
THE STATUS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS WITHIN THE HUMAN RIGHTS ARCHITECTURE OF THE EUROPEAN UNION

Harald Christian Scheu¹

*¹Police Academy of the Czech Republic in Prague
Lhotecká 559/7, 143 00 Prague 4-Kamýk, Czech Republic
E-mail: scheu@post.cz*

Bohumil Peterka²

*²Police Academy of the Czech Republic in Prague
Lhotecká 559/7, 143 00 Prague 4-Kamýk, Czech Republic
E-mail: b.peterka@post.cz*

DOI: 10.13165/PSPO-20-25-22

Abstract. This paper, deals with the specific position of the European Convention of Human Rights within the EU human rights architecture. Special attention is drawn to the relationship between the European Convention of Human Rights and the EU Charter of Fundamental Rights, as well as the relationship between the European Convention of Human Rights and general legal principles. Despite some tensions between the Luxembourg and the Strasbourg systems of protection, the European Convention remains an important external pillar of the human rights doctrine of the EU Court of Justice. The European Convention and the relevant case law of the European Court of Human Rights continue to be a stabilizing element of the European protection of human rights

Keywords: European convention, human rights, fundamental freedoms

INTRODUCTION

In the period immediately following the end of World War II, the international system experienced a paradigm shift. Whereas, in the spirit of traditional international law, human rights issues were considered an internal matter of sovereign states and possible claims arising from violations of individual rights were raised at the international level by the home state within the institute of diplomatic protection, after 1945, international organizations such as the United Nations and the Council of Europe began to address individual human rights with great commitment. For the first time, the protection of the rights of all human beings was codified in international documents, and international organizations established a solid institutional structure for human rights monitoring.

Besides the Universal Declaration of Human Rights of 1948 and the American Declaration of the Rights and Duties of Man of 1948, the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”) is one of the key documents

adopted at the first stage of international human rights protection. Unlike other legally non-binding documents of international organizations, the ECHR was conceived as an international treaty which, aside from the codification of binding rights and freedoms, established, for the first time in the history of the international system, a judicial, respectively a quasi-judicial system of protection accessible to individuals.

In academic literature, there is no doubt that the ECHR has become the basis of the most successful and dynamic regional system for the protection of human rights. European protection has long served as a model or inspiration for other regional systems and, in many ways, it even exceeds the universal standard of protection developed by the United Nations.

On the other hand, some problems related to current human rights protection in Europe must not be overlooked. The ECHR-based system has, in a way, fallen victim to its own success. This is true not only for the overburdening of the European Court of Human Rights by the high number of complaints from individuals who, after having unsuccessfully exhausted all national remedies, very often perceive an application to Strasbourg as their last hope for justice, and also from those who use the publicity and authority of the Strasbourg Court for political and lobbying purposes.

European protection involving several competing systems also suffers from a certain lack of systematicness. Over time, protection under the ECHR has come into direct competition with national constitutional mechanisms and EU instruments. Orientation in this system, sometimes referred to as the Bermuda Triangle,¹ Labyrinth² and Human Rights Puzzle,³ is not easy at all.

The Treaty of Lisbon introduced a new version of Article 6 of the Treaty on European Union (“TEU”), defining three levels of protection within EU human rights law: first the EU Charter of Fundamental Rights (“CFREU”), second the ECHR and third general principles of law. In this paper, we want to shed light on the specific position of the ECHR within the EU human rights architecture. After a brief introduction to the genesis of the three-pillar system of protection and the concept of the current Article 6 TEU, special attention will be drawn to the

¹ HIRSCH, Günter. Grundrechtsschutz im „Bermuda-Dreieck“ zwischen Karlsruhe, Straßburg und Luxemburg, *Europarecht – Beiheft* 1/2006, 7-18; Kleine-Cosack, Michael. Grund- und Menschenrechtsschutz im „Bermuda-Dreieck“. Mängel- und Reformbedarf aus Sicht der Anwaltspraxis, *Anwaltsblatt* 7/2011, 501-505.

² HARATSCH, Andreas. Die Solange-Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte – Das Kooperationsverhältnis zwischen EGMR und EuGH, *ZaöRV* 66 (2006), 927-947.

