European Union human rights law: a very particular internationalization of constitutional rights

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Introduction

The aim of this paper is to analyze the development of human rights law in the European Union as a particular process of internationalization of constitutional rights. The protection of human rights, which originally lacked a distinct basis as a source of law in the EU, is now part of the standard operation of EU law before the courts of the European Union and also in the EU legislative process. The main distinguishing feature of the law, as developed in what could be regarded as a process of internationalization of law by the EU Court of Justice and embodied in the EU Charter of Fundamental Rights – a key international instrument for the protection of fundamental rights, is that beyond and in parallel with the aim of providing legal protection to the human rights of individuals against EU legislative and administrative action and the action of the Member States under the scope of EU law, and, thus, subjecting the use of public powers in the EU to legal controls, the protection of human rights in the EU has always been associated, at least in judicial interpretation, with legal, constitutional and governance considerations as they emerged from the broader context of European integration. Most evidently, EU human rights law played a central role as an instrument of consolidating the EU as a polity in a constitutional and political sense.

The functionality of the law, which is a traditional feature of EU law in general, emerged as a dominant characteristic of anchoring the protection of human rights in the EU legal arena. The foundational jurisprudence of the EU Court of Justice developed the EU human rights principle in the context of establishing the core principles of the EU legal order and protecting its autonomy from external challenges. In this process, the protection of human rights as a significant legal achievement on its own right relevant from the perspective of securing the rule of law in the operation of the EU was inseparable from the more general constitutional and governance 'motives' pursued by the jurisprudence. Gradually, judicial interpretation incorporated further and further considerations provided by the EU context. The protection of human rights became entangled with the interest of effective implementation and enforcement of EU legal obligations at the national level, became connected with the roles assigned to individuals in the EU legal order and with EU citizenship, and found itself at the center of relations between the different constitutional authorities overlapping and colliding within the EU framework. In this sense, the constitutional rights discovered and elevated to the European level by the EU institutions for their own purposes became as autonomous and particular as the EU legal order itself.

This paper is structured as follows. First, it analyzes the character of EU human rights as it emerged from judicial interpretation. It addresses especially the exposure of the interpretation of human rights law in general and of individual human rights to considerations provided by the particular EU constitutional and governance context. This is then followed by the analysis of the different contexts identifiable on the basis of the jurisprudence which define appreciably the interpretation of human rights by the courts

of the EU. The article is closed with the close analysis of a recent manifestation of the interpretative practices pursued and the interpretative considerations used by the EU Court of Justice. The opinion delivered in 2015 as regards the accession of the European Union to the European Convention on Human Rights demonstrates clearly the acquired particularities of protecting constitutional rights at the European Union level. Paradoxically, the characteristics developed in judicial interpretation halted an attempt at its further consolidation by linking it more directly to the parallel international system for the protection of human rights in Europe, the law of the ECHR.

The character of EU human rights law

The internationalization of constitutional rights, which we now understand as EU human rights law, is, and remains to be, predominantly, the product of judicial interpretation as exercised by the EU Court of Justice.[1] Reacting to internal and external pressures, the Court embarked upon a journey starting from the recognition of the principle that, despite the silence of the Treaties, human rights must be protected in the EU, primarily v*is-à-vis* the institutions, which led to the development of a complex body of law covering a broad range of rights, including the right to human dignity in a biotechnological context, the protection of privacy and personal data in the context of the operation of the internet, and the right to a fair procedure in the context of EU and Member State administrative and judicial procedures under the scope of EU law.[2] The anchoring of the EU human rights principle, which is now recognized among the values of the Union in Article 6 TEU, is as much the result of teleological interpretation giving priority to the functionality of law, including human rights law, in the European integration process as of the judicial expansion of the rule of law principle as recognized in EU law requiring that legal protection is provided against the use of public powers. In this process of lifting rights and fundamental freedoms protected in national constitutions to the European level, the body of law as engineered judicially became entangled with the legal, constitutional and governance considerations arising from the context of EU integration.[3]

The need to interpret the character of EU human rights law, as it emerged from decades of judicial development, in this manner was recognized in academic commentary from relatively early on. The

[1] See the traditional general formula that the application and interpretation of human rights, as general principles of EU law, by the Court of Justice draw 'inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories', Judgment of 18 June 1991 in *Case 260/89, ERT*, EU:C:1991:254, para. 44 and Opinion of 28 March 1996 - *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Opinion 2/94*, ECLI:EU:C:1996:140, para. 33. Weiler argued that the formula asking for 'ideas' common to the constitutions of the Member States, instead of asking for a comparative examination and a reliance on national law, enables the EU Court to develop an autonomous human rights law, J.H.H. Weiler, 'Fundamental Rights and Fundamental Boundaries', in N.A. Neuwhal and A. Rosas (Eds.), *The European Union and Human Rights*, The Hague, Kluwer Law, 1995, pp. 113-114.

[2] Their invention in EU law as general principles was – the EU Court of Justice lacking other legal options – a '*solution de dépannage*', which according to the late Pierre Pescatore, one of the founding fathers of the EU legal order and EU human rights law, enabled the EU judiciary to fulfil its functions with a 'broad view of its mission', P. Pescatore, 'Written Communication "The Protection of Human Rights in the European Communities"', *CMLRev* 9, 1972, p. 79.

[3] Protecting the autonomy and supremacy of EU law was one of the main rationales followed, which, however, provides only a partial explanation for the judicial protection of human rights in the EU, see G. de Búrca, 'The Language of Rights and European Integration', in J. Shaw and G. More (Eds.), *New Legal Dynamics of European Union*, Oxford, Clarendon Press, 1995, p. 39.

argument was made most comprehensively by de Búrca who argued that the role of human rights in the EU cannot be assessed without reference to its complexity which follows, among others, from the character of the different rights protected, the actual context in which human rights are involved and their different features, and the actual place and impact of the right invoked in that particular environment.[4] In this light, particular legal developments, as overseen by the EU Court of Justice, such as the definition of the scope of human rights in the EU, the calibration of judicial deference – towards EU policy and legislation, the EU administration, Member State policy and legislation and Member State administration and judiciaries – in human rights cases, the judicial balancing between competing human rights and between human rights and competing interests, and the general positioning of EU human rights v*is-à-vis* constitutional rights at the national level and international human rights law, must be examined, even by lawyers, having regard to the considerations and agendas influencing the interpretative practices of the EU Court of Justice.

Human rights law in the EU, despite the Charter and its ever increasing legal influence[5] and despite the importance of human rights protection as provided by EU legislation,[6] is shaped and defined predominantly by judicial interpretation as exercised by the courts of the European Union with reference to the broader and narrower constitutional and governance context of the EU itself.[7] The body of law, thus, created pursues a busy, multi-tiered agenda governed partially by functional and instrumental impulses, by constitutional considerations specific to the EU as a polity, and by principles requiring the effective as well as the lawful operation and development of the EU and its legal order.[8] Even the original judicial recognition of the constitutional principle that EU legislation and administrative action must be subjected to human rights requirements, which was later extended to cover the conduct of the Member States under the scope of EU law, can be associated with multiple agendas. On the one hand, it ensured that the EU operates, just as its Member States, subject to the rule of law and human rights requirements, thus mending the incomplete EU constitutional architecture as established by the original Treaties. On the other, the anchoring the rule of law and the protection of human rights as the core principles of the EU legal order enabled the further, constitutionally more robustly underpinned pursuing of the ambitious aim that the implementation and enforcement of common EU policies, and

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[4] Ibid, at p. 53.

