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The Relationship Between the EU Charter and the ECHR in the EU and the EEA

*The Level of Protection Afforded in the EU Post Lisbon and Pre
Accession by the EU to the ECHR*

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Foreword

The protection of human rights in Europe is vital today. In relation to e.g. the handling of asylum seekers coming in to the continent, or the dealing with the ever-increasing population of the elderly, human rights are at the core of the considerations. Further, when combating terrorism on European territory, it may also be a challenge to maintain human rights in the process.

1 Introduction

1.1 Theme and issue

The theme of this thesis is the relationship between the Charter of Fundamental Rights of the European Union (“the EU Charter”)¹ and the European Convention on Human Rights (“ECHR”).² This relationship is relevant within the Contracting Parties to the Agreement on the European Economic Area (“EEA”).³ This includes the European Union (“EU” or “the Union”) and its Member States on the one hand, and the EEA and those EFTA States that are Contracting Parties to the Agreement (“the EEA EFTA States”) on the other. This division is necessary considering the differences in scope, content and purpose of the EU Treaties compared to the EEA Agreement.

The content of the EU Charter is heavily influenced by the ECHR, but also differs from it and guarantees protection for several additional rights. Since the EU Charter and the ECHR have an overlapping area of application within the EU States and both guarantee human rights, it is interesting to compare the two to examine how they coexist. In addition, the coming into existence of the Charter – and its application to the EU Member States only – entails that human rights are possibly regulated differently among the EEA States. It is therefore of interest to also look at the relationship between the EU Charter and the ECHR in relation to fundamental rights in the EEA.

The objective of this thesis is twofold; partly it is to present the factors that define and affect the relationship between these fundamental rights in the EU and in the EEA Area on a European level (Chapter 2); partly it is to highlight the differences in protection guaranteed under each catalogue (Chapter 3). In the process the author hopes to provide grounds for further thought and consideration on this subject.

¹ Charter of Fundamental Rights and Freedoms of the European Union [2012] OJ C 326/02

² European Convention on Human Rights (1953).

³ Agreement on the European Economic Area [1994] OJ L 1/1.

This thesis is limited by its form and does therefore unfortunately not include a lengthy discussion about in what way the presented rules and other relevant factors in fact do affect the relationship between the ECHR and the EU Charter.

The presentation of factors is not exhaustive, as there is an immense amount of literature and legislation relating to this subject. In the following the focus is on the rules within the EU primary legislation, the ECHR and the EEA Agreement. As for case law, it is limited to a select number of decisions from the Court of Justice of the European Union (“the ECJ”),⁴ the European Court of Human Rights (“the ECtHR”) and the EFTA Court. An extensive presentation of decisions by national courts of the Contracting Parties is largely missing due to space restrictions and their relative unimportance when interpreting the international rules.

1.2 Historic and legal context

For the purposes of this thesis, it is beneficial to have an overview over the main participants in the development and application of the ECHR and the EU Charter. In the following there will be an introduction to the Council of Europe, the EU and the EEA, as well as the EU Charter and the ECHR. It is important to note that these frameworks have been developed within two different legal systems. Still, action made by participants within one system may have a direct or indirect effect upon the participants within the other.

1.2.1 The Council of Europe and the ECHR

The Council of Europe (“CoE”) was established in 1949⁵ by 12 European countries. It aims to ‘achieve a greater unity between its Members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress’.⁶

⁴ The European Court of Justice (ECJ) is still often used to describe all three courts of the European Union, namely the Court of Justice, the General Court and any specialized court currently in function. It was renamed the CJEU by the Lisbon treaty cf. Art 19(1) TEU. In line with that renaming the term “ECJ” is in this thesis used as a reference only to the highest of these courts, the Court of Justice.

⁵ See Statute of the Council of Europe (ETS 1949) and Jacobs, White & Ovey, *The European Convention on Human Rights* (6th edn, OUP 2014) 4.

⁶ Statute (n 5) Art. 2(a).

There are 47 CoE Member States, including all the 28 EU Member States and the three EEA EFTA States.⁷ In addition, there are five States with observer status.⁸ The CoE consists of three organs: The Committee of Ministers, the Parliamentary Assembly and the Congress of Local and regional Authorities of Europe.

The CoE drafted the ECHR and this entered into force in 1953.⁹ With the ECHR, the CoE aimed to create a tool to prevent in the future such human rights violations as committed during the Second World War, and a set of rules to protect against communism overtaking Europe and the threat to democracy that could entail.¹⁰

The ECHR established a court, the ECtHR,¹¹ which may make decisions regarding ‘all matters concerning the interpretation and application of the Convention and the Protocols thereto’.¹² The ECtHR has played a major part in the development of the ECHR through its dynamic interpretation of the various provisions. This can be illustrated by the fact that the ECtHR considers the ECHR to be a ‘living instrument’ that ‘must be interpreted in the light of present-day conditions’.¹³

The ECHR was inspired by the Universal Declaration of Human Rights (“UDHR”)¹⁴ and thus contains rights of a mainly civil and political nature, although there are a few exceptions.¹⁵ Unlike the UDHR, the ECHR is binding upon its signatories. It follows from Art. 1 ECHR

⁷ Statute (n 5) Art. 26.

