Introduction

Sionaidh Douglas-Scott and Nicholas Hatzis

I

The place of human rights in EU law has been a central issue in contemporary debates about the character of the European Union as a political organisation. In Article 2 of the Treaty on European Union (TEU) human rights are described as one of the Union's foundational values while Article 6 TEU recognises fundamental rights as general principles of EU law and elevates the Charter of Fundamental Rights (CFR; Charter) to the same level as the Treaties. This is the culmination of a long process of incorporation of human rights principles in the legal architecture of the Communities and, now, the Union, which started in 1969 with the recognition by the European Court of Justice (CJEU) that 'fundamental human rights' are 'enshrined in the general principles of Community law and protected by the Court' (Case 29/69 *Stauder* [1969] ECR 419).

The original Treaties did not mention human rights and the initial reaction of the CJEU to human rights arguments was indifferent, if not hostile (for example Case 1/58 *Stork* [1959] ECR 17). This did not prevent – Stijn Smismans argues in the opening chapter of this volume – the emergence of fundamental rights narratives which claim retrospectively that human rights have always been part of the EEC/EU project. This was achieved in two ways: first, human rights were linked to the ancestral foundational justification for the EEC, namely that it was needed to ensure peace in Europe. Second, human rights were presented as being *inherent* to European unification. Cumulative exposure to those narratives led to the creation of a political myth which considers rights as foundational in nature. Although factually erroneous, the myth was adopted by civil society and political institutions, believed and acted upon. In other words, this is how we came to see the EU and how the EU came to see itself: as a polity whose existence is based on and justified by, among others, human rights protection. But despite its remarkable success, Smismans continues, the myth is now under such pressure from reality that its survival is at stake. On the one hand, the EU is adopting measures related to aspects of the Area of Freedom, Security and Justice which seriously threaten civil and political rights; on the other, the austerity policies in response to the financial crisis and the inadequate protection of social rights mean that the claim that participation in the Union will always ensure greater welfare and prosperity for the peoples of Europe, which is itself a foundational myth, is undermined.

The theme of the tension between what is being claimed about rights protection and what really happens is taken up, in different ways, by several contributors. Massimo Fichera explores the limits placed by human rights considerations on a member state's obligation to comply with a European Arrest Warrant (EAW). A crucial aspect of the

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Area of Freedom, Security and Justice, the EAW was introduced into the EU legal system through a Framework Decision under what used to be the Third Pillar and was meant, from the beginning, as a security-enhancing measure with little concern about freedom. The lack of satisfactory guarantees for human rights is described by Fichera as the 'original sin' of the EAW, made possible by the assumption that all member states share the same commitment to human rights and protect them in an adequate manner. As a result, surrender requests should be recognised as compliant with fundamental rights with very limited scope for substantive review by the court of the executing state. The solution adopted by member states' courts, Fichera argues, was to engage in a dialogue with the CJEU using proportionality and balancing in order to mitigate the harshness of the EAW system. Therefore, the presumption of mutual trust should be seen as rebuttable and not absolute.

Steve Peers focuses on the effect of the CFR on immigration and asylum and examines both the scope of application of the Charter in this field and the effect of individual provisions. Comparing the standard of protection under the Charter and the European Convention on Human Rights (ECHR), he identifies areas of convergence and dissonance and concludes that the practical importance of the Charter will depend, in large part, on how the CJEU approaches the rules of interpretation in its final Title. The rights of non-citizens are also discussed by Elspeth Guild who uses privacy and data protection as a case study for exploring the citizen-foreign distinction. While international human rights documents such as the International Covenant on Civil and Political Rights protect privacy without reference to citizenship, states often claim that their obligation to respect privacy rights does not extend beyond their own citizens. Guild shows how the notion of the universality of rights and the construction of privacy as an international human right which transcends the constitutional relationship between citizens and state have been used to challenge measures of mass surveillance.