[5] See A. J. Menendez, *Chartering Europe: The Charter of Fundamental Rights for the European Union*, Oslo, ARENA, 2001, at IV.3 and M.P. Maduro, 'The Double Constitutional Life of the Charter of Fundamental Rights of the European Union', in S. Peers and A. Ward (Eds.), *The EU Charter of Fundamental Rights*, Oxford, Hart Publishing, 2004, pp. 271-272, 281.

[6] See M. Varju, *European Union Human Rights Law*, Cheltenham, Edward Elgar, 2014, Ch. 4.

[7] The EU Court of Justice could rely on broad judicial competences, regulated under what is now Article 19 TEU, which was interpreted as providing a central position for judicial power in the constitutional arrangements under the Treaties which, then, allowed the Court to make the 'judicial leap' of developing a human rights law for the EU polity, see J.H.H. Weiler, 'Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Rights within the Legal Order of the European Communities', *Wash. L. Rev.*, 61, 1986, p. 1118. Criticized as enabling what was called as controversial retrospective 'myth building' practices which advocated that the EU 'is and always has been founded' on the protection of human rights and human rights protection has always been embedded in the Treaties, A. Williams, *EU Human Rights Policies*, Oxford, OUP, 2004, Ch. 6, especially p. 139 and p. 160. See also, I. Ward, *A Critical Introduction to European Law*, London, Butterworths, 1996, p. 25. See especially, Judgment of 3 September 2008 in *Joined Cases C-402/05 P and C-415/05 P, Kadi*, EU:C:2008:461, para. 282.

[8] The recognition of human rights as a condition of the validity of EU measures was crucial in the process of 'authenticating' the EU as a site of governance, Williams 2004, p. 129.

the process of European integration itself, are secured by the use of the machinery of law both at the EU and the member State level under principles requiring the effective fulfilment of EU legal obligations and the effective protection of the corresponding individual rights provided by EU law.[9]

From the perspective of the EU legal order and the protection of human rights therein, the anchoring of the EU human rights principle in the early formative jurisprudence and its application in later larger cases, such as *Kadi* or *Opinion 2/13*,[10] also meant their entrenchment as autonomous, self-defining regimes. The first judgments which addressed the protection of human rights in the EU raised this issue in the broader constitutional context of securing the autonomy of the EU legal order and defeating claims for competing authority by domestic constitutional orders.[11] The responses were framed with reference to the earlier mentioned functional considerations of ensuring the effectiveness of common policies and securing, as a related priority, of compliance with EU legal obligations by the Member States in the national arena. In these rulings, the protection of human rights was, thus, used, beyond their immediate application in adjudicating challenges against EU action or against the conduct of the Member States, as an instrument – as an 'existential requirement'[12] –in the much larger scheme of developing the EU into a polity different than any previous system of transnational relations. The protection of human rights was meant to stand for more than offering legal protection to individuals and subjecting public powers to legal restraints; it was essential for securing the effectiveness of governing and administering the EU at the national level and, in parallel, it contributed to reinforcing the constitutional qualities of the EU legal order and the legitimacy of EU action.

With the EU's rule of law principle overburdened with constitutional, governance and political demands and considerations,[13] it is hardly surprising that the protection and enforcement of human rights in the EU, primarily as regards the EU institutions, could not remain within the narrow confines of ensuring the legality of EU legislative and administrative action. The rule of law and the EU human rights principle, which are necessarily interrelated as one being the specific manifestation of the other, respond in judicial interpretation to the same considerations arising from the EU legal, constitutional and governance context and face similar limitations as to their influence and as to the related judicial functions.[14] The rule of law, interpreted so as to emphasize the functionality of the principle for the European integration process, was responsible for the functional interpretation and application of human rights in the EU. Human rights law also influenced the rule of law principle in the EU. The interpretation of human rights in a particular EU interpretative context, for instance in the context of

[9] Human rights became part of a constitutional trinity for the EU in this period of constitution-building consisting of the principles of supremacy and direct effect and the EU human rights principle, which were recognized in the jurisprudence to support the autonomy of the emerging constitutional order.

[10] *Joined Cases C-402/05 P and C-415/05 P, Kadi* and Opinion of 18 December 2014 - *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Opinion 2/13*, EU:C:2014:2475.

[11] See Judgment of 17 December 1970 in *Case 11/70, Internationale Handelsgesellschaft*, EU:C:1970:114.

[12] Cited from Opinion of 12 September 2007 of A.G. Maduro in *Case C-380/05, Centro Europa 7*, EU:C:2007:505, para. 19.

[13] See, *inter alia*, A. Williams, *The Ethos of Europe* Cambridge, CUP, 2010, Ch. 3; N. Walker, 'The Rule of Law and the EU: Necessity's Mixed Virtue', in N. Walker and G. Palombella (Eds.), *Relocating the Rule of Law*, Oxford, Hart Publishing, 2009; E.O. Wennerström, *The Rule of Law and the European Union*, Uppsala, Iustus Förlag. 2007; L. Pech, 'The Rule of Law as a Constitutional Principle of the EU', *EConstLR*, 6, 2010, p. 359.

[14] See Varju 2014, Ch 2.

the multi-layered EU judicial system where EU's particular right to effective judicial protection is enforced as interpreted having regard to the particularities of that context by the EU Court of Justice, stretched the meaning of the rule of law by forcing the principle to endorse the particular agenda pursued in that particular EU context.[15]

The original exposure in judicial interpretation of the protection of human rights in the EU to the functional considerations dictated by the European integration process,[16] which outside of the EU context may not emerge as relevant, and the ensuing instrumental use of human rights within the legal order in the interest of European integration led the way to a further opening of the texture of EU human rights law to considerations following from its broader context. Some of these support the functional reading of human rights in the EU that they form integral part of the broader legal mechanism in place to ensure the effective development of common policies and the effective enforcement of EU legal obligations. Enhancing the quality of EU law, especially to meet requirements under the rule of law, and ensuring that the values protected by human rights are recognized and safeguarded by law in the EU, although not entirely independently from the functional objective pursued, were, however, also given relevance in interpretative developments before the EU courts.[17] Overall, the main considerations arising from the EU context influencing the EU human rights jurisprudence include ensuring the effectiveness of EU governance and administration, including in particular the effective enforcement of EU law, entrusting national courts with roles in the application of EU law and designating, in parallel, their position in the multi-layered EU judicial system, securing the integrity of EU legislation and the corresponding governance structures with special attention paid to the balances achieved in EU instruments between their human rights objectives and the competing regulatory objectives, and developing a balanced relationship with the parallel constitutional authorities, both internal and external and national and European, especially with the ECHR system and its law.

Academic commentary has by-and-large recognized this complexity and context-dependence of EU human rights law as developed in the jurisprudence of the EU Court of Justice. In examining the origins of the judicial protection of human rights in the EU, the protection of human rights was interpreted as an instrument introduced to secure the acceptance of the supremacy principle in the Member States and also as a response to the challenges based on domestic constitutional principles against the autonomy and the core principles of the EU legal order.[18] Protecting human rights in the EU was argued to be a judicially engineered solution so as to relieve the pressure arising from the 'divided sovereignty'[19] between the EU polity and the Member States and an 'act of self-preservation'[20] for the

[15] See Judgment of 25 July 2002 in *Case C-50/00 P, UPA,* EU:C:2002:462.

[16] This is just one consequence of the interpretative approach followed by the Court of Justice, at least in the early decades. Clearly, there is coherence among the principles developed by judicial interpretation, which pursued the objective of securing a central position for law in the governance of common policies, which was to be achieved in a manner that legal rights and obligations can penetrate directly and deeply into national legal orders, see J.H.H. Weiler, 'The Transformation of Europe', *YLJ*, 100, 1991, p. 2403.