³ SCHEECK, Laurent. Solving Europe’s Binary Human Rights Puzzle. The Interaction between Supranational Courts as a New Parameter of European Governance, *Questions de Recherche - Research in Question*, October 2005, available at: <http://www.sciencespo.fr/cepi/sites/sciencespo.fr/cepi/files/qdr15.pdf>.

relationship between the ECHR and the CFREU, as well as the relationship between the ECHR and general legal principles.

ORIGINS OF THE RELATIONSHIP BETWEEN THE ECHR AND EU LAW – GENERAL PRINCIPLES OF LAW AND OPINIONS OF THE CJEU

Initially, the European Communities were not established with the aim of human rights protection. They were designed as tools of purely economic integration. Two main reasons for that may be identified. First, the founding Member States did not envisage going beyond the purely economic dimension of integration enshrined in the founding treaties, and second, Member States saw sufficient guarantees for the protection of human rights in their own constitutional catalogues of rights at the national level and mainly in the ECHR at the international level.

Until the late 1960s the CJEU⁴ simply rejected human rights arguments.⁵ It was, in particular, the development of the doctrine of the primacy of European law that required a shift of this paradigm. It was brought about by the CJEU in *Stauder* (1969).⁶ In *Stauder*, the CJEU reflected academic and political discourse of the time (which followed after previous judgments enshrining the primacy of EC law) and ruled that common values of national constitutional law, in particular national human rights, must be considered an unwritten part of EC law.

In the subsequent case law, the CJEU expanded the range of sources of general principles of law. In the *Internationale Handelsgesellschaft* (1970), the CJEU coined the notion of general principles of law. Until 1974, when the CJEU consolidated its approach in *Nold*,⁷ the relationship between EC Law and international law was not entirely clear, or rather the CJEU avoided mentioning the international human rights obligations of the Member States. In *Nold*, the CJEU expressly stated that “international treaties for the protection of human rights on which the member states have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of community law”, similar to the national constitutional law of the Member states. That opened up the relationship between EC

⁴ In this paper, the abbreviation of the CJEU refers to both the Court of Justice of the European Union and its predecessors, regardless of their official name.

⁵ Cf. e.g. *1/58 Stork v High Authority*, in which the CJEU expressly refused to review EC legislation in the light of the fundamental rights enshrined in the law of the Member States.

⁶ 29/69 *Stauder*.

⁷ 4/73 *Nold*.

law and the ECHR as the most important human rights treaty binding all the Member States.⁸ However, it was still a relationship without sharp contours, because the ECHR (as well as other human rights conventions) was never declared formally binding upon the EU, but it was only considered to be an especially significant source of inspiration for the CJEU. The first explicit reference to the ECHR in the case law of the CJEU appeared in *Rutili* (1975), where the ECHR recognized the need to interpret EC law in the light of the ECHR.⁹

This case law was soon reflected by other EC institutions. In their joint declaration of 1977, the European Parliament, the Council and the Commission emphasized the paramount importance of the protection of fundamental rights, which derives primarily from the constitutions of the Member States and from the ECHR.¹⁰ The exceptional position of the ECHR is well illustrated by the fact that no other human rights treaty is mentioned.

The final confirmation of the relationship between the ECHR and Community law followed in 1979, when the CJEU first decided a preliminary ruling on the basis of the ECHR. In *Hauer*,¹¹ following the opinion of Advocate General Capotorti, the CJEU ruled that the ECHR is integrated into Community law.¹² In the following years, the CJEU repeatedly returned to clarifying the boundaries between Community (and later EU) law and the ECHR,¹³ but the foundations laid from the late 1960s to the late 1970s were never called into question.

Quite soon, as early as 1979, the Commission called for the EC's accession to the ECHR in a memorandum.¹⁴ Efforts for the EC to formally accede to the ECHR, thus strengthening its position as a human rights organization, had grown stronger over time. They materialized in the early 1990s, when the Council asked the CJEU whether the EC's accession to the ECHR was compatible with primary law.

In its Opinion No. 2/94, the CJEU replied rather succinctly that it was not, for two reasons. First, the CJEU stated that it did not have sufficient information to answer the question, as the specific conditions under which the Community should submit to the judicial review mechanisms established by the ECHR were to be set.¹⁵ The second reason was that the EC at

⁸ 4/73 *Nold*, para 13.

