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Integration through Human Rights?

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Abstract:

European integration was originally based on a two-track approach with the European Union responsible for economic integration and the Council of Europe in charge of fostering democracy and human rights. With the entry into force of the EU's Charter of Fundamental Rights and the impending accession of the EU to the Council of Europe's European Convention on Human Rights, this traditional division of labour seems to be no longer in existence. The EU's Member States are now bound to abide by human rights by virtue of EU law and no longer only because of mere international treaty obligations. The paper will explore whether the EU's recent activity in the field of human rights has the potential for furthering European integration. It will in particular address the current legal limits of such negative integration in light of the limited scope of the Charter, explore the potential for new conflicts with national constitutional courts and the European Court of Human Rights.

1. Introduction

The following pages contain some rough thoughts on whether the Lisbon Treaty reforms in the field of human rights have the potential of furthering European integration. After briefly describing the original two-track system (CoE and EU), the paper presents the crucial Lisbon reforms and the theoretical potential for activism on part of the CJEU as far as negative integration is concerned. The paper then discusses the limits to such negative integration and finally addresses the renewed potential for cross-fertilization between the two European courts.

Please note that this is very much work in progress.

2. The original two-track system of European integration

The two main organizations concerned with European integration are the European Union (EU) and the Council of Europe (CoE). Both originally pursued different aims. The EU's founding treaty, the Treaty of Rome, had an economic focus as it was chiefly concerned with the creation of a common market and thus economic integration[1] whereas the protection of human rights did not feature. This aspect of European integration was left to the Council of Europe. The development of the Council of Europe was inspired by the same idea of European integration which led

[1] Article 2 EEC Treaty.

to the ECSC and later to the EEC and the EU.[2] The most important document adopted within the CoE was the European Convention on Human Rights (ECHR), which had first been proposed by the federalist European Movement.[3] The key difference between integration under the Treaty of Rome and under the CoE was that the CoE remained an international legal regime, which did not entail a pooling of sovereignty.[4] By contrast the European Union system is of a supranational character. The original two tracks of European integration suggested not only a division of labour between the CoE and the EU systems in thematic terms but also in terms of the intensity of integration: economic integration meant deep supranational integration whereas human rights integration was governed by 'ordinary' international law and was consequently less deep. This was also reflected in the membership of the two systems. The CoE system has always had a wider membership base than the EU system[5] while all EU Member States are also parties to the CoE system.[6]

Over the years since their inception, this division of labour has become less clear-cut. As far as the CoE system is concerned, the introduction of a compulsory right of direct petition with Protocol No 11[7] considerably strengthened the European Court of Human Rights (ECtHR) and potentially subjected every national court decision to a complaint in Strasbourg.[8] In this sense the potential for legal integration has deepened as universal access to the Court via individual petitions ensured a high volume of case law and thus many opportunities for the ECtHR to shape the understanding of human rights law in Europe.

On the EU side, the Court of Justice of the European Union (CJEU) had started to recognize fundamental rights as unwritten general principles of European Union law.[9] These fundamental rights were not only applied in cases dealing with alleged violation of such rights by the Union institutions, but their reach was extended to the Member States when they were implementing Union law (agency situations) and when they were derogating from fundamental freedoms.[10] Thus the potential for European integration through human rights was growing and the lines between the two organizations became a blurred. In addition to the recognition of fundamental rights as general principles, the Union made steps towards positive integration measures in the field of fundamental rights, most notably by passing a set of anti-

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[2] Cf. the CoE Statute, which expressly refers to the "need for closer unity between all like-minded countries of Europe"; a similar desire is expressed in Article 1 of the Statute.

[3] Bates, 47.

[4] This had been rejected mainly by the UK and Scandinavian countries, cf. Bates, 50.

[5] The current tally stands at 47 compared with 28.

[6] The only country for which this was not always entirely true was France, which only signed up to the ECHR in 1974; but it had of course always been a member of the CoE; also note that ECHR membership is practically a condition for EU membership even though Article 49 TEU does not expressly say so.

[7] In force since 1 November 1998.

[8] Before Protocol 11 entered into force, individual petition was optional. In particular some of the bigger states (France, Italy and the UK) steered clear of recognising such a right for many years, cf. Bates, 172 et seq.

[9] Starting with Case 29/69 *Stauder v Stadt Ulm* [1969] ECR 419.