[17] See, T. Tridimas, *The General Principles of EU Law*, Oxford, OUP, 2006, p. 301.

[18] *Inter alia*, Weiler 1995, pp. 107-108; A. Stone Sweet, 'Constitutional Dialogues in the European Community', in A-M. Slaughter, A. Stone Sweet and J.H.H. Weiler (Eds.), *The European Court and National Courts*, Oxford, Hart Publishing, 1998, pp. 317-319; Pescatore 1972, pp. 74-75.

[19] T.C. Hartley, 'Federalism, Courts and Legal Systems: The Emerging Constitution of the European Community', *AJCL*, 34, 1986, p. 243.

[20] M.H. Mendelson, 'The European Court of Justice and Human Rights', *YEL*, 1, 1981, p. 130.

emerging supranational sovereign that we now call the European Union. It was argued to serve the broader agenda of furthering legal integration in Europe[21] and it was held to be inspired, in part, by concerns for the effectiveness of the EU legal order and, in part, by other pragmatic considerations of governance on the European level.[22] Miguel Maduro, writing on human rights as general principles of EU law, made the highly relevant claim that human rights in the EU have a 'double constitutional life'.[23] In his interpretation, this means that, on the one hand, human rights were used to enable the consolidation of the EU constitutional order by offering stability and restraint, in particular, by way of introducing a rights language and an avenue of control of EU legislative and administrative action. On the other, their application was kept flexible intentionally so as to enable human rights to contribute to the construction and development of the EU polity and accommodate demands arising in the process of European integration.

In Douglas-Scott's more critical interpretation, the jurisprudence of the EU Court of Justice has been manipulating human rights for purposes other than their protection[24] and has been introducing 'ulterior agendas'[25] into judicial interpretation, which meant that, ultimately, human rights law has been exploited in the interest of expanding EU governance into new areas.[26] She argued that the protection of human rights in the EU (human rights as protected in the EU) is a 'floating concept' which is open to all application and interpretation which may follow from its context.[27] Similar claims were put forward by Ian Ward who criticized the minimalism of the early, foundational case law,[28] which meant that the recognition of the EU human rights principle was not an act of unqualified judicial embrace of a human rights agenda, but rather a calculated judicial response which regarded the commitment to the protection of human rights as an instrument capable of contributing to the constitutional consolidation of the EU polity. A similar character of EU human rights law was pointed out in Toth's much less critical work which argued that the Court enjoyed the best of two worlds: human rights were available to consolidate the EU constitutional order and they could be interpreted and applied flexibly 'in the best interest of the Community'.[29] The context-dependence and flexibility of EU human rights law, when criticisms that judicial administration of human rights in the EU left the law insufficient, ill-defined, ancillary, and dependent upon the intake of cases[30] are taken seriously, indicate major flaws in the development and state of the system.

The critical literature also pointed out that the openness of the jurisprudence to considerations arising from the broader context resulted in an often ambiguous and uneven jurisprudence,[31] which left only a

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[21] J. Coppel and A. O'Neil, 'The European Court of Justice: Taking Rights Seriously?', *CMLRev*, 29, 1992, p. 670.
[22] F.G. Jacobs, 'The Evolution of the European Legal Order', *CMLRev*, 41, 2004, p. 309.
[23] Maduro 2004, pp. 271-272.
[24] S. Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon', *HRLR*, 11, 2011, p. 650.
[25] Borrowed from S. Douglas-Scott, 'Fundamental Rights in the EU: the Ambiguity of Judicial Review', in T. Campbell, K.D. Ewing and A. Tomkins (Eds.), *The Legal Protection of Human Rights*, Oxford, OUP, 2011, p. 289.
[26] ibid.
[27] S. Douglas-Scott, *Constitutional Law of the European Union*, London, Pearson, 2002, p. 434.
[28] Ward 1996, p. 140.
[29] A.G. Toth, 'The European Union and Human Rights: the Way Forward', *CMLRev*, 34, 1997, p. 492.
[30] See P. Alston and J.H.H. Weiler, 'An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights', in P. Alston (Ed.), *The EU and Human Rights*, Oxford, OUP, 1999, pp. 22-23 and A. Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law', *OJLS*, 29, 2009, pp. 551-552.
[31] Ibid. See also the claim that EU human rights law, as a judicially developed body of law, will be contingent by definition, B. de Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human

residual role for the protection of rights[32] and which failed to locate the place of human rights in the EU polity.[33] The early critiques of the jurisprudence, disillusioned by the pragmatic ambitions of the Court, reprehended especially the instrumental use (the 'manipulation') of human rights 'so as to accelerate the process of legal integration', and they maintained that human rights are not protected 'for their own sake' and that the jurisprudence had failed to accord them a 'pre-eminent status'.[34] The rebuttal of the latter criticism, which argued that human rights indeed receive adequate protection in the EU, could not avoid admitting that the human rights jurisprudence of the EU may only develop from what is available in the law and what was available as a matter of values and ideology at the different stages of European integration.[35] This latter assessment has many things in common with the criticism which argued arguing that EU human rights law lacks a solid orientation and held that the EU human rights principle has unclear parameters and equally unstable constitutional and conceptual foundations leaving much uncertainty regarding the actual legal and political limitations imposed by human rights in the EU.[36] These meant that the causes of the shortcomings of the system of human rights protection in the EU must be found inside the EU polity which is responsible for creating a distorted system of human rights protection where the institutional priorities of the EU are given more weight than the substantive, value-generating aspects of protecting human rights.[37]

Securing the autonomy of the EU legal order was recognized as the motivation for the judicial protection of human rights in the EU in the famous passage in *Internationale Handelsgesellschaft* which contended that EU law may only be subjected to its own legality requirements and taking into account constitutional requirements established at the national level would jeopardize its integrity.[38] *Opinion 2/94* formulated the same arguments – this time in relation to the ECHR – in a more delicate manner and placed emphasis primarily on the constitutional significance and implications of introducing substantial changes from outside to the system of human rights protection in the EU.[39] The constitutionally defining choice between EU and international human rights law as the standard of protection under EU law in *Kadi* was also made with reference to maintaining the autonomy of the EU

Rights' in P. Alston (Ed.), *The EU and Human Rights*, Oxford, 1999, p. 870, and that the multiple and complex rationales for the judicial protection of human rights in the EU polity and the context influenced diversity of interpretative streams in the jurisprudence inevitably lend a sense of incompleteness, incoherence and inconsistency to the law, see L.F.M. Besselink, 'Entrapped by the Maximum Standard', *CMLRev*, 35, 1998 pp. 670-678.

[32] See A. Williams, 'Promoting Justice after Lisbon: Groundwork for a New Philosophy of EU Law', *OJLS*, 30, 2010, p. 663; Douglas-Scott 2011 (n. 24), p. 649.

[33] See Douglas-Scott 2011 (n. 25), pp. 289-290.

[34] Coppel and O'Neill 1992, pp. 685-686.

[35] See J.H.H. Weiler and N.J.S Lockhart, '"Taking Rights Seriously" Seriously: the European Court and its Fundamental Rights Jurisprudence – Part I', *CMLRev*, 32, 1995, pp. 69-72.

[36] Williams 2010, p. 115 and p. 267.

[37] ibid, at pp. 152-153. See also Williams 2004, p. 160 and I. Ward, *The Margins of European Law*, London, Palgrave 1996, p. 151.

[38] *Case 11/70, Internationale Handelsgesellschaft*, para. 3. It hinted at this specifically when stating that the protection of human rights 'must be ensured within the framework of the structure and objectives of the Community', ibid, para. 4. For a more dramatic expression, see Judgment of 13 December 1979 in *Case 44/79, Hauer*, EU:C:1979:290, paras. 13-14. According to Tridimas, this followed from the Treaties and enabled the Court of Justice to assure the Member States that the Treaty they had signed complied with the rule of law, Tridimas 2006, p. 302.