⁹ KORENICA, F. *The EU Accession to the ECHR; Between Luxembourg's Search for Autonomy and Strasbourg's Credibility on Human Rights Protection*, Springer International Publishing Switzerland, 2015, 43.

¹⁰ Joint Declaration by the European Parliament, the Council and the Commission, 4 May 1977, para 1.

¹¹ 44/79 *Hauer*.

¹² Opinion of AG Capotorti in 44/79 *Hauer*.

¹³ C-260/89 *ERT*, C-159/90 *SPUCI*, C-299/95 *Kremzow* or C-413/99 *Baumbast*.

¹⁴ Memorandum on the Accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms.

¹⁵ Opinion of the Court 2/94 of 28 March 1996, para 20-22.

the time did not have the power to accede to the ECHR, as the Community lacked both explicit and implicit power to join international human rights treaties.¹⁶

The situation changed by the adoption of the Lisbon Treaty, amended Article 6 TEU of which includes the obligation of the EU to accede to the ECHR. However, CJEU Opinion No. 2/13 has stopped the preparations for accession for the time being. The CJEU found the draft CJEU Accession Agreement inadmissible. There is not enough room to summarize the most important arguments put forward by the CJEU,¹⁷ but the leitmotif of the whole opinion is that the EU's accession to the ECHR, as proposed, jeopardizes the principle of autonomy of EU law as it has been shaped since the 1960s. We can consider paradoxical the fact that the very principle which was behind the origin and developments of the CJEU's human rights case law is currently hampering further development in the area.

POST-LISBON HUMAN RIGHTS ARCHITECTURE ACCORDING TO ARTICLE 6 TEU

The Lisbon Treaty fundamentally reformed the human rights framework of EU law and, through Article 6 TEU, introduced into EU law a comprehensive human rights architecture based on three pillars. Article 6 (1) TEU, which deals with questions of the status and interpretation of CFREU, provides that the Charter shall have the same legal value as the EU founding treaties and shall be interpreted in accordance with the general provisions in Title VII of the Charter and with due regard to the so-called Explanations.

The second paragraph of Article 6 TEU very briefly stipulates that the EU will accede to the ECHR, whereby such accession shall not affect the Union's competences as defined in the Treaties. At first sight, the wording of this provision seems very unfortunate, as it contains the unconditional obligation to enter an agreement which, however, has to be negotiated with the other contracting parties, and therefore will be subject to compromises. In other words, the EU is bound by an obligation which it, objectively, can fulfil only with the help of external subjects.

¹⁶ Opinion of the Court 2/94 of 28 March 1996, para 27.

¹⁷ For more detail consult e.g. HALBERSTAM, D. "It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward. *German Law Journal*, 2015, 16(1), 105-146; HALLESKOV STORGAARD L., EU Law Autonomy versus European Fundamental Rights Protection—On *Opinion 2/13* on EU Accession to the ECHR, *Human Rights Law Review*, Volume 15, Issue 3, September 2015, 485–521; KELLERBAUER, M., KLAMERT, M., TOMKIN, J. (eds.) *The EU Treaties and Charter of Fundamental Rights: a Commentary*, Oxford University Press, 2019, 83-86.

The third paragraph of Article 6 recalls and reaffirms the binding nature of general legal principles, which stem from the ECHR and the constitutional traditions of the EU Member States.

Although this three-pillar structure of European human rights protection looks very impressive and certainly reflects high ambitions, it should be noted that, in light of its genesis, the current version of Article 6 TEU is not the result of a long-term and well-thought-out human rights strategy. The architecture defined in Article 6 EU represents a synthesis of more or less successful stages of EU integration. The leitmotif of the whole regulation can be identified as the pursuit of a maximalist approach, according to the principle "the more human rights and the more human rights mechanisms, the better".

However, as in many other areas, greater quantity does not necessarily mean greater quality. The opposite may be true. The second pillar of the EU's human rights architecture was not implemented due to the fact that in Opinion 2/13 of December 2014 the CJEU declared that the text of the accession agreement, which had been finalized after long and complicated negotiations, was incompatible with EU law. Therefore, more than ten years after the entry into force of the Lisbon treaty, the ECHR as such is still not a formal part of EU law. In contrast, the binding nature of the general principles of EU law is not in dispute, but the scope for their practical application appears to be considerably limited in light of the post-Lisbon case law of the CJEU.