[10] Case 5/88 *Hubert Wachauf v Federal Republic of Germany* [1989] ECR 2609 and Case C-260/89 *Elliniki Radiophonia Tiléorassi AE (ERT)* [1991] ECR I-2925 respectively.

discrimination Directives.[11] Other examples of positive integration measures are the data protection directives.[12] Furthermore, it began operating a human rights policy in its external relations, in particular by including human rights clauses in trade agreements concluded by the Union and by conducting human rights dialogues with third countries and other regional organizations. The purpose of this policy was to export notions of democracy, rule of law and human rights to third countries. Moreover, a satisfactory level of human rights protection was made a condition for EU membership so that candidate countries were forced to change their laws and practices so as to conform to a minimum standard.

This shows that even before the entry into force of the Treaty of Lisbon, there has been some potential for integration through common human rights standards. They were partly enforceable by the CJEU in cases concerning fundamental rights as general principles of EU law and cases concerning positive integration measures. But integration also happened more subtly at least as far as new Member States were concerned through their desire to fulfil the Copenhagen criteria.

2. The Treaty of Lisbon reforms

The reforms brought about by the Treaty of Lisbon provided a twofold impetus in the field of human rights protection: the entry into force of the Charter of Fundamental Rights and the (still to be effected) accession by the EU to the ECHR.

The entry into force of the Charter of Fundamental Rights has for the first time made the rights previously recognized as general principles more visible and has largely removed the question of whether a specific fundamental right is recognised under EU law from the jurisdiction of the Court of Justice.[13] Of course, the Charter claims that it does nothing more than reaffirm 'the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States […]'. It thus purports to be a mere confirmation of what has already been in place. Yet as will be argued in more detail in section 4 of this paper, the potential for stronger human rights integration in the European Union has increased thanks to it. First, the Charter adds legitimacy to the CJEU's fundamental rights jurisprudence by confirming the commitment of the Member

[11] In particular: Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22; Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16; Council Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37; Directive 2006/54/EC of the European Parliament and of the Council on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23.

[12] Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data and Directive 2002/58/EC (Directive on privacy and electronic communications).

[13] Of course, Article 6 TEU clarifies that fundamental rights continue to (also) exist as a general principles so that the Court could, in theory, develop rights not recognised in the Charter; given the extensive number of rights guaranteed in the Charter, this is unlikely to occur very often.

States to these rights, in particular where their own acts when "implementing" Union law are concerned.[14]

Second, the Charter spells out the content of the rights protected so that the Court can legitimately claim that these rights are protected under EU law. This is in particular important where the recognition of rights is concerned which are not explicitly recognized in all the Member States' legal orders, e.g. freedom of the arts and sciences (Article 13), right to education (Article 14), freedom to conduct a business (Article 16), rights of the child (Article 24); and many of the provisions in the solidarity chapter (Articles 27-38).

Third, the Charter has the added advantage of profiting from the specific features of European Union law: primacy and direct effect. Where Charter rights can be invoked before a national court, they take precedence over national rules, no matter whether the validity of such rules can be questioned under the laws of the Member State in which the case arose.[15] This is particularly significant in Member States in which domestic courts do not have the power to strike down legislation, such as those in the United Kingdom.[16] But also where such powers exist, they are usually reserved to a supreme court or a constitutional court.[17] By contrast where the Charter is applicable any court may (and must) disapply conflicting national legislation.[18] The key issue is, of course, whether the Charter is applicable in the first place, which will be discussed in the next section.

In contrast to many other Treaty reforms, the Charter has the potential of upsetting the balance between Member State autonomy and the power of the European Union.[19] As *von Bogdandy* noted, much of the Court's constitutional case law was concerned with the procedural aspects of European integration, such as the establishment of key constitutional doctrines like direct effect and primacy. Interference with the legislative process, i.e. shaping of substantive political questions by the Court, was traditionally rarely done.[20] As *von Bodgandy* has argued, the Court's free movement case law (with the exception of its citizenship case law) cannot in this sense be regarded as a counter-example given that it is subject to the non-existence of harmonizing legislation. This means that the Union legislator can opt to pass legislation contrary to an earlier CJEU decision and not be in violation of the Treaties.[21] In this sense the Court's role stands in marked contrast to that of some national constitutional courts which may be considered rather activist.[22]

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[14] Cf. Article 51 (1) CFR: Charter only applies thus far to the MS.