[39] *Supra* note 1 (paras. 32-35). See also the discussion below on *Opinion 2/13*.

legal order and securing the integrity of the constitutional principles of EU law.[40] The autonomy of the EU legal order was a central component in the Strasbourg court's assessment of the protection of human rights in the EU in *Bosphorus*, which regarded sustaining the legal and other achievements of the EU as an important form of regional integration of states as supporting the leeway granted for the EU institutions in the protection of Convention rights.[41]

The introduction of a human rights principle in the process of constructing a constitutional identity and a legal order suited for the ambitious supranational polity, nevertheless, entailed – inevitably – developing and pursuing a human rights agenda – no matter how limited – for the European Union. The new constitutional principles generated legal changes within the polity which required a response from the EU Court of Justice – the architect of the new legal order – to keep the newly empowered polity under control.[42] It was suggested that the EU human rights principle was prompted by the 'arrogation of power' to the EU which resulted from the judicial creation of power-shifting doctrines, such as supremacy, direct effect and implied powers, which development clearly indicated that the use of powers acquired by the EU will not be limitless.[43] The necessity for the legal containment of newly found EU powers, as rationale for the protection of human rights, was recognized in the judgments in *Nold* and *Hauer*[44] in the judicial principle, which was also reiterated in *Opinion 2/94*, that respect for human rights is a condition for the legality of EU measures and that their observance must be enforced.[45] The political endorsement of the principle was achieved in the 1977 Joint Declaration laying down a commitment for the institutions of the then European Communities to respect human rights in the exercise of their powers and in pursuance of the aims of the EU in general.[46] The principle was later elevated to constitutional status by virtue of ex Article 6 TEU (now Article 6 TEU) furnishing the EU institutions with binding constitutional boundaries for their conduct and offering a constitutional basis for the jurisdiction of the EU courts to enforce human rights.

The EU human rights principle was, thus, presented as a consolidating principle for the emerging EU polity and offered an institutional recognition of the rule of law as a foundational principle for the new legal order. It allowed the jurisprudence to interpret human rights as instruments capable of supporting the constitutional foundations of the new legal order as well as containing the new legal order by formulating institutional duties and institutional constraints for European governance. The Court in *Kadi* made it particularly clear that the judicial protection of human rights is a constitutional fact, a cornerstone of EU constitutionalism which must not be compromised.[47] The jurisprudence of the Court made the protection of human rights 'integral, inherent, transverse' in the functioning of the EU polity, which should form part of all objectives, functions and powers of the EU,[48] and opened the gate for general constitutional changes affecting accountability and responsibility in the EU and anchored judicial review on the legal and institutional map of the EU. EU human rights law, together with other

[40] *Joined Cases C-402/05 P and C-415/05 P, Kadi*, especially para. 285.
[41] *Bosphorus v. Ireland*, ECHR 2005-VI, paras. 150-151 and 155-156.
[42] See Alston and Weiler 1999, pp. 22-23.
[43] Weiler 1991, p. 2417. Tridimas saw the EU human rights principle as a concession granted to national sovereignty on the road to secure the legitimacy of the EU polity which kept the EU Court of Justice in control over the constitutional qualities of the EU legal order, Tridimas 2006, 304.
[44] Judgment of 14 may 1974 in *Case 4/73, Nold*, EU:C:1974:51, para. 13; Case 44/79, *Hauer*, para. 15.
[45] *Opinion 2/94*, paras. 33-34; *Joined Cases C-402/05 P and C-415/05 P, Kadi*, para. 285.
[46] Joint Declaration of 5 April 1977 concerning the Protection of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, OJ 1977 C 103/1, para. 2.
[47] *Joined Cases C-402/05 P and C-415/05 P, Kadi*, para. 322.
[48] J.H.H. Weiler and S.C. Fries, 'A Human Rights Policy for the European Community and Union: The Question of Competences', P. Alston (Ed.), *The EU and Human Rights*, Oxford, OUP, 1999, pp. 155-156.

components of the rule of law in the EU, gave shape to the EU legal order and also to European governance. This was seen as human rights providing a certain, limited public morality for the EU.[49]

The character of EU human rights law was also shaped by the limitations arising in connection with the jurisdiction and the judicial role assumed by the EU Court of Justice in human rights matters. Fundamentally, the judicial protection of human rights is subject to constraints imposed by what may be called as parallel constitutional authorities operating in the EU legal space. The constraint may come from internally – from the constitutional authority of the Founding Treaties, the EU legislature and the EU administration, or from externally – from the constitutional authority of the Member States and of directly or indirectly binding international commitments.[50] In general, the jurisprudence duly recognizes these limitations and, as a main characteristic of EU judicial practice, exercises deference to these parallel constitutional authorities.[51] Mainly, this entails accepting that the assessment of the matter raised in individual cases involving human rights either falls to a different constitutional authority or it needs to be carried out having regard to considerations arising from a parallel constitutional authority. The EU Court of Justice would, thus, refuse to interfere with policy choices reflected in EU legislation, with the balances struck between human rights and competing interests and rights in EU instruments, with decisions serving the effective conduct of EU procedures, or would express trust towards the assessment carried out by national authorities under national law and towards national courts which may be given the task of making the final assessment under EU law of interferences with human rights. Reliance in the EU jurisprudence on legal authorities in national or, much more frequently, in the law of the ECHR is another important manifestation of this practice.[52]

This relevance of parallel constitutional authorities, both internal and external, for the jurisprudence has had the important consequence of EU human rights law being interpreted and applied in a multi-layered setting where national constitutional laws and international human rights law continue to seek to influence the law produced and applied in the EU. This became evident as early as the judgment in *Internationale Handelsgesellshaft* where the challenge from the constitutional protection of rights at the national level was repealed and the primacy enjoyed by EU law over national constitutional provisions, including constitutional rights, was confirmed.[53] The judgment in *Kadi*, *Opinion 2/94* and, ultimately, *Opinion 2/13*,[54] analyzed below, provide further examples of this interpretative development particular to EU human rights law, which is under pressure, mainly in order to protect its self-proclaimed autonomy, to seek approval from, or, at least, to coexist in a harmonious relationship with, other constitutional actors, such as national constitutional courts or the European Court of Human Rights, in the form of exercising deference towards national constitutional requirements, or of borrowing regularly from the ECHR jurisprudence.[55] This character of EU human rights law, whereby its relations with parallel bodies of human rights law influence its interpretation, is markedly reflected in the legal

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[49] See I. Ward, 'Beyond Constitutionalism: The Search for a European Political Imagination', *ELJ*, 7, 2001, p. 25.

[50] The protection of national constitutional identities, as recognized under Article 4(2) TEU, is a constitutional 'counter-limit' for EU law and for EU courts expressly recognized in the Treaties, L.F.M. Besselink, 'The Protection of Fundamental Rights post-Lisbon', <http://fide2012.eu/index.php?doc_id=94> (accessed 10 May 2013), p. 47.

[51] See, inter alia, C-386/10 P *Chalkor*, paras. 61-63 and the case law cited; Case C-272/09 P *KME* nyr., paras. 101-103 and the case law cited.

[52] See, inter alia, Case 44/79 *Hauer* [1979] ECR 3727, paras. 17-20.