The serious shortcomings of the system provided by Article 6 TEU cannot simply be resolved by Luxembourg case-law. The danger of divergent interpretations of human rights provisions at the level of the CJEU, the ECHR and national courts may, on the contrary, increase the fragility of the whole system and weaken its legitimacy. Needless to say, the instability of the Union's human rights system naturally influences the sensitive division of competences between international, EU and national courts. In this context, the proposal by European Commissioner Viviane Reding to repeal Article 51 of the CFREU can be seen as a clear effort to extend the Union's powers to the detriment of the Member States' sovereignty. According to this plan, all national acts, even those which are not related to EU law, would be potentially subject to legal action by the European Commission and to legal review by the CJEU whereby the CFREU would serve as the major point of reference.¹⁸ As openly admitted by

¹⁸ V. Reding's speech entitled "The EU and the Rule of Law - What next?" Is available on the European Commission's website (https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_677).

Reding, such extension of the scope of the CFREU would mean a significant federalization of the Union.¹⁹

In light of these ambiguities and risks, it is necessary to pay more attention to the relationship of the ECHR to other sources of EU protection of fundamental rights.

THE RELATIONSHIP BETWEEN THE ECHR AND THE CFREU

Even before the adoption of the CFREU, considerable attention was paid to the relationship between EC or EU law and the ECHR and it materialized in the case law of both the CJEU and the ECHR. Although the ECHR and CFREU regimes are based on different legal bases, given the largely identical scope of application it is natural that a comprehensive system of informal and formal links has been established between them. This relationship can be considered an important pillar of the European community of law, connected by the shared system of values.²⁰

The question of EC liability for breaches of the ECHR was raised in Strasbourg as early as in the 1970s. In the judgment in *Confédération française du travail v EC*, the European Commission of Human Rights rejected the complaint on the ground that, since the EC was not a party to the ECHR, the complaint was inadmissible *ratione personae*.²¹ Direct review of EC and EU acts is therefore ruled out until the EU's accession to the ECHR. However, the possibility of an indirect review, i.e. a review of the conduct of a Member State which has only complied with its obligations under EU law, remained open.

The European Court of Human Rights ("ECtHR") never gave up the possibility of reviewing violations of the ECHR which occur as a result of the application of EC or EU law by a Contracting Party to the ECHR. In *Matthews*, the ECtHR confirmed the earlier approach considering a direct review of an EC act impossible, but expressly allowed an indirect review, ruling that denying a citizen the opportunity to vote in the European Parliament elections in Gibraltar (on the basis of the UK Accession Treaty) constitutes a breach of the ECHR.²²

In *Bosphorus*, the ECtHR found a balanced compromise, sometimes nicknamed the "Strasbourg Solange". First, the ECtHR confirmed its previous case law according to which the parties to the ECHR can be held liable for all acts and omissions, no matter whether those acts

¹⁹ V. Reding: "I admit that this would be a very big federalizing step." (Ibidem.).

²⁰ GRAGL, P. *The Accession of the European Union to the European Convention on Human Rights*, Hart Publishing, 2013, 51.

²¹ *Confédération française du travail v the EC* (Application No. 8030/77).

²² *Matthews v United Kingdom* (Application No. 24833/94).

or omissions arise from national law or from their international obligations. They cannot therefore relieve themselves of this responsibility by mere reference to the fulfilment of their EU membership obligations. However, the ECtHR substantially mitigated this conclusion by introducing the presumption that the system of protection of human rights in EU law provides human rights protection equivalent to that of the ECHR, therefore a Member State implementing EU law cannot deviate from the ECHR standards.²³

A lively debate on speculation as to whether the ECtHR would reconsider the *Bosphorus* compromise after the CJEU opinion 2/13 was ended by Avotiņš.²⁴ In the ruling, the ECtHR did not fundamentally reconsider its position and confirmed that EU law represents a human rights protection regime equivalent to the ECHR. The ECtHR will continue to refuse to review Member States' acts if EU law does not allow for any discretion on the part of the Member State and if no dysfunction in the EU's control system can be identified.

The delicate balance between the Luxembourg and Strasbourg regimes, reflected by the ECtHR in *Bosphorus*, necessarily had to be imprinted in the CFREU text as well. Since its inception as a non-binding instrument in 2000, the CFREU has contained Article 52 (3).