[15] Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1; Case 11/70 *Internationale Handelsgesellschaft v Vorratsstelle für Futter und Getreide* [1970] ECR 1125.

[16] The most a (higher) Court can do is declare an Act of Parliament (Westminster) 'incompatible' with the Human Rights Act, which transposes the ECHR into UK law.

[17] E.g. in Germany only the Federal Constitutional Court may declare federal legislation unconstitutional.

[18] Case 106/77 *Simmenthal* [1978] ECR 629

[19] This fear was voiced by Armin von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' (2000) 37 Common Market Law Review 1307, 1317.

[20] Ibid 1325.

[21] Ibid, 1327.

[22] E.g. the Federal Constitutional Court of Germany.

The case law on EU citizenship may be considered different in this sense as the Court has based some of its decisions going beyond what is foreseen by secondary law on the Treaties themselves.[23] While many citizenship decisions have the procedural effect of requiring Member States to treat EU citizens equally, they may have implications for political compromises reached concerning e.g. the provision of social welfare with budgetary implications.[24] Moreover, there are decisions like *Rottmann* that can be considered to affect core sovereign rights of the Member State.[25] In view of the Court's activism in its case law on citizenship, this may prove to be a herald of the age of the Charter.

The Charter has the potential of subjecting carefully negotiated political compromises or political choices resulting in Member State legislation to the scrutiny of the Court of Justice. This may lead to national standards of human rights protection being supplanted by EU standards. The key danger in this respect is that national constitutions will often provide for ways of balancing the public interest with the individual interest in such cases. The details as to what counts as the public interest may differ from Member State to Member State.[26] The EU Treaties formulate public interests as well; however, these interests are those of the Union, i.e. interests lending support and legitimacy to Union policies and law making. However, in the context of Member State measures being subjected to human rights scrutiny, these Union interests are of no relevance. A way out for the Court would be the adoption of a margin of appreciation doctrine in such cases.

Moreover, if the Charter becomes an important focal point for the scrutiny of national legislation, spill-over effects may occur. National courts may choose to apply EU standards even in cases in which the Charter does not apply strictly speaking. Given that the applicability of the Charter is sometimes hard to determine, they may resort to applying Charter standards as a precautionary measure.

In addition to the Charter, the Treaty of Lisbon has provided the EU with an explicit mandate to sign up to the ECHR. While accession as such will not lead to an immediate and direct improvement of the protection of human rights in the EU (and before the EU courts), the indirect effects on both the EU itself and the Member States will arguably be significant. Before addressing this point in more detail below

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[23] On the constitutional dimension of the (earlier) citizenship case cf. Dougan, The constitutional dimension to the case law on Union citizenship. 31 ELRev (2006) 613, who argues that the application of the proportionality test to national legislation correctly implementing EU legislation in this field amounted to an indirect review of that EU legislation (page 621).

[24] Cf. Dougan, ibid., 623 et seq who accuses the Court of 'social engineering' with 'undermining (or at least ignoring) the psychological glue which binds together the national welfare systems and provides their moral sustenance. It is widely accepted that welfare states depend upon tacit popular legitimacy for their redistributive policies; that tacit legitimacy derives from a diffuse sense of social solidarity, which is based in turn upon some sense of shared identity and community of interests--usually membership of a national community'.

[25] E.g. Case C-135/08 *Rottmann v Freistaat Bayern* [2010] ECR I-1449; in this case the right to strip a national of his citizenship.

[26] Such a doctrine exists in the law of the ECHR.

in section 4, the next section aims to highlight the limits to negative integration through the Charter.

3. Limits to negative integration

The following discussion will focus on the limits to direct negative integration through human rights. Four issues will be discussed. First, the somewhat limited access to the CJEU; second, the distinction between rights and principles; third, and most importantly, the restriction of the Charter's applicability to the Member States in cases where they implement EU law. And finally in close connection to the previous question, in how far a generous interpretation of the reach of the Charter and of Charter rights is likely to be received in the Member States.