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[55] For example, Case C-36/02 *Omega* [2004] ECR I-9609, paras. 39-40. See also Case C-244/06 *Dynamic Medien* [2008] ECR I-0505, paras. 44-52.

commentary discussing the requisite standard for the protection of human rights in the EU which would satisfy the European as well as the diverse national constitutional requirements.[56]

Other commentators addressed this multi-layered, 'relational' character of EU human rights law more directly. In their interpretation, the EU constitutional order, including the protection of human rights emerged as a result of a discursive relationship between the EU and national legal orders based on a dialogue between the EU and the national courts.[57] Wedged between parallel constitutional orders on the European and national levels, EU human rights law was illustrated as the product of judicial practices which recognize the demands of the parallel constitutional orders and which provide appropriate responses to those demands. It was never convincingly established, however, that the EU Court of Justice was ever equipped with a toolkit which enabled it to carry out the task of generating human rights law in a 'reciprocal relationship' with parallel constitutional orders, and that the interpretative tools which were actually available to the Court, especially the comparative approach,[58] were suitable to create a human rights law which is not simply 'parasitic' or 'purely derivative' but which was created successfully by means of a genuine constitutional dialogue.[59] Despite these empirical shortcomings, Perez's detailed analysis of judicial dialogue as a model for the evolution of EU human rights law was right to make the claim that this way the 'normative authority' and the legitimacy of the EU Court of Justice's involvement with the protection of human rights can be ensured.[60]

The interpretative contexts of EU human rights law

EU human rights law was characterized above as a product of the interpretative practices of the EU Court of Justice which, beyond the immediate need to ensure the lawful operation of the EU polity through the protection of human rights, responded to the broader demands of the EU's constitutional and political construction and of the specific legal and governance considerations arising in the EU polity. It, thus, seems that reservation in *Internationale Handelsgesellschaft* that the protection of human rights must be ensured having regard to the structure and objectives of the EU[61] had the direct consequence of the narrower and broader context of the protection of human rights in the EU having an impact on their interpretation. As already raised, many of the interpretative considerations arising from these different contexts are linked to the functional agenda of ensuring the effectiveness of EU legal obligations and of the related governance structures. Others relate mainly to the EU judiciary determining the boundaries of its human rights jurisdiction *vis-à-vis* the different internal and external constitutional authorities in the European constitutional space. Their influence on judicial interpretation

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[56] See only the contrasting opinions of Weiler and Besselink, Weiler (n 3) 106 and 109-110 and Leonard F.M. Besselink, 'Entrapped by the Maximum Standard' 1998 35 CMLRev 629, 670-678.

[57] See Aida T. Perez, *Conflicts of Rights in the European Union* (OUP 2009) 92-93. Describing it as a bottom-up, 'permanent learning process' inspired by national constitutions, Maduro (n 32), 297-298.

[58] It must not be overlooked that the 'comparative method' has its own weaknesses, and it is unclear what outcomes it would produce and whether those outcomes would be suitable for the EU. A purely functionalist comparison will not do justice to the task of exploring common constitutional traditions, and a genuinely contextual approach may render the comparison unfeasible, especially when the original recommendation by the Advocate General in *Internationale Handelsgesellschaft* to investigate the 'philosophical, political and legal substratum common to the Member States' is considered.

[59] Terms borrowed from Gráinne de Búrca, 'Convergence and Divergence in European Public Law: the Case of Human Rights' in Paul R. Beaumont, Carole Lyons and Neil Walker (eds) *Convergence and Divergence in European Public* Law (Hart 2002) 132.

[60] Perez (n 39) 97 and 109-110.

[61] supra

amounts to two major interpretative reactions: judicial deference and judicial balancing between the imperative of legal control and the interest of effective legislative and administrative action.[62]

The primary interpretative consideration for EU human rights law following from its legal, political and governance context is the rule of law principle. As already discussed, the protection of human rights is a manifestation of the rule of law in the EU and it finds its conceptual basis in the EU's rule of law principle. The interpretative relevance of the rule of law is manifold. Its formal aspects find expression in the EU Court of Justice interpreting and applying human rights so as to control the legality of EU action and to hold actors accountable for the breach of the law.[63] The rule of law is also responsible for the unconventional usages of human rights in the EU. Under the general effectiveness requirement of the EU, the rule of law pursues multiple, often contradictory agendas in the construction of the EU as a polity and this circumstance is channelled into EU human rights law called to appreciate the functional demands of EU law and governance.[64] The conflicts between the conventional constraining and unconventional constitutive aspects of the rule of law in the EU are matched by the corresponding tensions between the different uses of human rights in the EU arena.[65]

In the context of EU economic regulation and the law of the Single Market, EU human rights law is interpreted with reference to the fundamental question what constitutes appropriate regulation from the EU and from the Member States when they act under the scope of the law of the Single Market. In this regard, human rights are applied by the EU Court of Justice so as to determine the margin of policy and regulatory discretion reserved for the EU legislator and for the Member States.[66] In majority, judicial interpretation focusing on the complex and often contradicting policy priorities pursued by the legal measures under scrutiny led to near complete deference to legislative discretion and treated the corresponding human rights claims accordingly.[67] The relevant judgments were clearly aware of the necessity of preserving the integrity of complex legislative and regulatory arrangements and were preoccupied with determining the legitimacy and the scope of judicial assessment in enforcing the requirements regarding the design and quality of regulation, which follow from EU human rights law.[68]

The increasing regulatory activity in the EU in the field of human rights protection presents another distinct interpretative context for EU human rights law. The relevant EU measures regulate the scope and substance of human rights, identify the rights and public interest considerations which compete with human rights, and lay down boundaries for public and private action by establishing balances between competing rights and interests.[69] The judgments, which most often dealt with legal challenges

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[62] These judicial reactions are direct consequences of the application of the interpretative principle at the heart of the jurisprudence, the principle of proportionality.

[63] See, inter alia, Case C-50/00 P *UPA* [2002] ECR I-6677, para. 38; Case C-355/04 P *Segi* [2007] ECR I-1657, para. 51; Case C-354/04 P *Gestoras* [2007] ECR I-1579, para 51; Case C-265/08 *Federutility* [2010] ECR I-3377, para. 44.

[64] See, inter alia, C-402/05 P and C-415/05 P *Kadi*, paras. 281-282 and 285, and C-144/04 *Mangold* and Case C-555/07 *Kücükdeveci*. See the discussion concerning the true purpose of the so called *ERT*-scenario in EU human rights law in Joseph H.H. Weiler, 'Fundamental Rights and Fundamental Boundaries' in Nanette A. Neuwhal and Allan Rosas (eds), *The European Union and Human Rights* (Kluwer 1995) 121-125

[65] See, inter alia, Case C-399/11 *Melloni* nyr., para. 60; Case C-571/10 *Kamberaj* nyr., paras. 62-63 and C-617/10 *Fransson*, para. 44.

[66] See, inter alia, Case C-491/01 *BAT* [2002] ECR-I 11453, para. 123; Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, paras. 14-20; Case C-368/95 *Familiapress* [1997] ECR I-3689, para. 26.

[67] John Usher, *General Principles of EC Law* (Longman 1998), Chapter 6.

[68] See, inter alia, Case 4/73 *Nold* [1974] ECR 0491, para. 14; Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health* [2005] ECR I-6451, paras. 125-126; Case C-370/05 *Festersen* [2007] ECR I-1144, para. 37.