Article 25 (3) enshrines the principle that the CFREU must provide at least an equivalent level of protection of rights that are also covered by the ECHR. The provision (together with Article 53 of the CFREU)²⁵ enshrines the relationship between the two instruments from the CFREU's point of view.²⁶ The two provisions belong to the most important rules of interpretation of the CFREU.²⁷ Since the CFREU became a binding instrument, there has been a will to maximize convergence between the CFREU and the ECHR, as evidenced e.g. by the Joint Declaration of the CJEU and ECtHR Presidents of January 2011.²⁸ The aim of Article 52

²³ *Bosphorus* (Application No. 45036/98).

²⁴ Avotiņš (Application No. 17502/07).

²⁵ Although Article 53 of the CFREU explicitly mentions the ECHR, it can be argued, in line with the commentary literature, that since the relationship between the CFREU and the ECHR is specifically governed by Article 52 (3) of the CFREU, Article 53 makes no difference in this respect. Cf. e.g. KELLERBAUER, M., KLAMERT, M., TOMKIN, J. (eds.) *The EU Treaties and Charter of Fundamental Rights: a Commentary*, Oxford University Press, 2019, 2261-2262.

²⁶ Two remarks must be added. First, according to the Explanations to the CFREU, Article 52 (3) covers not only the ECHR itself but also its Protocols. Second, reservations of individual Member States to the ECHR cannot be taken into account when applying the CFREU.

²⁷ PEERS, S. (ed.) *The EU Charter of Fundamental Rights: a Commentary*, Beck, 2013, 1490.

²⁸ Joint communication from Presidents Costa and Skouris, available at: https://www.echr.coe.int/Documents/UE_Communication_Costa_Skouris_ENG.pdf.

(3) is to keep human rights protection in the EU coherent without violating the principle of the autonomy of EU law.²⁹

However, the question is to what extent the CJEU is also bound by the case law of the ECHR, not only by the ECHR itself. On the one hand, the ECHR must be seen as a "living instrument", the content of which is to a large extent determined by the ECtHR's interpretation, which reflects social and political developments and often favours teleological and comparative interpretations.³⁰ On the other hand, the CJEU is the sole highest authority in interpreting EU law.³¹ Again, the result is a compromise. The CJEU must respect the case law of the ECtHR, although it is not unconditionally bound by it. This was subsequently reflected in a number of judgments and opinions in which the CJEU explicitly cites an analysis of the case law of the ECtHR as a precondition for its own reasoning.³²

If we focus on the exception to the equivalence rule, i.e. on the situation where EU law provides higher protection, we can distinguish at least two types of cases where the CJEU has identified the need to deviate from the ECHR.³³ The first is the situation where EU law confers a higher level of protection of rights than the case law of the ECtHR. *Diouf*³⁴ or *Radu*³⁵ can serve as an illustration of this approach. The second situation appears if the relevant provision of the ECHR has not been ratified by all Member States and the ECHR regime, enshrined in international law, is not able to provide the same level of protection as a more coherent system of EU law. This was reflected, for example, in *Fransson*, in which the CJEU emphasized that Article 52 (3) of the CFREU did not affect the relationship between Member States' national law and the ECHR, and clarified that until the EU acceded to the ECHR, the ECHR itself had not formally been incorporated into the legal order of the Union. Thus, European Union law does not constitute, as long as the European Union has not acceded to it, a legal instrument

²⁹ PEERS, S., ed. *The EU charter of Fundamental rights: a Commentary*, Beck, 2013, 1742.

³⁰ Cf. e.g. KELLERBAUER, M., KLAMERT, M., TOMKIN, J. (eds.) *The EU Treaties and Charter of Fundamental Rights: a Commentary*, Oxford University Press, 2019, 2256.

³¹ BRITAIN, S. *The Relationship Between the EU Charter of Fundamental Rights and the European Convention on Human Rights: an Originalist Analysis*, *European Constitutional Law Review*, 11: 482–511, 2015, s. 503.

³² E.g. C-334/12, *Jaramillo*, para 43: "According to the case-law of the European Court of Human Rights on the interpretation of Article 6(1) of the ECHR, to which reference must be made in accordance with Article 52(3) of the Charter (...)"

³³ Cf. BRITAIN, S. *The Relationship Between the EU Charter of Fundamental Rights and the European Convention on Human Rights: an Originalist Analysis*, *European Constitutional Law Review*, 11: 482–511, 2015 506 et seq.