a. Access to Court

The first limitation is a factual limitation in that in theory the European Union operates 'a complete system of remedies'.[27] However, there are arguably gaps in that system. The most famous gap, which is unrelated to the question of applying Charter rights in the MS, is found in the restrictive conditions governing the direct access to the CJEU for individuals under Article 263 (4) TFEU. However, this is not the only one. More problematic in many respects is the interaction between the courts of the Member States and the CJEU through the preliminary reference procedure. While in theory domestic courts are under an obligation to make a reference to the CJEU where they are courts of last instance[28] or where they consider an act of the Union to be invalid[29] references do not always happen. In particular the Court's CILFIT case law has given courts of last instance an escape route as it is their decision whether they consider a question of interpretation of Union law to be *acte claire* or acte eclaire. For instance, English courts place much reliance on the question whether a reference complies with the wishes of the parties. Closely connected is the question how well domestic courts function as Union courts. After all, it is they which are supposed to apply European Union law, including the rights contained in the Charter, in the vast majority of cases. This, however, presupposes a familiarity with the intricacies of European Union law coupled with a willingness to engage with it. There are no studies on the application of the Charter in the courts of the Member States. However, a study conducted by this author regarding the remedy of state liability under European Union law (Francovich cases) revealed a certain unwillingness to engage with this remedy found in EU law on part of English and German courts.[30] Similar to state liability claims under EU law, the Charter will often be invoked in a context in which traditional domestic remedies do not help. There is thus reason to suspect that the Charter may not come to its full potential in practice.

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[27] Cf. Case C-50/00 P *Unión de Pequeños Agricultores* [2002] ECR I-6677; Case C-583/11 P *Inuit Tapiriit Kanatami and Others* [2013] ECR I-0000.
[28] Article 267 (3) TFEU.
[29] Case 314/85 *Foto Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199
[30] Tobias Lock, 'Is Private Enforcement of EU Law through State Liability a Myth? : An Assessment 20 Years after Francovich' (2012) 49 Common Market Law Review 1675.

b. Rights and principles

The potential effect of the Charter as a tool for integration is further reduced by the distinction between rights and principles contained in Article 52 (5) CFR. By contrast to rights, principles cannot serve as a sole cause of action but need to be implemented first. The Charter does not make it clear which of its provisions contain principles and which rights, but it is safe to say that most principles will probably be found in the Social Chapter of the Charter (Title IV). While this distinctions thus somewhat weakens the integrative effect of some Charter provisions, it does not entirely take that effect away. Principles can become judicially cognizable in the interpretation of Member State and Union acts, which implement such principles. It is still not clear what types of act would count as an implementation in that sense. If the notion of implementation were restricted to acts directly implementing the principle then the effect of principles would be very much limited. However, it has been suggested that a broader view is preferable which, it seems, would allow principles to influence the interpretation and legality review of most Union acts, and by extension, of implementing acts by the Member States.[31]

c. The limited application in the MS legal orders

The applicability of the Charter is limited to acts and omissions, which come within its scope. Article 51 (1) CFR has two prongs: (1) the Charter is always binding on the European Union; (2) it is binding on the Member States only when they are implementing Union law. The exact meaning of the term 'implementing Union law' contained in Article 51 (1) is still not entirely clear. The explanations to the Charter, which must be given due regard when interpreting its provisions, suggest that Member States are 'implementing Union law' when they are acting within the scope of EU law. This reading of Article 51 (1) CFR is in line with the Court of Justice's pre-Charter case law, under which the EU's fundamental rights (as general principles of EU law) are cognizable 1) where a Member State applies provisions of EU law (e.g. when compensating a farmer for discontinuing to produce milk under an EU Regulation) , i.e. where the Member State's authorities act as agents of the EU; and 2) where the Member State restricts Treaty rights on free movement (e.g. where a Member State closes a major transport link between two Member States to allow a demonstration to take place with the effect that for a certain period of time goods cannot be brought from one Member State to the other). This has generally been confirmed by the Court of Justice in its judgment in *Åkerberg Fransson*.[32] In that case the Court adopted a relatively wide approach when it considered that provisions of Swedish law criminalizing tax evasion could be considered such an implementation despite the fact that the provisions pre-dated Sweden's EU membership. The reason for this was that Article 325 TFEU and VAT Directive 2006/112/EC place the Member States under an obligation to ensure collection of VAT and to prevent evasion. The crucial question for whether the Charter grants

[31] P. Craig, *The Lisbon Treaty* (OUP, Oxford 2010) 220 who relies on the examples given in the Explanatory Memorandum.
[32] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECR I-0000.

rights to individuals, which they can enforce in the courts of the Member States, is therefore whether the legal dispute at issue arises within the scope of EU law.