[69] See, inter alia, Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the

against the particular balance struck between the protection of human rights and the competing interests and rights, and sometimes with the implementation of human rights requirements in the measures in question, were dominated by the EU Court of Justice deferring heavily to the EU legislators original determination of the relevant human rights issue as represented by the provisions of the legal measure under challenge.[70] Judicial interpretation, thus, dutifully followed the general scheme and structure adopted in those measures for the human rights regulated, or it accepted the specific provisions determining the relevant human rights requirements as adequate. Judicial assessment stayed within the framework provided in the relevant instruments for the balancing exercised between human rights and the competing interests and rights and respected the compromises established by the EU legislator between the policy and human rights objectives of the measure in question. Human rights law, as applied by the EU Court of Justice, on the whole tends to give way to the intent of the EU legislator as regards the protection of human rights in the particular policy context. In the few instances, when the Court assumed jurisdiction to assess and correct the human rights arrangements laid down in EU legislation,[71] does not challenge this trend as the aim of judicial intervention was to ensure that the EU instrument in question and the related governance system, following some minor interpretative adjustments, can be maintained.

The EU's multi-layered judicial system combining the EU courts and courts at the Member State level had a profound impact on the interpretation of the EU's rather peculiar[72] right to effective judicial protection and effective remedies. The complex interpretative considerations arising from this context, made particularly complicated by the complementary relationship between the rule of law and the right to effective judicial protection, resulted in interpretative practices which rely on interpreting the multi-layered judicial system of the EU as a single[73] coherent system. On the one hand, this meant that the shortcomings of judicial protection before EU courts were sought to be remedied in judicial

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processing of personal data and on the free movement of such data, OJ 1995 L 281/31; Regulation 45/2001/EC of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ 2000 L 8/1; Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks, OJ 2006 L 105/54; Regulation 1049/2001/EC of the of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145/43; the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, 1262 UNTS 153; Regulation 44/2001/EC of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2000 L 12/1; Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ 2002 L 190/1; Regulation 343/2003/EC of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national, OJ 2003 L 50/1; Directive 98/44/EC of 6 July 1998 on the legal protection of biotechnological inventions, OJ 1998 L 213/13.

[70] See, inter alia, Joined Cases C-465/00, C-138/01 and C-139/01 *ORF* [2003] ECR I-4989, para. 70; Case C-101/01 *Lindqvist* [2003] ECR I-12971, para. 79; Case T-174/95 *Svenska Journalistförbundet* [1998] ECR II-2289, paras. 111-114; Case C-7/98 *Krombach* [2000] ECR I-1935, para. 19; Case C-283/05 *ASML* [2006] ECR I-12041, para. 24; Case C-394/07 *Gambazzi* [2009] ECR I-2563, para. 28; Case C-341/04 *Eurofood* [2006] ECR I-3813, para. 64; Case C-444/07 *MG Probud* [2010] ECR I-0417, para. 34; Case C-303/05 *Advocaten voor der Wereld* [2007] ECR I-3633, paras. 28 and 31; Case C-66/08 *Kozłowski* [2008] ECR I-6041, paras. 31 and 43; Case C-34/10 *Brüstle* nyr., paras. 27 and 32.

[71] C-411/10 and C-493/10 *N.S.*, paras. 15 and 56.

[72] See Case C-50/00 P *UPA* [2002] ECR I-6677, para. 39; Case 222/84 *Johnston* [1986] ECR 1651, para. 18; Case C-199/11 *Europese Gemeenschap* nyr., paras. 47-48.

[73] See *inter alia* Case 294/83 *Les Verts* [1986] ECR 1339, para. 23; Case 315/85 *Foto-Frost* [1987] ECR 4199. See also *Michaud v France* ECHR 2012, paras. 110-111.

interpretation by seeking alternative avenues of redress, primarily before national courts.[74] On the other, it entailed an anxious scrutiny, as regards the participation of national courts in the EU judicial system, of solutions which could reconcile the interest of the effective enforcement of EU law with the autonomy available at the national level for regulating and administering the domestic justice system.[75] The operation of national courts and their participation in the EU judicial system, thus, became central to the interpretation of the right of effective judicial protection and effective remedies, which, then, revolved around the issue of the deference owed towards the Member States and around their responsibilities and obligations in the EU judicial system.[76]

EU administrative procedures and infringement procedures, conducted before the European Commission, are responsible for very peculiar developments in the interpretation of otherwise fairly standard procedural rights and guarantees by the EU courts.[77] In EU competition enforcement procedures, the effective conduct of these procedures and the effective use of the discretion made available to the Commission to achieve the effective enforcement of EU competition law dominated the framing of the relevant rights and guarantees, especially the rights of the defence, and their enforcement.[78] Similar considerations played role, although in a very different context, in the interpretation of the defence rights of the Member States as participants of infringement procedures which were quire readily subsumed to considerations of administrative and broader policy effectiveness characterizing the conduct of these particular procedures.[79]

As raised earlier, human rights are interpreted by the EU Court of Justice in a multi-layered environment whereby the existence of parallel constitutional authorities – at the national, the European and at the international level – bears relevance for the protection of human rights in the EU.[80] Also, human rights need to be interpreted and applied in the various multi-layered legal and governance constructions of the EU,[81] for example in the EU judicial system consisting of the EU courts and the courts of the member States. Regarding the first context, human rights in the EU are understood as having a 'relational'

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[74] C-50/00 P *UPA*, para. 45 and *Opinion 1/09*, paras. 80 and 84. See the development of this idea in Joined Cases 133-136/85 *Walter Rau* [1987] ECR 2289; Case C-209/94 *Buralux* [1996] ECR I-0615; Case C-321/95 P *Greenpeace* [1998] ECR I-1651; Joined Cases T-172 and T-175-177/98 *Salamander* [2000] ECR II-2487.

[75] See, inter alia, C-50/00 P *UPA*, para. 41; Case C-432/05 *Unibet* [2007] ECR I-2271, para. 43; Case 33/76 *Rewe-Zentralfinanz* [1976] ECR 1989, para. 5; Case 45/76 *Comet* [1976] ECR 2403, para. 12; Case 14/83 *Von Colson* [1984] ECR 1891, para. 26.

[76] See, inter alia, Case C-312/93 *Peterbroeck* [1995] ECR I-4599, para. 14; C-432/05 *Unibet*, para. 54; Case C-40/08 *Asturcom* [2009] ECR I-9579, para. 39; Case C-63/08 *Pontin* [2009] ECR I-10467, para. 47; Case C-276/01 *Steffensen* [2003] ECR I-3735, para. 66.

[77] See Christopher Harding and Julian Joshua, *Regulating Cartels in Europe* (OUP 2010), CH ???; Jürgen Schwarze, 'Tendencies towards a Common Administrative Law in Europe' (1991) 16 ELRev 3, 5; Paul Craig, *Administrative Law* (Sweet and Maxwell 2012) 356-363; Hanns P. Nehl, *Principles of Administrative Procedure in EC Law* (Hart 1999).

[78] See, inter alia, Case 17/74 *Transocean Marine Paint* [1974] ECR 1063, para. 15; Case 85/76 *Hoffman-La Roche* [1979] ECR 0461, para. 9; Case 322/81 *Michelin* [1983] ECR 3461, para. 7; Joined Cases 46/87 and 227/88 *Hoechst* [1989] ECR 2859, paras. 14-15; Case C-550/07 P *Akzo Nobel* [2010] ECR I-8301, para. 92; Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paras. 30-32 and 34-30

[79] See, inter alia, Case C-185/00 *Commission v Finland* [2003] ECR I-14189, para. 79; Case C-439/99 *Commission v Italy* [2002] ECR I-0305, para. 10; C-494/01 *Commission v Ireland*, paras. 42-47; C-369/07 *Commission v Greece*, para. 75.

[80] Supra notes IHG.

[81] See for example Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1; Regulation 1151/2012/EU of 21 November 2012 on quality schemes for agricultural products and foodstuffs, OJ 2012 L 343/1.

character which manifests in interpretative practices of borrowing from other constitutional locations or in judicial deference to their authority and to the autonomy and discretion of actors located there.[82] In the second interpretative context, the main issue is whether all actors should be allowed jurisdiction to control the operation of the system and what institutions and processes are available to maintain its integrity.[83] As mentioned earlier, in the EU's multi-layered judicial system the place and the role of national courts serve as the fundamental interpretative consideration in the jurisprudence.