In his chapter on the financial crisis, James Fraczyk criticises the Court of Justice for failing to examine the human rights dimensions of the fiscal measures adopted in response to it. He explains how the EU tried at first to stabilise the market by agreeing bail-outs outside the framework of EU law, before creating by Regulation the European Financial Stabilisation Mechanism and, finally, the European Stability Mechanism (ESM) as a permanent assistance programme. The latter was established as a separate intergovernmental organisation under public international law but utilises the institutions of the EU, including the CJEU. When litigants challenged the austerity measures that accompanied financial assistance, the Court held that, in establishing the assistance mechanisms and imposing austerity, the member states were not implementing EU law, and therefore the Charter rights were not engaged. Fraczyk argues that while the Court was right to hold that the Treaties do not confer on the EU the competence to create a stability and assistance mechanism, the conclusion that the Charter is inapplicable does not necessarily follow. First, the EU has very significant interests in the ESM, which is meant to ensure the stability of the Euro. Second, the Court held that the creation of the ESM was lawful under EU law precisely because the loans it provided were subject to austerity measures, so the refusal to apply the Charter to those measures seems inconsistent. The result, he claims, is a responsibility gap in the context of alleged violations of human rights arising from austerity programmes.

On the other hand, the Court has left the door open to human rights challenges against austerity measures which are clearly based on EU law.

The protection that social rights receive under EU human rights law is discussed in the chapter by Sionaidh Douglas-Scott and Nicholas Hatzis. The inclusion of social rights in the same legal instrument with civil and political rights is an innovation which brings into focus the indivisibility of human rights. However, the opaque language often used in the Charter and the distinction between rights and principles create considerable uncertainty as to what their effect might be: principles do not give rise to judicially enforceable rights, so if social rights provisions are considered to be principles, as it is often claimed, their practical importance is diminished. The same ambivalence, it is argued, is evident in the jurisprudence of the CJEU in two areas where social rights considerations could have made a difference, namely cases where fundamental economic freedoms clash with social rights and the austerity measures in response to the financial crisis.

Finally, a different form of tension, that between understandings of rights in the old and new member states, is examined in the chapter by Michal Bobek. His starting point is that the content of a right is determined to a great extent by historical experience which shapes our attitude towards conflicting values. To demonstrate how this affects the constitutional protection of human rights he discusses three case studies: secret legislation, data retention and privacy and general economic freedom. His conclusion is that in states with more recent experiences of totalitarianism there is greater distrust of government and a prioritisation of individual liberty, while the default interpretative approach to human rights provisions appears to be in *dubio pro libertate*. By contrast, in some of the old member states with no such experiences, and in the EU itself, the construction of the substantive content of rights is considerably more communitarian and the need to complete the common market and promote the ever closer union of the peoples of Europe often trumps individual rights. This divergence, Bobek argues, demonstrates that there is a need for flexibility and differentiation in the Union's human rights regime. If the protection of rights is a justificatory reason for the EU's existence, brushing aside the concerns of some member states in the name of the efficient functioning of the EU is not only morally wrong, but, in the current climate of Euroscepticism, also politically unwise.

II

Contemporary liberal democracies have increasingly come to depend on courts as guardians of human rights. In the EU legal system, this function is fulfilled primarily by the CJEU and also national courts when applying EU law and, therefore, operating as Union courts, in the sense of being part of a judicial architecture entrusted with the task of interpreting and enforcing European law. The discussion about the role of the CJEU was given new impetus after the adoption of the CFR, which became legally binding in 2009 following the entry into force of the Treaty of Lisbon. Two main questions emerge from the contributions in this book: first, what is the remit of the Court's human rights jurisdiction; second, how does the Court decide human rights issues in terms of methodology and reasoning?

Sybe de Vries examines the relationship between the Charter and the issue of the competences of the EU. Both the TEU and the Charter contain provisions to the effect that the Charter shall not extend the competences of the Union, but drawing a clear line, and, thus, defining the outer limit of the Court's powers in that field, is not straightforward. He identifies an activist trend in the Court's case law, described as a process of 'trigger and creep', which, through the medium of the general principles of EU law, led to a broad approach to human rights and a corresponding expansion of the Union's competences. While an important document like the Charter, which codifies existing principles and protects new rights, might be expected to accelerate that process, the picture which emerges in the post-Lisbon era is, de Vries argues, more blurred and uncertain. On the one hand, the Court has been willing to use the Charter as an autonomous source of human rights obligations, aligning its scope with the general principles developed during its more activist phase. On the other, the reasoning adopted in human rights cases is often technical and formalistic, reflecting a cautious approach to the question of competences and the Court's own limits.

