ECHR). Since the entry into force of the Treaty of Lisbon, the Charter has been referred to on numerous occasions by the European Court of Justice and now acts as the main source of human rights in the EU. This article examines the import of this case law, some of which are ground-breaking and controversial, as well as how the higher profile for human rights under the Charter is likely to change the nature of the EU’s relationship with the ECHR. The article also examines the complex procedure for the EU’s accession to the ECHR, which is now underway, highlighting particularly significant aspects of this process. The article concludes with some general reflections about the status of human rights protection in the EU, suggesting that this has become one of the most significant areas of EU law that has had, and continues to have, a crucial impact on the EU’s relationships with its Member States, the EU and international law.

Keywords: international law, European Court of Justice, human rights, treaty of Lisbon, the rights, legally binding

1. Introduction

What sort of role should human rights play in the European Union (EU)? While no organisation would ever openly reject or ignore the crucial role of human rights in contemporary consciousness (not least the EU, with its roots in postwar attempts to forge peace among nations previously guilty of the greatest atrocities), the EU’s overwhelming associations with free trade, the single market and regulation might suggest that it cannot be primarily defined as a human rights organisation. Its centre of gravity appears to lie elsewhere. How can we, then, ensure respect for human rights in the EU at a time when economic crises or terrorist threats are sometimes offered as reasons for their diminution or side-lining? Events such as the extraordinary rendition of terrorist suspects by the US via EU Member State territory (for which the application is now lodged against Poland, Al Nashiri v Poland, under the European Convention of Human Rights on 6 May 2011, in which it is alleged that Poland hosted a secret CIA prison at a military intelligence training base in Stare Kiejkuty where the applicant was held incommunicado and tortured).

Currently, with the Lisbon Treaty in force, one can begin to assess its achievements in the fundamental rights field. In the face of this, the Lisbon Treaty, which came into force on 1 December 2009, has introduced, or enhanced, provisions that should strengthen the protection of fundamental rights in the EU. The Charter of Fundamental Rights of the European Union (CFR or ‘the Charter’) has at last acquired binding force; provision is made for the EU to accede to the European Convention on Human Rights; and the European Court of Justice (CJEU) is to have greater powers of judicial review in the field of police and judicial cooperation in criminal law (Weak mechanisms operated in the past under the 3rd Pillar with diminished control by the CJEU, and the former Article 35(2) TEU exclusion of matters of ‘national security’ from the scope of those cases which could be heard by the CJEU. ), an area of obvious relevance to human rights. The EU has also now appointed a commissioner with new and special responsibilities for fundamental rights. This appointee, Viviane Reding, has already claimed that the EU is ‘an area of fundamental rights. Furthermore, Article 2 of the Treaty on European Union (TEU), as amended, insists that ‘respect for fundamental rights’ is one of the values on which the EU is founded, including a new reference to ‘the rights of persons belonging to minorities.

However, it is the transformation of the Charter into a legally binding document with primary law status and the extension of the Court’s jurisdiction in areas such as asylum, immigration and criminal matters that will (and indeed have already) increase the Court’s profile in the fundamental rights field. This article pays special attention to the role of the Court and to its recent jurisprudence. However, the first point of note is that human rights protection in contemporary Europe is
complicated and not always satisfactory. There are at least three (i write ‘at least’ because international law may sometimes offer further avenues) possible judicial avenues for European residents to assert their human rights. First, they may apply in their national courts for the enforcement of their rights as protected by national law, for example, under the UK Human Rights Act or the German Basic Law.

Second, if this fails, once they have exhausted domestic remedies, they may proceed to the European Court of Human Rights (ECtHR) in Strasbourg. Third, if the matter is one that falls within the competence of the EU, they may have a claim under EU law, either in their national courts, in the CJEU, or both. (That is, in the instance of a claim commenced in the national courts, in which a reference is made to the CJEU in Luxembourg for a preliminary ruling and then completed in the national courts.) Therefore, from this perspective, it might appear that there is not a lack but possibly a surfeit of human rights protection within the European legal space. Is the additional EU level necessary? Does it add any value to existing fundamental rights protection? A pertinent question might be whether fundamental rights are indeed ‘lost in complexity’ in the EU (Van der Heyning, 2011).