The exact limits of the scope of European Union law are, however, not as clear as one might wish. This has recently been highlighted in the case of *Siragusa*[33] in which the Court held that an Italian measure ordering Mr Siragusa to dismantle a property built without planning permission was not acting within the scope of EU law. Considering that the property was situated in a landscape conservation area and considering that the European Union has exercised its competence concerning the protection of the environment, the national court wondered whether the Italian measure ordering the dismantling of the property was contrary to Article 17 CFR (right to property). The Court spelled out a test for the determination under which circumstances national legislation implements EU law:

> […] whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it.[34]

In this context the Court reaffirmed its pre-Charter case law that it is not sufficient for a measure to fall within the scope of EU law if it merely indirectly affects EU measures.[35] It furthermore remarked on the objective of protecting fundamental rights in EU law, 'which is to ensure that those rights are not infringed in areas of EU activity, whether through action at EU level or thorough the implementation of EU law by the Member States'. This statement can be read to suggest a narrower approach than that in *Fransson* as it appears that the Court considers the purpose of the application of the Charter to the Member States to consist in covering situations in which the Member States act as agents of the Union. It is suggested, however, not to read too much into this statement. After all, the Court decided as a chamber of three judges only. Furthermore, the criteria quoted above remain vague as it is not clear under what circumstances EU law would only be indirectly affected and where that is so whether the national legislation pursues objectives other than those covered by Union law. Moreover, the paragraph quoted above refers to Member State legislation so that it is not entirely clear whether the same test applies to executive action on part of a Member State.

These limits to the application of the Charter in the Member States were exposed in the proceedings surrounding the new Hungarian constitution. Arguably, since the constitutional reforms in Hungary initiated by the ruling Fidesz party, the standard of fundamental rights protection in that Member State has dropped significantly and arguably behind the standard required of all Member States under

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[33] Case C-206/13 *Cruciano Siragusa v Regione Sicilia - Soprintendenza Beni Culturali e Ambientali di Palermo* [2014] ECR I-0000.
[34] Ibid, para 25.
[35] Ibid, para. 29 quoting Case C-309/96 *Annibaldi v Sindaco del Comune di Guidonia and Presidente Regione Lazio* [1997] ECR I-7493.

the Copenhagen criteria.[36] However, the European Commission had difficulty to react to this given that the Union lacks a far-reaching human rights competence. It was limited to initiating proceedings based on age discrimination[37] and violations of the data protection directive.[38] For this reason the EU's fundamental rights Commissioner Reding called for Article 51 (1) CFR to be amended so as to include all Member State measures.[39]

d. Reception and acceptance in the Member States

An important limit to integration is of course the acceptance of European Union rules in the Member States. As far as the Charter is concerned there is evidence of some reluctance to such acceptance, which is demonstrated in the following two examples.

aa. The German Federal Constitutional Court and *Fransson*

While the Court's general approach of equating 'implementing EU law' with 'the scope of EU law' may not be considered overly controversial, the concrete application of this trigger test to the factual scenario in Åkerberg Fransson certainly was. Only a few days after that decision, the German Federal Constitutional Court made it clear that it did not agree with an expansive reading of the Åkerberg Fransson decision. It held:

> [Åkerberg Fransson] must not be interpreted in a way which would lead to the conclusion that the decision constituted an ultra vires act or in a way which would endanger the protection by or enforcement of the Member State's fundamental rights, which would call into question the identity of the constitutional order erected by the Basic Law [the German constitution]. In this sense the decision may not be understood and applied in a way that any reference of a provision to the abstract scope of Union law or purely factual effects on Union law would be sufficient for the Member States to be bound by the fundamental rights contained in the Charter of Fundamental Rights.[40]

Implicit in this quote is the threat that the Federal Constitutional Court may consider a decision by the CJEU ultra vires and thus not applicable in Germany. Given that the Federal Constitutional Court considers itself to have jurisdiction to make such a finding, it can be considered one of the most important antagonists of the CJEU. Its decisions carry particular weight in the discourse between the CJEU and national courts about the limits of European Union law. Its case law has in the past influenced the case law of highest courts in many other EU Member States, so that it

[36] Cf. for a short analysis CMLRev Editorial, 'Hungary's new constitutional order and "European unity"' 49 CMLREv (2012) 871.
[37] Case C-286/12.
[38] Case C-288/12.
[39] SPEECH 13/677, 4 September 2013.
[40] BVerfG *Antiterrordatei* 1 BvR 1215/07, para. 91 (translation by the author).

is likely that this dictum by the Federal Constitutional Court will trigger a response from the CJEU.