The rule that the Charter shall not expand existing competences forms the background of Angela Ward's discussion of the judicial enforceability of human rights in the EU. She notes that the Charter did not provide for new remedies specifically designed for human rights claims and, thus, it should be enforced through the procedures normally available to address violations of EU law. There are four main considerations underpinning the issue of enforceability: the limits on EU competence, the distinction between rights and principles, the distinction between derogable and non-derogable rights and the limitation clause in Article 52(1) of the Charter. Where a litigant seeks the enforcement of Charter rights before national courts, the important threshold question that needs to be answered is whether the member state is implementing EU law. If the answer is yes, the principle of national procedural autonomy means that the remedy depends on national law, subject to the requirements of effectiveness and equivalence. In cases before the General Court involving a direct challenge of a measure by an EU institution the same rules on the Charter's enforceability apply with one important difference: the Court is not obligated by the effectiveness principle to go beyond its existing remedial framework in order to ensure that the right in question is adequately protected. Ward concludes that the Charter should not be approached as a document revolutionising judicial protection of rights but, rather, as an addition to the Union's existing judicial architecture which was not meant to upset the balance of power between national and EU courts or furnish the Union with competence in new areas.

The question what properly belongs to the EU and what remains within the competence of member states is also examined in the chapter by Alison Young, who explores the structure of the Court of Justice's reasoning in human rights cases. The unique difficulty facing the Court, she argues, is that it is simultaneously policing the activities of both the Union and its members for human rights violations. This requires an approach which is flexible enough to maintain diversity but consistent enough to allow for the emergence of common standards of protection in the face of reasonable disagreement as to the substantive content of rights and as to the institution better suited to determining such content. Of the three methods often used to modify human rights adjudication so as to accommodate divergent approaches – deference, dialogue

and margin of appreciation – the one suitable for EU law is dialogue, which requires the Court of Justice to engage with the reasoning of national courts in a spirit of mutual respect. The main dialogic mechanism is the Article 267 of the Treaty on the Functioning of the European Union (TFEU) preliminary reference procedure. Young suggests a theory of adjudication based on dialogue where the Court of Justice provides different amounts of authority to national courts to decide human rights questions. Four factors are particularly relevant for this exercise: whether national courts or the CJEU offer greater protection to the right in question, whether the member state is implementing or derogating from EU law, the importance of the interest protected by EU law and the degree of democratic input into the resolution of a specific rights issue.

One of the issues raised by Young is that there are at least 29 human rights communities in the EU – the member states and the Union itself – with the possibility of additional communities within member states where there are separate nations, separate legal systems and strong regional interests. This point is explored in relation to the United Kingdom by Aidan O’Neil. One of the limits imposed on the executive and legislative organs of Scotland, Wales and Northern Ireland following devolution is the obligation to respect EU law including provisions on fundamental rights, an obligation which mirrors the rule developed by the Court of Justice that internal division of competences in member states cannot be invoked as a reason justifying non-compliance with EU law. While EU human rights have had little immediate impact on the exercise of devolved powers, there is evidence, O’Neil explains, of indirect impact on the issue of standing in public law cases where the strict requirements of Scots law were liberalised under the influence of the considerably more relaxed standing rules developed by the CJEU in the context of EU environmental law. But this tendency might clash, he continues, with the unwillingness of national courts to allow EU law to modify what might be considered as constitutional fundamentals, and the question that will need to be addressed in future cases is what counts as a constitutional principle in the devolved UK constitution.

Alexander Turk examines the respective roles of the Court of Justice and the EU legislature in the development of fundamental rights rules for the Union’s administrative procedures. The main innovation introduced by the Charter is the right to good administration in Article 41 CFR, which, however, as Turk argues, falls short of the existing protections for individuals developed by the Court of Justice under the notion of ‘good’ or ‘sound’ administration. The discrepancy is particularly apparent where there is no explicit reference in Article 41 of a specific right created by the Court, such as the duty of Union institutions to exercise due care and assess all relevant elements when making a decision. Turk suggests that the Court has an important role to play in the area of individualised determinations by EU organs: if case law principles offer more extensive protection to individuals than the Charter right to good administration, the Court should try to interpret the latter in conformity with the former, and where such harmonious interpretation is impossible, it should adopt the greater standard of protection. By contrast, where the Union institutions adopt acts of general application through administrative rule-making procedures, the primary responsibility for establishing standards of good governance falls on the legislature.