2. Fundamental Rights in the EU—The Growth of an Idea

Despite Article 2 of the TEU’s majestic claim that the EU is ‘founded’ on the value of respect for human rights, human rights were not a pressing concern in the early EEC (as it then was). As Smismans (2010) states, to suppose otherwise, it is to engage in mythology. The reasons for this lack of attention are embedded in the EU’s history and are similar to the explanation as to why there was no Bill of Rights in the original draft of the American Constitution, when it was thought that the Federal Government would be insufficiently powerful to require a bulwark against its powers in the form of guaranteed rights. The EEC Treaty started as an economic treaty of limited ambitions, with the aim of creating a common market. There were no sections on fundamental rights because the EEC founders did not think this was relevant to a treaty with mainly economic aspirations. The European Convention on Human Rights and Fundamental Freedoms (ECHR) (1950,5 ETS) was also, of course, already in existence and was likely sufficient to operate as a ‘Bill of Rights’ for Europe. However, the EU has gone beyond being a common market, encompassing a much greater range of activities, particularly in the area of freedom, security and justice (for which see now TitleV TFEU), which includes visas, asylum and criminal law and has obvious relevance for human rights.

Cases have been heard by the CJEU concerning, for example, freedom of expression, the right to equal treatment of transsexuals, and the rights of suspects within the field of international terrorism. (T-163/96 Connolly v Commission [1999] ECR II-463; Case C-13/94 P v S and Cornwall County Council [1996] ECR I-2143: and Joined Cases C-402/05P and C-415/05P Kadi and Al Baraka at v Council [2008] ECR I-6351. The growth of EU competence then requires, at the very least, that the EU ensure that its actions comply with human rights and that mechanisms exist for legal redress where it has not. Whether the EU should go further than this, and forge a more active human rights role for itself in the 21st century, notwithstanding that attempts to create a broader, more constitutional identity for itself failed with the defunct European Constitution, is a different matter and will be considered in greater detail later in this article. However, despite the EU’s increased competences, it was only in December 2000 that the EU proclaimed its own (then nonbinding) Charter of Fundamental Rights, and only with the coming into force of the Treaty of Lisbon on 1 December 2009, that this Charter eventually attained legally binding force (Mancini, 1989).

Therefore, for most of its history, the EU possessed no charter of rights. However, this does not mean that fundamental rights were ignored. For more than 40 years, fundamental rights have had a recognised status in the EU as ‘general principles of law’ (Article 6(3) of the TEU [2008] OJC115/15 states: ‘The Union shall respect fundamental rights, as guaranteed by the European Convention on Human Rights and as they result from the constitutional traditions common to member states as general principles of Community law.’ a status confirmed by successive versions) of Article 6 of the TEU (starting with the insertion of Article F(2) by the Treaty of Maastricht in 1992, which had nearly identical wording to Article 6(3).

There is, of course, Article 2 of the TEU’s assertion of the foundation of the EU on respect for human rights, which is supported by a sanction procedure in Article 7 of the TEU, whereby a member state’s rights may be suspended if it engages in ‘a serious and persistent breach...of values mentioned in Article 2’. There are also specific treaty items that qualify as fundamental rights, such as Article 157 of the Treaty on the Functioning of the European Union (TFEU) (the right to equal pay) and Article 19 of the TFEU, which provides the EU with a legal base to enact legislation on nondiscrimination. Its present name is a result of amendments by the Treaty of Lisbon.

Article 19 of the TFEU reads: The Council...may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation). Some fundamental rights exist as secondary legislation rather than treaty provisions, of which equal treatment directives are good examples. However, it should be noted that the protection of fundamental rights in the EU has evolved in an ad hoc, confusing, incremental manner and that there is
no clear conceptual support for the rights protected by EU law. Hence, the importance of the Charter being able to function as a 'road map' and identifier of the EU's rights function, which it should be able to perform more effectively since becoming binding. Given the lack of EU rights until 2000, the protection of fundamental rights for the first 40 years of European integration has developed into a very large judicial system.

The history of how the protection of fundamental rights developed in the EU is now well known, and space precludes its discussion here, but the late Judge Mancini, of the ECJ, written in 1989, summarised the position that the Luxembourg Court had reached in the following manner of fundamental rights: the work is the most striking contribution the Court has made to the drafting of a constitution for Europe. However, he went on to describe it this way: “this statement was forced on the court from abroad, by Germany and later, the Italian constitutional courts (Mancini, 1989) autonomy, supremacy and legitimacy of EU law, not for their purposes (Coppelland O'Neill, 1992)”. Criticism that continues today.