It should be noted that not all constitutional courts reacted in a confrontational manner. For instance, the Spanish Constitutional Court changed its doctrine on whether a trial *in absentia* was permissible under the Spanish constitution after the CJEU's decision in *Melloni.*[41]

bb. The House of Commons EU Scrutiny Committee and its Investigation in the Charter

In March 2014 the UK's House of Commons European Union Scrutiny Committee published its report resulting from an 'inquiry' into the status of the Charter of Fundamental Rights in the UK. It came to the conclusion that there was uncertainty about the Charter in the UK.[42] The Committee seemed principally opposed to the application of the Charter to the United Kingdom[43] and thus recommended that the European Communities Act 1972 be amended 'to exclude, at the least, the applicability of the Charter in the UK.'[44] Such a move, if adopted, would have far-reaching consequences. The European Communities Act 1972 is the basis on which the EU Treaties are applicable in the (dualist) United Kingdom. The European Communities Act 1972 is the reason why the House of Lords was able to recognize the primacy of European Union law in its famous Factortame decision.[45] Were the Act to explicitly exclude the applicability of the Charter, the UK courts would no longer be able to apply it.[46] This would place the UK in breach of EU law.

cc. Discussion

Together with the previous section on the German Constitutional Court's reaction to the Charter, this demonstrates that the Charter is not universally welcomed in the Member States, neither by judiciaries nor by legislatures. This might suggest limits to the potential for a harmonizing effect of EU fundamental rights. It is admittedly unlikely that the UK will choose to unilaterally opt out of the Charter and it is also unlikely that the Federal Constitutional Court will find a decision of the CJEU with relation to fundamental rights *ultra vires*. However, these two warning shots may well undermine the legitimacy for progressive decision-making by the CJEU and may therefore reduce the Court's own appetite and willingness to go down such a route.

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[41] Case C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] ECR I-0000; a discussion of the Spanish court's decision can be found here: http://europeanlawblog.eu/?p=2261.

[42] An additional problem in this respect was an alleged 'opt-out' from the Charter which some thought the UK had secured with Protocol No. 30 to the Lisbon Treaty.

[43] The Committee's main reason seems to be that most people thought that there was an opt-out when in reality there was not.

[44] Para. 172 of the Report; as an aside, in a strange misconception of the separation of powers in the UK, this parliamentary (!) Committee urges 'the Government to amend the European Communities Act', thus suggesting that the government has the power to do so and not the (sovereign) Parliament.

[45] Factortame (No. 2) [1991] 1 AC 603 (per Lord Bridge).

[46] In how far this would also affect s. 29 of the Scotland Act 1998 would be an interesting question as that provision refers to the need for Scottish legislation to be compatible with "EU law".

4. Integrative effects of cross-fertilization between the Courts

Having explored some of the limits of integration through the Charter, the following paragraphs argue that the potential for the integrative effects of fundamental rights is not exhausted by cases strictly coming within the scope of the Charter. Cross-fertilization between the European Court of Human Rights and the Court of Justice of the European Union is already occurring and may well increase leading to the standard of fundamental rights protection spiralling up.

Cross-fertilization between the two European courts in matters of human rights protection is nothing new and has received some attention in the literature.[47] It is argued here that the advent of the Charter and the prospect of EU accession to the ECHR will exacerbate that trend, leading to higher and more entrenched fundamental rights standards, which are likely to influence decision making by national courts not only where Member State action within the scope of Union law is at issue but also beyond.

The Court of Justice of the EU has a long tradition of referring to the case law of the ECtHR when defining the fundamental rights recognised as general principles under European Union law. With the Charter having become binding, such referrals have now become mandatory under Article 52 (3) CFR. This provision reads:

> In so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by said Convention. This provision shall not prevent Union law from providing more extensive protection.

The explanations to the Charter make it clear that this is a dynamic reference as they expressly state that 'the meaning and scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the [ECtHR]'.[48] This means that whenever the ECtHR raises the standard of fundamental rights protection, the Court of Justice must follow suit.[49] No such duty exists, by the way, where the ECtHR lowers that standard given that the CJEU may provide more extensive protection.

