

Introduction

The protection of fundamental rights in Europe and the way the charters of rights have been interpreted by the highest courts (the European Court of Justice, the European Court of Human Rights and the national constitutional courts) have always attracted the interest of legal scholarship. The latter has coined the expression ‘multilevel’ protection,¹ which captures the complexity of the relation between the sources of law in which fundamental rights are enshrined and the courts entrusted with addressing issues relating to such rights.

The interest in finding the best way to guarantee an effective protection of fundamental rights in the EU legal order gained new impetus with the entry into force of the Lisbon Treaty on 1 December 2009. Indeed, Article 6(1) of the Treaty on European Union (TEU) conferred binding legal value on the Charter of Fundamental Rights of the European Union (CFR), and while the Charter did introduce new rights, it more broadly reaffirmed (by codification) the general principles of law that over the last decades the European Court of Justice (ECJ) had developed in the field of fundamental rights. The Treaty also laid the legal basis for the Union to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (Article 6(2) TEU). Thus the Lisbon Treaty – giving effect to what had been set out 25 years earlier in Article 4 of the so-called Spinelli Draft – marks an important milestone in the European integration process, warranting the assertion that the European Union (EU) is equipped with a constitutional order of its own: central to this order is the protection of fundamental rights, and by foreseeing the accession to the ECHR, the Masters of the Treaties sought to increase the coherence of such protection in Europe.

There persistently lingers, however, what has been described as an ‘*incohérence génétique*’ of the EU legal system.² In fact, the protection of

¹ The expression seems to have been coined by Ingolf Pernice, ‘Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-making Revisited?’ (1999) 36 *CML Rev* 703.

² Edouard Dubout, ‘L’objectif de protection des droits fondamentaux et la répartition des compétences dans l’Union européenne: La confrontation des

fundamental rights figures among the Union's founding values (Article 2 TEU) and the promotion of such protection is an objective of the Union (Article 3 TEU). The Charter of Fundamental Rights, along with the general principles of law on the protection of fundamental rights, operates as a benchmark to determine the validity of secondary law and as an essential hermeneutical instrument that constrains the institutions, bodies, offices and agencies of the Union, as well as the Member States when they are implementing Union law (Article 51(1) CFR). No applicant State can be admitted to the Union if it does not respect and promote these rights, along with the other values on which the Union is founded (Article 49 TEU), and a Member State found to be in serious and persistent breach of such rights and values may be 'censured' by a suspension of its voting rights in the Council (Article 7 TEU). The new Article 6(2) TEU expressly provides for the Union's accession to the ECHR (finally making up for the lack of a legal basis highlighted in Opinion 2/94 of the ECJ) and some provisions in the Treaty on the Functioning of the European Union (TFEU) allow measures to be taken in the domain of fundamental rights (e.g. Articles 19 and 82(2)), but the Union has no general competence to pass legislation in this field. Indeed, both Article 6(1) TEU, which makes the Charter binding, and Article 6(2) TEU, which postulates the accession to the ECHR, respectively clarify that the 'provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties' and that accession to the ECHR 'shall not affect the Union's competences as defined in the Treaties'. Speaking to the same effect is the redundant language of Article 51(2) CFR.³

Even so, the EU legislator and the EU Courts alike have repeatedly intervened in this area,⁴ especially in response to the challenges raised by

logiques constitutionnelles' in Eleftheria Neframi (ed.), *Objectifs et compétences dans l'Union européenne* (Bruylant 2012) 369, 370, who also speaks of an 'attitude schizo-phrénique' on the part of the Member States, offering an in-depth analysis of the phenomenon.

³ Also laying down the same restrictions is Article 1 of Protocol No. 8 annexed to the TEU and the TFEU, relating to Article 6(2) TEU on the accession of the Union to the ECHR.