III

Human rights considerations had been relevant for resolving disputes arising in the context of various areas of EU law long before the proclamation of the Charter and its subsequent acquiring of binding effect. Several contributors to the volume raise the issue whether the Charter is likely to have a transformative effect. In other words, if human rights were already protected through the general principles of EU law which incorporated ECHR standards and national constitutional values, what is the Charter's contribution to the conceptual categories and the methodological apparatus of EU fundamental rights law?

A characteristic example of the role played by human rights is the regulation of trade in the internal market. Stephen Weatherill points out that the Court of Justice established a link between justifications for trade barriers and fundamental rights in the early 1990s when assessing governmental restrictions on broadcasting in light of Article 10 ECHR which protects freedom of expression. Subsequent cases embedded this link in the law of the internal market, with the Court being willing to draw on sources other than the provisions on free trade. The result was the development of a body of rules which although primarily aimed at opening up national markets, was porous enough to allow the absorption of human rights concerns. The two changes introduced by the Treaty of Lisbon which affect the relation between internal market law and human rights protection are the Charter and the expanded obligation of the Union under Article 4(2) TEU to respect the national identities of member states. Weatherill argues that the post-Lisbon jurisprudence shows that these changes were, in most cases, easily accommodated within the existing legal architecture. Thus, they are not transformative but confirmative of the Court's and the EU legislature's readiness to take into account non-economic values and the need for protection of fundamental rights.

Another area where fundamental rights have played a significant role is freedom of movement for EU citizens. Niamh Nic Shuibhne notes that disputes concerning the right to move and reside freely in the territory of member states have provided an avenue for the realisation of the Union's role in protecting human rights even in the pre-Charter era. But, then, what is the added value of conceptualising the right to move and reside as a fundamental right in Article 45(1) CFR? She argues that, first, adding the rights dimension reinforces the political character of citizenship as a unique bond between the individual and the EU as a polity; second, if movement is a human right the limitations imposed on it by EU law must be interpreted restrictively. Subsequently, she explores the two ways that freedom to move and reside create a nexus with fundamental rights protection: free movement as a right *per se* and as a stimulus for the protection of other rights, such as family life. She notes that the Court's jurisprudence has entered a more cautious phase than before in an effort to accommodate the legal effect of the limitations of the rights of the Charter. A symptom of such caution is case law which takes a narrow view of what constitutes 'implementation of EU law' in free movement cases. In turn, this raises the question whether the Court will be able to maintain the commitment to the constitutional character of citizenship or whether it will end up subordinating citizenship rights to the interests of member states.

In competition law, discussed in this volume by Vincent Smith, most of the human rights issues arose before the Treaty of Lisbon and litigants relied on the ECHR through the medium of the general principles of EU law, making use of Article 6 ECHR on fair trial to either attack the Commission's enforcement procedure as a whole or to argue that their rights of defence had been violated in their particular case. Smith takes the view that the Article 47 CFR which now protects fair trial rights has had no significant effect on the CJEU's approach to human rights protection in the competition field. On the one hand, it has been held that at the Commission stage of competition proceedings only Article 41 on the right to good administration is applicable, a provision which guarantees a level of due process rights which is significantly lower than the one under Article 47 CFR and, still more, Article 6 ECHR. On the other, the Court of Justice considers that the powers of the General Court to review competition cases are, in the abstract, enough to satisfy the requirements of the Charter without the need to examine whether it has actually exercised those powers in each particular case. The potential for conflict between the Charter and the Convention, Smith argues, was a major consideration in the Court's rejection of the draft agreement for the accession of the EU to the ECHR.

The way free speech rights, developed in the context of traditional communicative environments, apply to new areas of digital communication is explored by Lorna Woods, who structures her discussion around three main issues: the importance of the right to receive information; the extent to which the subject matter of the speech in question is relevant for the justification of restrictions; and the scope of positive obligations to protect freedom of expression. She argues that complications mainly arise from the fact that existing analytical frameworks still rely on the distinction between speaker and receiver of information which is unsatisfactory for the Internet era where the same network is used for speaking and receiving, therefore making communication interactive and horizontal rather than passive and vertical. Further, private ownership of communications infrastructure means that the extent of positive duties owed by such actors is uncertain. After comparing the ECHR and EU law, she concludes that the latter appears to be more aware of the particular characteristics of multilateral communication frameworks in the digital era.