The relationship of EU human rights law with ECHR law provides a peculiar multi-layered interpretative context for the EU jurisprudence. The two legal orders are joined in a relationship of mutual observation which manifests in interpretative approaches informed of developments in the other legal order.[84] The interpretative considerations arising from the parallel existence of EU and ECHR law affect the entire EU jurisprudence, although not in a uniform manner. They include the interpretative pressure of divergence from ECHR law, which is responsible for the interpretative reaction of alignment, and the interpretative consideration of flexibility as available under the margin of appreciation doctrine in ECHR law, which together shape EU human rights law.[85] Alignment to ECHR law, under the pressure of potential divergences between the parallel legal orders, manifests in direct borrowing from the jurisprudence of the European Court of Human rights and in other less explicit practices of alignment.[86] The jurisprudence is also aware of the circumstance that alignment is a necessary precondition for EU human rights law being able to exploit the autonomy provided for the development and application of human rights under the flexible ECHR framework, as indicated especially in the ECHR's '*Bosphorus*-principle'.[87]

The character of EU human rights law as an impediment to its consolidation

The character developed for EU human rights law by way of judicial interpretation which exposed the law to considerations arising from the broader EU context had a direct influence on the EU Court of Justice's controversial legal obstruction of the Union's accession to the European Convention on Human Rights.[88] Paradoxically, the Court, which championed the cause of consolidating the EU legal order and the protection of human rights therein by means of securing in law its autonomy and protecting its core constitutional principles, shied away from the further consolidation of EU human rights law by bringing it under the scope of the parallel international system for the protection of constitutional rights in

[82] Case C-71/02 *Karner* [2004] ECR I-3025; Case C-112/00 *Schmidberger* [2003] ECR I-5659; Case C-244/06 *Dynamic Medien* [2008] ECR I-0505; Case C-36/02 *Omega* [2004] ECR I-9609.
[83] See, inter alia, C-402/05 P and C-415/05 P *Kadi*, paras. 286-289, 291-309, 316-317.
[84] Sionaidh Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis' (2006) 43 CML Rev 629; Joël Rideau, 'La coexistence des systèmes de protection des droits fondamentaux dans la CE et ses états membres' (1991) 7 Annuaire Internationale de Justice Constitutionnelle 11; Jutta Limbach, 'Inter-Jurisdictional Cooperation within the Future Scheme of Protection of Fundamental Rights in Europe' (2000) 21 HRLJ 333.
[85] Marton Varju, *European Union Human Rights Law* (Elgar 2014), Ch 8. See also ; Florence Zampini, 'La CJCE, gardienne des droits fondamentaux "dans le cadre du droit communautaire"' (1999) 35 Revue trimestrielle de droit européen 659, 680 and 688.
[86] See, inter alia, Case T-194/04 *Bavarian Lager* [2007] ECR II-4523, paras. 113-115; ; Case C-450/06 *Varec* [2008] ECR I-0581, para. 48; Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri* [2005] ECR I-5425, paras. 214-219; Case C-112/00 *Schmidberger* [2003] ECR II-5659, para. 79.
[87] See, inter alia, Case C-465/07 *Elgafaji* [2009] ECR I-0921; Joined Cases C-341/06 P and C-342/06 P *Chronopost* [2008] ECR I-4777, paras. 44-60; Case T-59/02 *Archer Daniels Midland* [2006] ECR II-3627, para. 264-269; Case C-199/11 *Europese Gemeenshap* nyr., paras. 71-76.
[88] *Opinion 2/13*, supra.

Europe, the law of the ECHR.[89] Equally paradoxically, the legitimization of the internationalization of constitutional rights, which is EU human rights law, by accession to the ECHR, seeking which was regulated as a distinct aim for the EU in Article 6(2) TEU, was rejected on account of the threat posed to the integrity and autonomy of the EU constitutional order[90] by its legally ordered exposure to further internationalization under the scope of ECHR law.[91] *Opinion 2/13* also identified a deep rift between the different interpretative considerations influencing EU human rights law and, thus, between its different uses in the EU context, namely between the commitment to uphold the rule of law and protect human rights and the interest of securing the effective operation of common policies and the effective enforcement of EU legal obligations.

The opinion was not the first occasion when the EU legal order, including EU human rights law, was confronted with the contradictions within its own system of commitments. As already discussed, the earlier, *Opinion 2/94* rejected, having regard to the constitutional and political state of the Union (then, the EC) at that time, that accession to the ECHR could take place lawfully under EU law.[92] When declining that the European Community would have competence to make that move, the Court argued in essence that accession would challenge the integrity of the EC legal system and subject its operation directly to a 'distinct international institutional system' and to the rules enforced by that system.[93] The constitutional setting for the protection of human rights in the EU had changed considerably since then. On the one hand, Article 6(2) TEU imposed a constitutional obligation on the Union to seek, without affecting the Union's competences as defined in the Treaties, accession to the ECHR. Although formulated with a strong element of conditionality, this Treaty provision provides that being exposed to controls as exercised by a parallel international system for the protection of human rights and being subject to its rules cannot alone serve as the basis for denying the legal possibility of the EU acceding to the ECHR. On the other, with the adoption and the entry into force of the EU Charter of Fundamental rights the protection of human rights in the EU acquired an even more solid and autonomous constitutional footing within the EU legal order. In parallel, the relevant jurisprudence of EU courts, which, as a norm, has regard to and borrows from the jurisprudence of the European Court of Human rights, matured considerably.[94] Finally, rulings, such as those delivered in *Kadi*,[95] indicated a reinforced autonomy of and a marked internal closure in the law of human rights in the EU.[96]

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[89] Not final, as coexistence and borrowing under the Bosphorus principle is still.

[90] Effective enforcement, which was central to the EU law's claim for authority, was rejected as constitutionally impossible.

[91] KUMM

[92] *Opinion 2/94* of the Court of 28 March 1996 - Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms ECLI:EU:C:1996:140. The Court made it clear that controlling accession to the ECHR under EC law was equally important for the Member States having regard to the 'institutional implications' it may entail not only for the EC but also for them, para. 35.

[93] para. 34. It would entail a 'substantial change' in the current system of human rights protection in the EC and, thus, in the system available to ensure the lawful operation of the EC (the protection of human rights is a 'condition of the lawfulness of Community acts').

[94] EXAMPLES OF CORRECTION AND data prot cases!!! The *Boshpurus*-ruling of the European Court of Human Rights made it clear that EU human rights law, in general, satisfies ECHR benchmarks, see paras.

[95] C-402/05 P és C-415/05 P. sz. *Kadi* egyesített ügyek.

[96] See also, the judgment in Fransson where the Court, having recognized the Treaty provisions regulating the current role of the ECHR in EU human rights law, rejected that the ECHR, 'as long as the European Union has not acceded to it', would constitute a legal instrument formally incorporated into EU law, Case C-617/10 *Fransson* nyr.,

In *Opinion 2/13*, the Court again rejected that accession to the ECHR would be possible under EU law. The opinion, which highlighted a number of legal shortcomings which were left unaddressed or were inadequately addressed in the legal preparation of the accession process,[97] established much more assertively than *Opinion 2/94* that the accession as prepared by the EU institutions as required by Article 6 TEU failed to give due respect to the fundamental principles of the EU legal order in general and EU human rights law in particular, and that it was not ensured that these internal legal principles constituting the legal order of the Union would not be jeopardized upon accession by virtue of its direct legal consequences.[98] It was made evident that the protection of human rights in the EU may only be provided lawfully and constitutionally when the legal and constitutional framework developed by the EU Court of Justice in its jurisprudence and by the Treaties is respected and maintained. Transgressing those internally determined boundaries by way of exposing EU law and EU human rights law directly to the obligations of the ECHR and the jurisdiction of the European Court of Human Rights may only be permissible under EU law in case the current framework is abandoned, or duly amended, or when the peculiarities of that framework are duly catered for, if that is possible, in the legal regulation of the accession.