³⁴ C-69/10 *Diouf*.

³⁵ C-396/11 *Radu*.

which has been formally incorporated into European Union law. Consequently, European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of a conflict between the rights guaranteed by that convention and a rule of national law.³⁶

In the period following the Opinion 2/13, it is possible to identify a trend in the case law of the CJEU, where in some human rights cases the Court completely omits the explicit reference to relevant ECtHR case law and focuses only on the assessment of its compatibility with the CFREU, despite the ECtHR case law clearly being taken into account.³⁷ The "Charter-centrist" view is demonstrated in some recent case law. In *JZ*, the CJEU even ruled that the application of Article 52 (3) is permissible only if the autonomy of Union law and of the CJEU is preserved.³⁸ However, this approach does not constitute any clear trend. An example of recent landmark decision, in which the CJEU, on the other hand, clearly preferred compliance with the case law of the ECtHR over the effectiveness and coherence of EU law and the principle of mutual trust between Member States, is *Aranyosi and Căldăraru*.³⁹ The subject of the dispute was the extradition of the citizens of Hungary and Romania on the basis of a European arrest warrant to these states, where the prison conditions do not meet the requirements of the ECtHR case law. In his Opinion, Advocate General Bot favoured the principle of mutual trust (possibly threatened by the EU accession to the ECHR according to Opinion 2/13). However, in the ruling, the CJEU stated that the issuing authority must examine carefully and in the light of each individual case whether the extradited person is in danger of inhuman or degrading treatment under Article 4 of the CFREU, which must be interpreted in accordance with ECtHR case law.

THE RELATIONSHIP BETWEEN THE ECHR AND GENERAL PRINCIPLES OF LAW

The general principles of law include fundamental rights, which are guaranteed by the ECHR and which result from the constitutional traditions common to the Member States. From the late 1960s, it was the CJEU that introduced and gradually shaped the doctrine of general legal principles. Since protection based on unwritten general principles was conceived as a

³⁶ C-617/10 *Fransson*, para 44.

³⁷ C-362/14 *Schrems*.

³⁸ C-294/16 *PPU JZ*, para 50.

³⁹ C-404/15 a C-659/15 *PPU Aranyosi and Căldăraru*.

compensation for the absence of human rights in the founding treaties, the status of such principles became somewhat complicated and confusing after the Lisbon Treaty which stipulated that the CFREU, as a maximalist codification of human rights, is legally binding.

The question arises as to whether it would be more appropriate to fully replace the concept of general human rights principles with the CFREU. It is also unclear what should be the relationship between the general principles of law and the ECHR after the EU's accession to the ECHR. However, due to the mentioned problems related to the implementation of Article 6 (2) TEU, the second question has not become relevant, so far.

While Article 6 TEU does not at all address the relationship between the CFREU and general principles of law, the Charter itself is more explicit in this regard. Under Article 52 (4) of the Charter, fundamental rights which result from the constitutional traditions common to the Member States shall be interpreted in harmony with those traditions. In other words, the EU institutions, in particular the CJEU, do not interpret general principles of law autonomously, but take into account the use of certain terms and concepts by national authorities.

However, this interpretative rule does not solve all issues related to general legal principles, as Article 52 (4) of the CFREU relates only to the common constitutional traditions of the Member States. This provision, therefore, does not reflect the problem that general legal principles are based not only on constitutional traditions but also on the ECHR. Although the formal accession of the EU to the ECHR has not yet taken place, it must be borne in mind that the vast majority of the rights contained in the ECHR (and its additional protocols) have been reflected into both the CFREU and the set of general legal principles.

At this point, the problem of competing interpretations of general legal principles needs to be addressed. Although Article 52 (4) of the CFREU takes into account only the constitutional traditions of the Member States when interpreting general principles of law, with a view to the historical development of the whole concept, it is obvious that the ECHR forms the core of the general principles of law. Therefore, the interpretation of rights guaranteed by the general principles of law needs to take into account not only the text of the ECHR but also relevant Strasbourg case-law.

It is common ground that the interpretation of general principles of law may be the same in the light of constitutional traditions and also in the light of the Strasbourg case-law. This is because the national standard of human rights in Member States is often strongly influenced by

the Strasbourg system, not only in those Member States, such as the Czech Republic, in which the ECHR forms part of the constitutional order.