Xavier Groussot, Gunnar Thor Petursson and Justin Pierce look at the freedom to conduct business under Article 16 CFR. This is a right which has been present in EU law for a long time, often under different names, and the terse provision of Article 16 appears to add nothing new to its content. They argue that this appearance is deceptive because its scope of application is potentially very wide. Article 16 is relevant not only for challenges against EU measures and secondary legislation limiting freedom to trade but also for disputes between private parties where it can be invoked horizontally. Moreover, having acquired constitutional status through the Charter, the right to conduct a business is now on a par with social rights, with which it may clash. They suggest that the impact of Article 16 will depend to a large part on how the Court of Justice conducts the balancing exercise between private autonomy in the economic sphere and competing values, such as social protection or market integration and harmonisation. In turn, this will depend on the intensity of the proportionality review and the effect of the limitation clause in Article 52(1) CFR.

Sanja Bogojević discusses environmental protection and asks whether Article 47 CFR creates a new, autonomous right. She notes that there is no explicit reference to specific rights to environmental protection or to an environment of a particular quality and this means that Article 47 enshrines a principle which can be used as an interpretative tool but not as a source of justiciable, free-standing rights. Therefore, in the case law of the Court of Justice it is usually invoked either as a reason justifying limitations on other rights, such as property, and equality and non-discrimination, or in combination with others rights like health and effective judicial protection, but is rarely used on its own. She concludes that litigants have not much to gain from Article 47 and that they will continue to need to rely on secondary EU law, and some provisions of international environmental law like the Aarhus Convention, to enforce environmental rights.

IV

While the discussion of the effect of the Charter and its relation to the general principles of EU law has occupied a central place in the debate about human rights protection in the post-Lisbon European Union, those are by no means the only fundamental rights norms relevant for Union law. Human rights are also protected in national constitutions and international treaties, which combine with EU law to create a complex, multilevel system of legal rules which differs considerably from more traditional systems of human rights protection.

For Kaarlo Tuori, the best way of understanding that system – a system where competing claims to authority are made by different legal orders – is through the lens of legal pluralism. He distinguishes between two types of pluralism: radical pluralism, which considers conflict to be unavoidable and rejects the possibility of amicable resolution, and dialogical pluralism, which strives for accommodation of difference through dialogue. Tuori's pluralism is of the latter kind. He discusses in detail two issues where there is potential for conflict, namely the application of EU fundamental rights to national measures and the determination of the level of fundamental rights protection, and argues that the solution is being sought in a dialogic project involving the CJEU and national courts. In the same spirit, he approaches Article 4(2) CFR on national constitutional identities as a channel for discussion between Union and members states' constitutional actors. Tuori advocates a pluralism of interlegality where plural legal orders do not conceive of themselves as self-sufficient, closed systems but as mutually overlapping entities engaged in a cooperative enterprise.

Tuori examines the possible conflicts between EU and member states fundamental rights law. Marta Cartabia and Stafania Ninatti explore the relation between EU law and the ECHR, focusing on the interaction between their respective courts. Their starting point is that the constitutional interdependence which defines Europe's legal space is not the result of exclusively formal procedures which impose a particular framework but also of informal and flexible interaction among judges and other constitutional players in the form of a bottom-up, step by step process which allows for trial and error. Like Tuori, they view dialogue between courts as a central narrative for

analysing the emerging system of human rights protection and emphasise the non-hierarchical and flexible nature of this process. Further, they also see the issue of the standard of protection as an area where there is potential for friction but, at the same time, as fertile ground for negotiating the terms of co-existence of different legal orders which strive to find equivalent standards in a spirit of mutual respect. But there is also a second narrative in the effort to formalise the co-ordination of the competing systems through the accession of the EU to the ECHR. Here, Cartabia and Ninatti discuss in detail Opinion 2/13 of the Court of Justice. While they agree with the critics of the Opinion as regards the effect it has on future efforts for accession, they also try to flesh out what was really at stake for the Court of Justice. They argue that the accession agreement would have made the Strasbourg Court the final arbiter of human rights claims and that this is what provoked the reaction of the Court of Justice. Opinion 2/13 was an effort by the Court to maintain ownership of the system for human rights protection and the EU legal order as a whole, which is unlike a national legal order that can be subjected to review by the European Court of Human Rights. The main idea underlying the Opinion, they continue, was that the ECHR and EU law in their present state are too distant from each other to be able to enter in a formal union. Their conclusion is that the two narratives could meet in a symbiotic relationship of the two European courts and national courts where there are formal procedures that facilitate the circulation of arguments and ideas but also leave room for experimentation and divergence.