The prospect of EU accession to the ECHR is likely to exacerbate this trend. Accession will lead to the EU being subjected to the ECHR regime and thus to direct scrutiny by the ECtHR. In most cases reaching Strasbourg involving EU measures the CJEU will have come to the conclusion that the measure in question was not in violation of fundamental rights. The prospect of receiving a 'wrap on the knuckles' by another court is new to the CJEU. It can thus be expected that the Court will

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[47] E. g. S. Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis' (2006) 43 Common Market Law Review 629.

[48] Explanations to the Charter, OJ 2007 C 303/17.

[49] This is not a strict doctrine of precedent, however, cf. Tobias Lock, 'The ECJ and the ECtHR: The Future Relationship between the Two European Courts' (2009) 8 The Law and Practice of International Courts and Tribunals 375.

adhere even more strictly to the case law of the ECtHR to avoid being reprimanded in public. This can potentially result in an overcautious CJEU being far more willing than hitherto to find EU measures in violation of fundamental rights. Should the EU sign up to Protocol 16 of the ECHR, which would allow the CJEU to actively seek guidance on the interpretation of the Convention, this trend may even be enforced.

In this connection the effect of precedent should be taken into account. While there is no binding rule of stare decisis under European Union law, the Court *de facto* operates a system of precedent. Hence decisions adopted in cases in which the conduct of the European Union and its institutions are at issue, can have an effect on the fundamental rights protection in the Member States where the standard applied in that case is then carried forward and applied in subsequent case law concerning Member State measures either by the Court itself or by the Member State courts.

Moreover, the ECtHR has started making increasing references to the fundamental rights protection under European Union law and has found inspiration in the EU Charter of Fundamental Rights. Many provisions of the CFR replicate those found in the ECHR but contain slight modifications, and indeed modernizations. An example is the case of *Bayatan v Armenia*, in which the Grand Chamber had to decide whether Article 9 ECHR entailed a right to conscientious objection.[50] Previous decisions by the ECommHR indicated that it did not, chiefly because Article 4 (3) (b) ECHR suggests that conscientious objection is only protected by the Convention if recognised by the contracting party.[51] Given that only four countries did not recognise conscientious objectors, the Court concluded that there was now a European consensus justifying an evolutive interpretation of Article 9 ECHR. The Court relied amongst other materials on Article 10 CFR, which is modelled on Article 9 ECHR but explicitly recognises the right to conscientious objections. A similar reference to a deliberate difference between the wording of Article 49 CFR and Article 7 ECHR was used in *Scoppola v Italy (no 2)* to justify departure from the previous decision by the ECommHR in *X v Germany*[52], which held that a criminal court was not obliged to apply a more lenient penalty retroactively where at the time when the offence was committed a more severe penalty would have had to be imposed. Examples of references to European Union law can also be found outside the context of the Charter. For instance in the case of *D.H. v Czech Republic* ECtHR transplanted the CJEU's case law on the use of statistical evidence in discrimination cases into its own case law.[53] The key question was whether it was sufficient proof of indirect discrimination if applicants could produce statistical evidence only. This had previously not been accepted by the Court[54] but was reversed in *D.H.*

[50] *Bayatyan v Armenia* [GC] app no 23459/03, ECHR 2011.
[51] Starting with *Grandrath v Germany* app no 2299/64 DR 31, para 32.
[52] *X v Germany* app no 7900/77, DR 13, p 71.
[53] *D. H. and others v Czech Republic* [GC] app no 57325/00, ECHR 2007-IV.
[54] Cf. the Chamber judgment in the same case: *D. H. v Czech Republic* app no 57325/00, 7 February 2006, para 46; *Hugh Jordan v United Kingdom* app no 24746/94, ECHR 2001, para 154.

If the ECtHR continues with this trend of aligning its case law with that of the CJEU, the effect may be that the CJEU's interpretations of Charter rights are indirectly recognized in the context of the ECHR. Given that the ECHR must be obeyed by the Member State independently of whether they are acting within the scope of EU law, the Charter thus has an indirect influence on them even in those areas for which only the Member States are competent.

Moreover, the direction of the standard of fundamental rights protection can be considered "upward" towards stricter standards. The present practice of the two courts of cross-referencing each other's case law and of using it as justification for adopting the same (higher) standard for their respective system, thus leads to spiral effect towards stronger fundamental rights protection. For the Member States this means that they are required to comply with this higher standard by virtue of both systems, which shows the potential for integration through human rights law.