On the other hand, the concept of general principles of law also includes potential contradictions between Strasbourg's understanding of human rights as a living tool and a more conservative approach applied by national constitutional courts. The reference to national constitutional traditions in Article 52 (4) of the Charter can thus be understood as a certain defence of national traditions and values against Europeanisation and globalization tendencies.⁴⁰ However, the line between national and European values is not set in stone. As national constitutional traditions do not approach all human rights in the same way, national values can vary significantly from one Member State to another.

In the past, the CJEU has, therefore, relatively freely interpreted general principles of law. German legal doctrine has introduced the term “evaluative legal comparison” (“*wertende Rechtsvergleichung*”) in order to explain the Court’s methodology.⁴¹ In some cases, the CJEU recognized a general principle of law which was adopted by only one Member State’s legal order (e.g. a specific form of confidentiality between lawyer and client).⁴² In other cases, it did not accept as a general principle a rule which had been recognized by the vast majority of Member States (e.g. animal protection).⁴³ It is no wonder that such degree of methodological freedom, which can take the form of an autonomous interpretation of national concepts, was criticized long before the adoption of the Treaty of Lisbon.⁴⁴

The uncertainty associated with the interpretation of general principles of law could be reduced if the CJEU took strong account of the ECHR, especially in those cases in which the constitutional traditions of the Member States appear to be contradictory. Such an interpretative rule is supported by Article 52 (3) of the CFREU, according to which the meaning and scope of the rights, which are simultaneously guaranteed by both the CFREU and the ECHR, shall be the same. It would certainly go against the premise of the unity and autonomy of European

⁴⁰ See Borowsky, M. Artikel 52, In Mayer, J. (ed.) *Charta der Grundrechte der Europäischen Union* (4th edition), Baden-Baden, 2014, 801.

⁴¹ For more details, see Franz C. Mayer, Constitutional comparativism in action. The example of general principles of EU law and how they are made—a German perspective, *International Journal of Constitutional Law*, Volume 11, Issue 4, October 2013, 1003–1020.

⁴² 155/79 AM & S.

⁴³ C-189/01 Jippes.

⁴⁴ Lecheler, H. *Der Beitrag der allgemeinen Rechtsgrundsätze zur Europäischen Integration – Rückblick und Ausblick*, ZEuS 2003, 338-352.

Union law if the interpretation of the rights guaranteed by the CFREU and the ECHR had to change as a result of a new approach in some Member States.

At first sight, the Explanations *relating to the Charter of Fundamental Rights* support the argument that general principles of law do not have any direct effect on the meaning and scope of the rights laid down in the Charter and the ECHR. This concerns, for example, the right to life (Article 2 of the CFREU and Article 2 of the ECHR), the right to personal liberty (Article 6 of the CFREU and Article 5 of the ECHR), the freedom of expression (Article 11 of the CFREU and Article 10 of the ECHR) or the right to property (Article 17 CFREU and Article 1 of the first Additional Protocol to the ECHR). However, the Explanations do not offer a similar comparison of rights guaranteed by the Charter and general principles of law. Part of the doctrine therefore admits the relevance of general principles of law only in those cases in which the scope of a certain right (e.g. the right to education) goes beyond the narrow scope of the CFREU and the ECHR (Article 14 CFREU and Article 2 of the first Additional Protocol to the ECHR).⁴⁵

We do not fully agree with this interpretation. Although in standard cases there is not much room left for the application of general legal principles besides the CFREU and the ECHR, the attention paid by the ECtHR to arguments based on the so-called European consensus cannot be overlooked. According to the case law of the ECtHR, the meaning of the provisions of the ECHR is not given forever, but must be understood in light of the societal changes in the Contracting States.⁴⁶ From a methodological point of view, the ECtHR examines relevant standards and legal practices at the national level in order to identify common approaches shared by most States Parties.⁴⁷ The content and scope of the rights under the ECHR are therefore to some extent conditioned by the understanding of those rights by the authorities of the Contracting States. Thus, in the light of the case law of the ECtHR, new developments in most Member States may significantly affect the interpretation of the fundamental human rights provided by the ECHR.