Tobias Lock also looks closely at Opinion 2/13 in order to assess the validity of the Court of Justice's objections to the accession agreement. He explains that the Court's arguments about the unsatisfactory arrangements in the co-respondent mechanism and the rules for the prior involvement of the CJEU are underlined by a concern to safeguard the autonomy of EU law and the exclusive jurisdiction of its courts which are construed as elements of the Union's identity as a supranational entity. This means that unless there is a Treaty change, accession can only take place in the future on the basis of a renegotiated agreement which will accommodate the Court of Justice's concerns. Lock argues that accession will inevitably change the current dynamics in the relation between the two European Courts and will place the CJEU in a position similar to that of national supreme courts which regularly have their judgments on human rights issues reviewed in Strasbourg. Far from being catastrophic for the European Union, this development, he concludes, will demonstrate the Union's maturity and its role as a force for integration.

The relationship between EU human rights law on the one hand, and international law generally and international human rights law specifically, on the other, is examined by Katja Ziegler. She argues that although Article 3(5) TEU enshrines an openness and embeddedness of the EU in the international legal order, recent case law of the Court of Justice points to the opposite direction, taking a restrictive, isolationist approach. This trend is evident both in cases concerning treaties and customary international law, and the ECHR. The overarching reason for this approach is the autonomy of the EU legal order. Ziegler criticises the Court's very expansive interpretation of the autonomy concept and notes that it is on the course of acquiring independent normative force and becoming a proxy for the entire EU legal system. In relation to the ECHR, she argues that Opinion 2/13 distorts the accession conditions laid down in the relevant legislative

provisions and confirms the CJEU's 'anachronistic inward-turning' stance which results in a parochial conception of the relationship of the EU with anything that lies beyond its borders. The alternative, she suggests, is a narrow interpretation of the accession conditions which takes into account the political will of the member states to accede to the Convention and the fact that their concern in laying down those conditions was to protect their own powers from encroachment by the EU through accession rather than protect the EU, and the Court of Justice, from the Convention.

Ziegler points out that one of the dangers of the CJEU's isolationist approach and its refusal to accept external review of its human rights decisions is to undermine the EU's legitimacy as a human rights actor in relations with non-member states. The role of human rights in the EU's external action is discussed by Annabel Egan and Laurent Pech. Unlike human rights enforcement within the EU, where the CJEU occupies a central position, responsibility for the Union's global human rights policy is shared among the Council, the Commission and the Parliament. The Union's early practice, continued after the reforms of the Treaty of Lisbon, was to adopt soft law measures including human rights guidelines, diplomacy at UN level, trade agreements and technical and financial assistance instruments. The most widely used measure is the standard human rights clause: all agreements with third countries include a clause which makes respect for human rights an essential element of the agreement and provides for its suspension or termination in case of human rights violations. The main weaknesses of the Union's approach, Egan and Pech argue, are the fragmented nature of its initiatives and perhaps more importantly, the issue of double standards. The EU is not treating all third countries uniformly: it tends to penalise weaker countries when they breach mutually agreed human rights rules but has failed to include legally binding human rights clauses in agreements with powerful countries.

The lively debate on the place of human rights in the EU legal system, which has been an important feature of EU law scholarship in recent years, will certainly continue in the future. The contributions to this volume, abounding in ideas, criticisms and suggestions, address several of the key issues and explore possible developments in the time ahead. What comes into view after reading this book is a multifaceted, multilevel system of human rights protection which does not fit easily within established paradigms and poses new challenges for the theory and practice of the law. As Marta Cartabia and Stefania Ninatti point out, it resembles a work by Jackson Pollock, not Mondrian. Seen in this light, even if we sometimes regret the lack of geometric simplicity, we can appreciate the richness and diversity of the picture that emerges.