Therefore, the changes brought about by the Lisbon Treaty to the protection of fundamental rights to the EU will need to be assessed according to these two critiques of incoherence and of the manipulation of rights for other purposes. Article 6 of the TEU, as amended by the Lisbon Treaty, now has a tripartite structure and reads as follows: Article 6 (ex Article 6 TEU) (1) The Union 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. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the treaties. The rights, freedoms and principles of the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter that set out the sources of those provisions. (2) The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession will not affect the Union’s competences as defined in the Treaties. (3) 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, constitute the general principles of the Union’s law. Article 6(1) therefore deals with the Charter, Article 6(2) with EU accession to the ECHR and Article 6(3) with fundamental rights as general principles of law. The remainder of this article addresses these three topics in that order.

3. Accession of the EU to the ECHR

The growth of the EU into a feasible polity in its own right, with substantial fundamental rights jurisprudence, raises the issue of external accountability. The most obvious source of this would be the ECHR. The accession of the EU (formerly the EC or EEC) to the ECHR had been considered in the past but was never achieved. There are many perceived advantages of EU accession to the ECHR. A formal linking of the EU and ECHR could be seen as underlining EU concern with human rights and eliminating charges of double standards, based on the criticism that whereas the EU requires all of its Member States to be parties of the ECHR, it is not itself a party. It would also minimise the danger of conflicting rulings emanating from the CJEU and ECHR, given that they could now rule on virtually identical issues.

The problem of conflicting rulings has already arisen in the context of the right to respect for private life under Article 8 and the right to a fair trial under Article 6 of the ECHR. EU accession to the ECHR would also alleviate the situation in which individuals may find themselves when faced by possible breaches of the ECHR by EU institutions, given the present situation in which there is no possible remedial action in Strasbourg unless EU law has been implemented by some act on Member State territory. Accession would therefore satisfy a perceived need for external judicial supervision of EU institutions, especially given the large growth of EU agencies and competencies in, for example, the field of criminal law. In that Opinion, the ECJ held that, as EC law then stood, the Community had no competence to accede to the ECHR, as there was no adequate legal basis in the Treaty for accession, rejecting the argument that Article 308 of the EC (then the governing provision) might serve as a base. Therefore, accessions could only be brought about by way of the Treaty amendment. Article 6(2) of the TEU, as amended, has removed that obstacle (Hart, 2011), providing a legal basis for EU accession, reading as follows: The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession will not affect the Union’s competences as defined in the Treaties.

A. Procedure Therefore, Article 6(2) of the TEU now makes it obligatory for the EU to accede to the ECHR. This does not, however, mean that accession is by any means a simple affair. Given the particular characteristics of the EU and its singular nature as a sui generis international organisation rather than a state, accession will prove challenging. The Council of Europe (COE) and its institutions are not designed with supranational entities in mind. Questions such as the following had already been canvassed in the course of previous attempts to urge EU accession, for example, who would represent the EU in the Strasbourg court, and would non-Member States of the EU have a right to bring proceedings against the EU in the ECHR? The requirement for the exhaustion of domestic remedies under the Convention could also lead to extremely lengthy litigation if EU law was at issue and preliminary rulings had already been made to Luxembourg.

The accession process must take into account these challenges as well as the complicated procedures for accession required by EU law, which are described below. Accession must follow the long and complex mandatory procedure that governs all EU agreements with third countries and international organisations, as described in Article 218 of the TFEU. For
such an agreement to be concluded, Article 218 sets a requirement of unanimity in the COE, the consent of the European Parliament (by a 2/3 majority) and its ratification in all EU and COE Member States. Furthermore, it is probable that one or more member states will ask the CJEU for an opinion under Article 218(11) of the TFEU on whether the accession treaty is compatible with EU law. There may also be concern or objections raised by some non-EU COE Member States. Therefore, the accession process is likely to take several years. However, the Stockholm Programme (Council of the European Union, The Stockholm Programme ‡ An open and secure Europe serving and protecting citizens (Brussels, 2 December 2009)) at 3. of the Council of the EU urged that ‘the rapid accession of the EU to the European Convention on Human Rights is of key importance’ (European Commission, 2009).