At present, there is no effort on the part of the CJEU to address the conceptual weaknesses of European human rights protection. In its practice, the Court practically no longer takes into

⁴⁵ BOROWSKY, *op. cit.*, 803.

⁴⁶ For a critical analysis of the concept of European consensus in the case law of the ECtHR, see DRAGHICI, Carmen. *The Strasbourg Court between European and Local Consensus: Anti-Democratic or Guardian of Democratic Process?* Public Law. 2017 (1), 11-29.

⁴⁷ REGAN, Daniel. *European Consensus: A Worthy Endeavour for the European Court of Human Rights.* Trinity C.L.Rev. 51 (2011), p. 52.

account general legal principles, nor does it have any clear ambition to clarify the link between the ECHR and general legal principles in the current system of EU law.

REFERENCES

1. Borowsky, M. Artikel 52, In Mayer, J. (ed.) *Charta der Grundrechte der Europäischen Union* (4th edition), Baden-Baden, 2014.
2. BRITTAIN, S. The Relationship Between the EU Charter of Fundamental Rights and the European Convention on Human Rights: an Originalist Analysis, *European Constitutional Law Review*, 11: 482–511, 2015, s. 503.
3. *Confédération française du travail v the EC* (Application No. 8030/77).
4. DRAGHICI, Carmen. The Strasbourg Court between European and Local Consensus: Anti-Democratic or Guardian of Democratic Process? *Public Law*. 2017 (1).
5. Franz C. Mayer, Constitutional comparativism in action. The example of general principles of EU law and how they are made—a German perspective, *International Journal of Constitutional Law*, Volume 11, Issue 4, October 2013.
6. GRAGL, P. *The Accession of the European Union to the European Convention on Human Rights*, Hart Publishing, 2013.
7. HALBERSTAM, D. “It's the Autonomy, Stupid!” A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward. *German Law Journal*, 2015, 16 (1).
8. HALLESKOV STORGAARD L., EU Law Autonomy versus European Fundamental Rights Protection—On Opinion 2/13 on EU Accession to the ECHR, *Human Rights Law Review*, Volume 15, Issue 3, September 2015.
9. HARATSCH, Andreas. Die Solange-Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte – Das Kooperationsverhältnis zwischen EGMR und EuGH, *ZaöRV* 66 (2006).
10. HIRSCH, Günter. Grundrechtsschutz im „Bermuda-Dreieck“ zwischen Karlsruhe, Straßburg und Luxemburg, *Europarecht – Beiheft* 1/2006.
11. Joint communication from Presidents Costa and Skouris, https://www.echr.coe.int/Documents/UE_Communication_Costa_Skouris_ENG.pdf.
12. Joint Declaration by the European Parliament, the Council and the Commission, 4 May 1977.
13. KELLERBAUER, M., KLAMERT, M., TOMKIN, J. (eds.) *The EU Treaties and Charter of Fundamental Rights: a Commentary*, Oxford University Press, 2019.
14. Kleine-Cosack, Michael. Grund- und Menschenrechtsschutz im „Bermuda-Dreieck“. Mängel- und Reformbedarf aus Sicht der Anwaltspraxis, *Anwaltsblatt* 7/2011.
15. KORENICA, F. *The EU Accession to the ECHR; Between Luxembourg's Search for Autonomy and Strasbourg's Credibility on Human Rights Protection*, Springer International Publishing Switzerland, 2015, 43.
16. Lecheler, H. Der Beitrag der allgemeinen Rechtsgrundsätze zur Europäischen Integration – Rückblick und Ausblick, *ZEuS* 2003.
17. *Matthews v United Kingdom* (Application No. 24833/94).
18. PEERS, S. (ed.) *The EU Charter of Fundamental Rights: a Commentary*, Beck, 2013.
19. REGAN, Daniel. *European Consensus: A Worthy Endeavour for the European Court of Human Rights*. *Trinity C.L.Rev.* 51 (2011).
20. SCHEECK, Laurent. Solving Europe's Binary Human Rights Puzzle. The Interaction between Supranational Courts as a New Parameter of European Governance, *Questions de Recherche - Research in Question*, October 2005, available at: <http://www.sciencespo.fr/cepi/sites/sciencespo.fr/cepi/files/qdr15.pdf>.

-
21. V. Reding's speech entitled "The EU and the Rule of Law - What next?" Is available on the European Commission's website (https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_677).