The opinion largely relied on the conceptual framework established in the judgment in *Kadi*. That ruling, which in effect contradicted the arguments supporting the position the EU Court of Justice hoped to secure for EU law *vis-à-vis* national law and national constitution law in *Costa* and *Simmethal*,[99] constructed a relationship between international law and the EU legal order which rejected the openness of the latter towards considerations or pressures raised externally.[100] The Court, based on these premises, declared the unquestionable autonomy and inviolability of the EU legal order and the system of the protection of human rights therein. Autonomy and inviolability also provided the principled basis of the legal assessment of the legal particulars of the accession process. It was held that the undertaking of obligations under the ECHR through accession may only be realized legitimately under EU law, in case the autonomy of the EU legal order and the inviolability of the related principles governing the effective enforcement of EU law were adequately secured.[101] The Court made it particularly clear that the Treaty-required accession to the ECHR, which is expected secure broader constitutional benefits for the EU legal order, may go ahead only when the original fundamental interpretative context of EU human rights law – that the protection of human rights plays a significant role as a system-constituting instrument in the establishment and the subsequent consolidation of the EU polity – is given sufficient recognition.[102]

The reference to *Kadi* as the most relevant authority and the ensuing legal reasoning clearly meant that the opinion refused to reconsider the constitutional and, thus, the legal interpretative foundations of the EU legal order and the protection of human rights therein. While it is difficult to contest that the protection of human rights bears direct relevance for the lawful operation and for the overall legitimacy of any legal order and that exposure to an international body of human rights law and an institutional

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para. 44

[97] paras.

[98] paras. 179-200.

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[100] C-402/05 P és C-415/05 P. sz. *Kadi* egyesített ügyek, 282–285. pontok

[101] para. 199.

[102] paras. 159-177.

system established for the enforcement of those rights places the integrity of any legal order under pressure, the internal enclosure of a legal order on these grounds fails to recognize the positive implications of opening up that legal order to international (human rights) law for the exact same constitutional considerations. Arguably, as intended by the makers of the new Treaties, although Article 6(2) TEU does not make this explicit, accession to the ECHR will have the effect of enhancing the lawful operation and the legitimacy of the EU legal order and the filtering of human rights violations with the help of the ECHR by the European Court of Human Rights will enable the EU legal order to restore its integrity undermined by such violations. Obviously, the EU Court of Justice did not reject these considerations in its opinion as being irrelevant; it was more worried that EU human rights law will lose its connection with its very own context and be governed, instead of the complexity of considerations arising from that context, by a more reduced formal legal arrangement under the single constitutional clause provided by Article 6 TEU.

The threat posed by accession to the ECHR to the current system of human rights protection as exercised by the EU courts must not be underestimated. There is no guarantee that the EU jurisprudence and the body of law thus created would not be placed under pressure from a less context-driven interpretation of rights by an external institutional framework. The EU human rights principle itself, as developed in the founding jurisprudence, could attract legally established criticisms on account of the obvious linking of the protection of human rights to the legal consolidation of the constitutional principles which, in effect, claim an absolute priority for the effective enforcement of EU legal obligations and, thus, the effective operation of law in the EU's multilayered governance system. The position carved out for effectiveness in EU law may not be completely compatible a more balanced approach which may follow from human rights law where the interest of effectiveness in law and in its enforcement needs to be measured against competing rights claims. EU human rights law may also struggle with protecting the judicial deference exercised towards parallel constitutional authorities in the EU legal space. While the ECHR system has its own principle – the margin of appreciation doctrine – and practice governing judicial deference under the Convention, there is no guarantee that EU and Member State regulatory and governance would receive the same deferential judicial treatment under ECHR law.[103] Much depends on the application of the '*Bosphorus*-principle' which recognized international cooperation among States and the setting up of regional systems of inter-State cooperation as an interest which needs to be given consideration in the context of protecting human rights.[104]

For the EU Court of Justice's arguments to really convince, the opinion should have concretized the risks and effects which would follow from accession to the ECHR capable destabilizing the EU legal order and challenging its identity and integrity.[105] In light of the current treatment available under the '*Bosphorus*-principle', which recognizes a conditional autonomy for the EU legal order and EU human rights law therein, it is not particularly clear how opening of the EU legal order to direct influence and direct

[103] See the discussion concerning the threat of divergence and the pressure of alignment, already indicating that differring intensities of judicial scrutiny could cause tensions between the systems.

[104] Arguably, the '*Bosphorus*-principle' provides a much similar flexible boundary to that under the margin of appreciation doctrine determining the autonomy available to the ECHR Constracting States.

[105] In case the level of general principles is left behind, the opinion implies that membership in the ECHR weakens the effective enforcement of EU obligations against the Member States at the national level and, thus, undermines the effective realization of EU common policies. These potential outcomes should have received a more exacting treatment by the Court.

control by the ECHR as a source of international human rights law would actually jeopardize the fundamental, essentially functional premises of the EU legal order.[106] As suggested earlier, the opinion did not consider whether the EU legal order would benefit from ECHR accession complementing, potentially with values, its core functional ethos.[107] Furthermore, the opinion, despite the example given by the '*Bosphorus*-principle', failed to permit the same preliminary trust towards the operation of the ECHR system as that provided towards the protection of human rights in the EU under the Convention. The EU Court did not consider allowing the ECHR system to promote its own interpretative considerations as regards the protection of human rights in the same way as the European Court of Human Rights recognized the ability of the EU Court of Justice to develop its human rights jurisprudence autonomously in the particular context of the EU polity. This choice has particular relevance as without permitting ECHR law to impose its interpretative considerations on EU human rights law it is difficult to imagine under what conditions may accession to the ECHR be legally permissible under EU law.[108]

Conclusions

The development of EU human rights law by the EU Court of Justice provides an example of the internationalization of constitutional rights under a busy agenda. It took place in a very particular context and in a very particular time period, which resulted in the legal, constitutional and governance context of the European Union subjecting the interpretation of rights to the peculiar considerations arising from there. The exposure of the law to the considerations arising from its difficult constitutional and governance environment meant that human rights law became responsible, beyond the protection of individuals and controlling in law the use of public powers under the scope of EU law, for the constitutional construction and consolidation of the EU polity, and was drawn into giving effect to (…). Paradoxically, the characteristics developed in judicial interpretation for EU human rights law halted its further consolidation by integrating it more fully under the parallel international system for the protection of human rights in Europe, the law of the ECHR. Unless sufficient legal assurances are given that the autonomy and the fundamental principles of the EU legal order will not be jeopardized by accession to the ECHR, the enrichment of EU human rights law with interpretative considerations other than its own, which are relevant for the protection of human rights, is not permissible under EU law.

[106] See the interpretation by Tridimas of the '*Bosphorus*-principle' that it represents the same conditional and reversible endorsement of EU human rights law under the ECHR as that granted by national courts under the respective national constitutional orders, Tridimas (n 15) 352.

[107] see criticisms supra.

[108] A clause in the accession treaty concerning the inviolability of the autonomy and the principles of the EU legal order may offer a solution, but that alone cannot remedy a refusal in the EU jurisprudence to open human rights law to external influences.