4. Fundamental Rights as General Principles of Law

This residual system of human rights in the EU should by no means be underestimated. Article 6(3) of the TEU, as amended by the Treaty of Lisbon, provides that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law’. Article 6(3), and its earlier versions, reflect the earlier case law of the CJEU in which, as already mentioned, it was held that respect for fundamental rights forms an integral part of the general principles of law protected by the Court. The insistence of the German courts that EU law respected fundamental rights and their veiled threat of ignoring the primacy of EU law if it did not was the original motivation for the protection of fundamental rights in the EU and was reflected in the Court of Justice’s early jurisprudence in Stauder and Internationale Handelsgesellschaft (Case 29/69 Stauder v City of Ulm [1969] ECR 419).

However, the common constitutional traditions of the Member States have not, over time, been as important a source of principles for the CJEU as the ECHR, which has been ratified by all the Member States of the EU. The constitutional traditions of the Member States provide a necessarily incoherent source, given the very different constitutional traditions and practices of those States. The result is that the Court of Justice, in analysing those sources, necessarily forms its own subjective opinion as to whether a right is recognised in common throughout the Member States and, even if it is recognised, whether it is actually protected in the same way. Indeed, Member State constitutional traditions can prove to be a divisive and fragmenting source, rather than a unifying source, for rights. In any case, where a right is respected only in very few States or protected in a singular and particular way (which may amount to the same thing), the tendency may be to fragment rights protection. In Omega, Germany banned a laser syndrome game involving simulated homicide because it infringed on the protection of human dignity under the German Constitution.

The applicant company, Omega, challenged the ban as contrary to the freedom to provide services under EU law, arguing that the game had been lawfully produced and marketed in the UK. Human dignity is given special priority under the German Constitution and the case law of the German Constitutional Court. If the CJEU had enforced internal market law at the expense of the protection of dignity in the German Constitution, this might have encouraged challenges to the supremacy of EU law from Germany. Therefore, the CJEU upheld the German ban, but while holding that human dignity was also respected by EU law, it stated that this outcome did not depend upon ‘a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected’.

The Court, therefore, considered the subject matter to belong to a sphere properly left to the Member States. In this context, rather than unifying and harmonising fundamental rights in the EU, Member State constitutional traditions may in fact separate them, operating not as conditions of legality of EU action but rather as Member State defences to EU action, justified as furthering the public interest conventional to the normal function of fundamental rights to operate as claims against state action. In this case, they are pleaded as state justifications for limiting the application of EU law in their territory and function rather like the margin of appreciation under the ECHR[49] point that will be elaborated further presently.

The Charter also takes into account this more recent function of constitutional traditions as sources of rights, stating that 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’, a further recognition of the individual, particular and singular nature of state constitutional traditions, rather than their tendency to harmonise and unify EU fundamental rights law. However, if constitutional traditions provide a complex and possibly fragmentary source of general principles of law, the role of the ECHR in future elaborations of EU fundamental rights as general principles of law is questionable. Certainly, after the accession of the EU to the ECHR, it is arguable that the ECHR should simply be applied directly to EU law rather than through the medium of general principles of law (Co. v Sullivan, 1964)

Additionally, might the Charter not have superseded general principles of law as a source for EU rights? Possibly not. Although the Charter is now binding, with primary law status, by continuing with this reference to general principles, Article 6(3) makes it possible for the EU courts to recognise and/or enforce rights that are not to be found in the Charter or ECHR or, significantly, rights in the Charter whose impact is limited due to the existence of protocols such as those of the UK and Poland or by horizontal, or limitations, clauses. It is, however, an interesting question as to whether general principles should
now be seen as subsidiary to the Charter, which now seems to have become the first point of reference for fundamental rights in the EU (Tightrop, 2011).

The Kucukdeveci case (Kucukdeveci, 2010), which has controversial implications, provides an interesting illustration of possible future directions for general principles of law and how general principles of law can work together with the Charter. Ms. Kucukdeveci had been employed in Germany in Sweden for 10 years when, at the age of 28, she was fired by that company with one month's notice. In accordance with German legislation, in calculating her notice period, no period of employment before the age of 25 was taken into account. She challenged her dismissal, claiming that German law discriminated on grounds of age and itself violated EU law, whose implementation period had expired prior to her dismissal. However, given that Swedex was a private party, the general prohibition on the horizontal direct effect of directives (on the lack of direct effect of directives (Craig, 2009)) would normally have prevented her reliance on the Directive.