⁴ According to Dubout (n 2) 389, 'Les droits fondamentaux opèrent comme moyen de dilatation progressive du droit de regard de l'Union européenne en dehors des compétences qui lui sont attribuées'. On the existence of a general 'macro-principle' providing a suitable legal basis in virtue of which the ECJ, and indeed all EU institutions, may legitimately act to protect fundamental rights in the EU, see Joseph HH Weiler, Sybilla C Fries, 'A Human Rights Policy for the

Member States that would never have accepted the primacy of EU law without the Union's guarantee that there would be no encroachment on fundamental rights simply to ensure the unity and effectiveness of EU law. Sixty years after the Rome Treaties were signed, the Union – although at birth purely economic in nature – can now also be regarded as a system for the protection of fundamental rights.

Also testifying to this new era of European integration based on fundamental rights is Article 6(3) TEU, which the Masters of the Treaties decided to retain notwithstanding the binding force ascribed to the Charter. This provision confers on fundamental rights the status of general principles of EU law, and this unwritten source of fundamental rights prevents the ossification of the Charter's system for protecting rights, while ensuring that the integration process can move on.

The post-Lisbon legal literature has been using the Charter as a starting point in studying fundamental rights in the EU. The focus of these investigations falls on the scope of the Charter's provisions and their relation to those of the ECHR.

Apart from a few occasional remarks in contributions devoted to the Charter, legal scholarship does not accord much importance to an 'independent' study of the way the general principles of EU law bear on fundamental rights. Some authors have even claimed that general principles now play only a residual role, so that Article 6(3) TEU can be considered superfluous and even erased from the Treaty since the ECJ would still be able to use this source pursuant to Article 19 TEU.

This work places itself outside the mainstream approach to fundamental rights, and instead of focusing on the Charter in the current legal landscape – and only indirectly and marginally addressing the way fundamental rights are affected by the general principles of EU law – it will investigate the role that such unwritten source of law can still play after the codification operated by the Charter. This poses first and foremost the question of whether, and if so to what extent, the recognition of the binding force of the Charter has 'marginalized' or otherwise reshaped the role of the general principles of EU law in protecting fundamental rights.

Through an analytical and systematic study of the ECJ's case law, we will thus attempt to outline (i) the role the general principles of law regarding fundamental rights can still play in the EU system after the Lisbon Treaty's entry into force, (ii) the relation between unwritten and

European Community and Union: The Question of Competences' in Philip Alston (ed.), *The EU and Human Rights* (OUP 1999) 147, 157.

written sources of law concerning the protection of such rights and (iii) the techniques that have been used, or could or should be used, by the ECJ when handling general principles in order to ensure proper coordination with the Charter.

This book will thus assess the role and scope of written and unwritten law in the EU multilevel system of protection of fundamental rights, and in so doing the argument will be made that the general principles of EU law relating thereto still form an essential part of the EU system. They do so in *supporting* the Charter, acting as alternative tools for the protection of fundamental rights; in *complementing* the Charter, when it is ineffective; and even in *moving beyond* the Charter, when it is silent.

The complex normative paradigm outlined in Article 6 TEU has had to be systematized. For this reason, the discussion will begin, in the first chapter, by reconstructing the EU fundamental rights protection system under the same provision as amended by the Lisbon Treaty. After having dwelled upon the written source of EU law and its general principles, the analysis will focus on the legal basis for the Union's accession to the ECHR. Opinion 2/13 of the ECJ in 2014 led to the stalling of the accession process, which raises the issue of the status that the ECHR currently holds in the Union and its Member States, as well as the status that it would gain if the process should be brought to completion. Without discounting the difficulties involved in overcoming the impasse created by that Opinion, a few alternatives to accession will be considered that are capable of improving the dialogue between the ECJ and the European Court of Human Rights (ECtHR). However, accession is not believed to be indispensable for the furthering of fundamental rights protection in Europe, with the consequence that in the absence thereof the EU and ECHR systems would in any case continue to virtuously coexist.