In spite of this, the CJEU determined that nondiscrimination on grounds of age was a general principle of EU law that was given specific expression in the Directive. Article 21(1) of the Charter also provides that ‘discrimination based on...age...shall be prohibited’. The Court in Kucukdeveci proceeded to examine the matter at hand and concluded that the principle, as given by the Directive, precluded German national legislation. At the centre of the Court’s judgement was the requirement that national courts apply a general principle of nondiscrimination on grounds of age as an autonomous ground for judicial review, giving rise to an obligation to set aside conflicting national legislation in a dispute between private parties. Kucukdeveci illustrates that those general principles of EU law (and their realisation as EU fundamental rights) can have horizontal direct effects.

This development is very important, given that general principles and fundamental rights usually protect individuals from public authorities rather than from private parties. Given the significance of such a holding, it might have been thought desirable that the CJEU set out the reasons for extending the reach of general principles of law into the private sphere. However, Kucukdeveci provides no such clear reasoning. In Mangold and Kucukdeveci, the Court looked to Member State constitutional traditions and international law as a source for the principle of nondiscrimination on grounds of age. However, the horizontal application of the equality principle is not the norm at the national and international levels, and very few EU Member States even explicitly recognise such anagenerale principles. Nor does the Court’s citation of the Charter provide any support for horizontal application because the scope of the Charter is, as already discussed, limited to EU bodies and Member States in Article 51 of the CFR.

The holding in Kucukdeveci provokes speculation as to which other general principles the Court might consider to have a horizontal effect. Elsewhere, in the Audiolux case, the CJEU held that a principle must have a ‘constitutional status’ (‘Ibid’) to qualify as a general principle of Community law rather than being ‘characterised by a degree of detail requiring legislation to be drafted and enacted at community level by a measure of secondary community law’. Obvious candidates for principles of constitutional status are those set out in the Charter, although the field is not limited to the Charter. Therefore, although, according to Article 51 of the CFR, the Charter may not extend EU competences, it may nonetheless be utilised to enable the faster transposition of EU law into domestic law if its provisions operate as general principles of law giving special expression to directives, and although the Charter’s scope is expressed as binding only EU institutions and Member States implementing EU law, it may nonetheless become a source of general principles of law binding on private parties.

The Court’s declaration in Kucukdeveci of the crystallisation of unwritten obligations of private parties as overriding general principles, or fundamental rights, seems to threaten legal certainty, resulting in a situation in which EU law can apply even on matters only incidentally governed by a directive and even if, due to the lack of horizontal effect of directives, the directive itself cannot apply. In Kucukdeveci, the CJEU did not stress Article 21 of the Charter. Indeed, the entry into force of the Lisbon Treaty postdated the facts of the case, and a direct application of the Charter would have opened the Court to applying the Charter retrospectively. However, the Charter’s binding, treaty-like nature now provides private parties with the power to invoke it in private disputes on the basis of the reasoning in Kucukdeveci, although it would seem that the role that the Charter plays in such cases is as a source of general principles of law. Kucukdeveci therefore illustrates the ongoing, far-reaching potential of general principles of law and their capacity to provoke controversial, multidirectional, new developments.

5. A More Developed Fundamental Rights Law for the EU?

This article concludes with a brief discussion of further recent case law, which raises interesting questions as to the future development of EU fundamental rights law. One such case with far reaching implications is that of Ruiz Zambrano. The main issue for determination by the European Court of Justice was whether Mr. Ruiz Zambrano, a Colombian national, could claim a right of residence in Belgium under EU law following the birth of his children (who were EU citizens) in 2003 and 2005, notwithstanding that his EU citizen children had yet to exercise their right of free movement within the Union, which would normally be a requirement for triggering the application of EU law, removing it from the scope of Belgian domestic law. Although most of the discussion in this case focused on EU citizenship and reverse discrimination, in her Opinion, AG Sharpston considered the role of fundamental rights in EU law, arguing that their invocability should be ‘dependent neither
on whether a Treaty provision was directly applicable nor on whether secondary legislation had been enacted’ (Dickson and Eleftheriadis, 2012).

Rather, AG Sharpston argued that EU fundamental rights should protect European citizens in all areas of EU competence, regardless of whether such competence had actually been exercised. Part of the point of her comparison was to compare the present EU law on fundamental rights, with its uncertain scope of EU competence, against an ideal of consistent protection of fundamental rights. In particular, the question of reverse discrimination, whereby Member States can, in purely internal situations, apply less favourable laws than would EU law in similar situations, continues to cause problems. Some Member States indeed now reject the possibility of such reverse discrimination, asserting that withholding a right from a nation in such a way is discriminatory and infringes constitutional equality clauses. The Court in Ruiz Zambrano, however, did not discuss this point, despite the apparent centrality of the right to family life. There are other factors that clearly have an impact on, and may accelerate, the recent development of EU fundamental rights law.

The growth in anti-terrorism law in the early years of the 21st century involved the EU as much as its member states and actions taken at the EU level, such as the European arrest warrant or concerning data protection (Douglas-Scott, 2011). The EU has also, in taking over competences previously exercised by its Member States, been subject to obligations under international law, such as UN Security Council resolutions adopted under Chapter VII of the UN Charter. Kadi, one of the most significant cases ever determined by the CJEU, illustrates the relevance of this.

In the Kadi case (Kadi & Al Barakaat, 2008). Mr. Kadi was one of a number of people and groups who had been blacklisted as terrorists and had their assets frozen by a UN Security Council resolution. The EU, as a successor to the member states in this area of foreign policy, took measures to implement the resolution. Kadi argued that he was the victim of a miscarriage of justice and had never been involved in terrorism. He claimed, inter alia, that the EU measure violated his fundamental rights to property, the right to a fair hearing and judicial redress. It was not possible for him to petition the UN Sanctions Committee directly, as the Committee does not accept direct representations from individuals but only from Member States. Such situations have been characterised as ‘black holes’, with people finding it very hard to find a forum to challenge their blacklisting, a state of affairs that undermines the more usual perception of international law as a source of protection for human rights. In Kadi, the Court of Justice, proclaimed the constitutional autonomy and hegemony of the EU legal order, holding that the EU is a community based on the rule of law and that respect for fundamental rights is an integral part of the EU legal order. It also held that the obligations of an international agreement could not prejudice the constitutional principles of the EU treaty.

Thus, there was less concern than the CFI about the primacy of the UN SC resolutions. From there, it was possible to review the measure under EU rights standards and to find that Mr. Kadi’s right to effective judicial process had been violated by the failure to communicate to him the reason for his listing. The failure of the observer due to process standards also resulted in a violation of his right to property. This might seem like a victory for human rights. However, the real concern of the European Court seemed to be the autonomy of the EU legal order. The CJEU relied very heavily on EU ‘constitutional principles’ in its judgement. Indeed, the Court locates the principle that all EU acts must respect fundamental rights among the constitutional principles of the treaty. This illustrates a very strong constitutional emphasis on the part of the CJEU on par with that of its early pathbreaking cases of Van Gend en Loos and Costa v Enel, which set out the basic principles of the direct effect and supremacy of EEC (as it then was) law. However, the judgement showed less respect for international law and UN resolutions, rejecting any notion of a subordinate relationship between the EU and the UN (De Burca, 2009). The Court’s decision in Kadi, along with AG Maduro’s Opinion, also seems to align itself with the German Constitutional Court’s Solange approach, suggesting that judicial deference extends only as far as the satisfactory protection of human rights by other jurisdictions.

6. Final considerations

First, it highlights the EU’s lack of a clearly developed, substantive understanding of human rights or justice, with fundamental rights initially recognised by the Court of Justice as a means to protect EU law’s supremacy. Despite the recognition of fundamental rights in certain cases, such as Kadi, the EU’s primary focus remains on economic integration rather than human rights.

Second, the protection of fundamental rights within the EU is complex and often addressed on a case-by-case basis. The EU’s approach tends to prioritise proportionality over the development of a coherent substantive fundamental rights law.

Third, national courts play a significant role in ensuring the observance of fundamental rights within the EU. This leads to a multilevel and complex system of protection, with national courts challenging EU decisions on grounds of inadequate protection of fundamental rights.

Furthermore, the article suggests that the EU’s accession to the European Convention on Human Rights (ECHR) and alignment of its fundamental rights jurisprudence with Strasbourg standards are necessary steps to legitimise its fundamental rights credentials and address challenges from national courts.
Despite the resources provided by the Lisbon Treaty for more effective protection of fundamental rights, there remains a need for the EU, particularly the Court of Justice, to adopt a more mature conception of fundamental rights as inherent goods rather than as instrumental to market integration.

Finally, the dynamic between the Court of Justice and the European Court of Human Rights, as well as the potential impact of increased fundamental rights competence for the EU, are complex issues that will continue to be debated. In summary, while recent developments have increased the complexity of fundamental rights protection within the EU, challenges remain in ensuring robust protection and aligning EU standards with those of the ECHR.

**Ethical Considerations**

Not applicable.

**Conflict of interest**

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