The second chapter will examine in detail the relation between the relevant sources of law for the protection of fundamental rights mentioned in Article 6 TEU. Although, as noted, the Charter of Fundamental Rights largely reproduces the general principles developed by the ECJ, neither the Charter nor the Treaties contain any provision formally coordinating the two. This is quite peculiar if one considers that these two instruments for the protection of fundamental rights have (i) the same rank as primary law, (ii) the same sources of inspiration and (iii) the same scope of application, both applying only in cases involving EU law. The Charter and the unwritten source are instead expressly correlated with the ECHR, which continues to have indirect force in the Union system pending the Union's accession to it. This correlation is no longer established only through the general principles of EU law –

outlined by the ECJ by drawing them especially from the ECHR itself or from the constitutional traditions common to the Member States (Article 6(3) TEU) – but also through the Charter by way of its so-called homogeneity clause (Article 52(3)), which states that the ECJ shall guarantee to the rights provided for in the Charter the same meaning and scope of the corresponding ECHR provisions. Hence, there is a need to address the coordination between the Charter's provisions and the corresponding ECHR provisions looking at the case law of the ECJ and the ECtHR and focusing on the points of agreement and disagreement (past and present, real or apparent). Attention will then be paid to the way the general principles of EU law coexist with the ECHR and with the Charter (and specifically with the rights and principles set forth in the latter) under the Charter's horizontal clauses and the ECJ's case law.

The third chapter deals with the jurisprudence developed by the ECJ in the field of fundamental rights protection since the entry into force of the Lisbon Treaty. As will be seen, in interpreting EU primary and secondary law, and assessing the validity of acts adopted by the institutions, as well as the compatibility of national laws and practices with the Treaties, the Luxembourg Judges sometimes use written and unwritten sources of law as a parameter of constitutionality, while at other times they only use one of these sources (occasionally, quite surprisingly, confining themselves to general principles even when the Charter could and should be applied). The case law shows that the two sources have been interpreted and applied in parallel; and when the ECJ decides to use only one of the two sources, the same interpretative line of reasoning should be ensured to the other one when the circumstances call for its application. We shall thus be analysing cases in which the ECJ could have invoked alternatively or jointly both sources in ensuring the protection of fundamental rights but instead chose self-restraint and refused to use them as standards of constitutionality, sometimes denying that a certain fundamental right is worthy of protection. In the same vein, we will be looking at cases in which the ECJ, also by virtue of the homogeneity clause, could have set a higher standard of protection than that granted by the ECtHR but instead chose not to.

The fourth and final chapter examines those cases in which, even though the Charter has become binding, the general principles of EU law maintain and enjoy an independent legal life, which justifies their application beside and beyond the former. Indeed, if the dispute concerns facts that occurred before the entry into force of the Lisbon Treaty, the Charter cannot be applied *ratione temporis*. In such circumstances, fundamental rights can only be protected through general principles of EU law. The same occurs when the relevant Charter provisions are

directed at the EU institutions, bodies, offices and agencies, as opposed to the Member States (Article 41 CFR), or when the latter could be considered inapplicable to certain Member States (Protocol No. 30 on the application of the Charter to Poland and to the UK). Moreover, there are cases in which the general principles of EU law can integrate the Union's *acquis*: this is a function that they have always served in the EU system, as can be appreciated from the wording of Article 6(3) TEU, and it will be argued that this function in itself justifies retaining the textual provision of the TEU with the Lisbon reform. As anticipated, this function makes it possible to avoid the ossification of the rights enshrined in the Charter, and also allows for the development of the Union's *acquis* in such a way as to close some of the gaps in the system. In this case, the general principles will not evolve in parallel to the Charter, for they have no corresponding written rule, so they have an independent meaning and, as noted, an autonomous legal life. The general principles could enjoy a similar conceptual and operative autonomy even after the Lisbon Treaty, and regardless of the Charter's homogeneity clause (Article 52(3)), if the ECHR provisions continued to be applied by the ECJ taking into account the specificities of the EU legal order, therefore potentially departing from the ECtHR jurisprudence. The closing part of this volume will precisely tackle this 'conservative' function of the general principles investigating, in particular, whether the distinctive features, and thus the autonomy, of the EU legal order could actually survive the Union's accession to the ECHR.