⁸ Council of Europe, ‘Our Member States’ <http://www.coe.int/en/web/about-us/our-member-states> accessed 9 March 2017. The observer States are the Holy See, Japan, Mexico, Canada and the United States.

⁹ *Jacobs, White & Ovey* (n 4) 4.

¹⁰ *Ibid* 3.

¹¹ ECHR (n 2) Art. 19. Originally the Convention established a Commission of Human Rights as well as a Court of Human Rights. However, these were replaced by a single European Court of Human Rights by an amendment in 1998, thus simplifying the process of procedure for filing a complaint about an alleged breach of the ECHR.

¹² Art. 32(1) ECHR.

¹³ *Tyrer v. The United Kingdom*, App no 5856/72 (ECtHR, 25 April 1978) para 31.

¹⁴ Universal Declaration of Human Rights (1948).

¹⁵ Such as the right to assembly (Art. 11), the protection for property (Protocol 1 Art. 1), the right to education (Protocol 1 Art. 2), safeguards relating to expulsion of aliens (Protocol 7 Art. 1) and equality between spouses (Protocol 7 Art. 5).

that the Contracting Parties commit themselves to securing the rights and freedoms defined in the first section of the ECHR for all people within their jurisdiction.

The ECHR consists of three sections; the first contains the specific rights and freedoms protected by it, section II is devoted to the establishing and functioning of the ECtHR, while the last section contains miscellaneous provisions on the functioning and application of the Convention system. Furthermore, there are six additional Protocols to the ECHR, as well as a few amending Protocols. The additional Protocols are nos. 1, 4, 6, 7, 12 and 13, and contain additional rights and freedoms to the ECHR. Today, all the EEA States are Contracting Parties to the ECHR, however not all Contracting Parties have ratified all Protocols.

1.2.2 The European Union and the Charter

The EU is a cooperation between 28 countries, usually referred to as the “EU Member States”. They have transferred certain powers to the organs of the EU in a wide range of areas, including competence to adopt legislation and decisions with legal force in the Member States.

The EU cooperation started out as three international agreements regarding European trade in the years after World War II, signed by six European States.¹⁶ Each of these three treaties established organs to manage the application of the provisions contained in them. The Union became what it is today via a gradual development connected to the expanding co-operation between its signatories.

Through a series of amendment treaties, the organs established by the three original treaties were merged to promote efficiency. The court, the ECJ, was formed to decide on the application and interpretation of the Treaties. Since the early 90s, the cooperation through the three treaties was renamed “the European Communities” (also referred to as “the first pillar”), whereas “the European Union” was used to describe the full cooperation, also including the new aspects of the organisation (formerly referred to as the second and third pillar). With the amendments made by the Lisbon Treaty,¹⁷ the term ‘Community’ was abandoned, as that part of the cooperation was fully integrated into the collective cooperation that is “the Union”.

¹⁶ Belgium, France, Germany, Italy, Luxembourg and the Netherlands.

¹⁷ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C 306/01, cf. the EU Charter (n 1).

Today the Treaties that constitute the European Union are the Treaty on the European Union (“TEU”)¹⁸ and the Treaty on the Functioning of the European Union (“TFEU”).¹⁹

There were no provisions guaranteeing human rights in the original treaties.²⁰ As the co-operation developed and extended to include more vast areas of law, some Member States began questioning whether human rights protected in their constitutions were in peril when the State itself was bound by legislation made by a supranational organisation that did not take human rights into consideration.²¹ An important point that heightened the stakes for the Member States was that EU law has primacy over the Member States’ domestic law.²²

A series of cases came up before the ECJ, notably Cases 29/26 *Stauder*,²³ 11/70 *Handelsgesellschaft*²⁴ and 4/73 *Nold*,²⁵ in which the protection for human rights within the Community was challenged. The ECJ stated that respect for fundamental rights ‘form an integral part of the general principles of law’²⁶ protected by the ECJ, and that the Court is bound to draw ‘inspiration from constitutional traditions common to the Member States’.²⁷ Further, it 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’.²⁸ An example of such an international treaty is the ECHR. The first time the ECJ referenced the ECHR was in the 1975, in Case 36/75 *Rutili*.²⁹ In 1986 the

¹⁸ Treaty on the European Union [2012] OJ C 326/13.

¹⁹ Treaty on the Functioning of the European Union [2012] OJ 326/47.

²⁰ See Case 1/58 *Friedrich Storch & Cie v High Authority of the ECSC* [1959] ECR I-17, p. 26 section 4a & b. The Court rejected the applicant’s submission that fundamental rights enshrined in Member States’ constitutions were relevant when interpreting Community law.

²¹ See especially the German Bundesverfassungsgerichtshof’s case *Solange I* [1974] BVerfGE 37.

²² The ECJ laid down the doctrine of supremacy in Case 6/64 *Costa v ENEL* [1964] ECR I-585, and extended it to include supremacy over national constitutional rules in Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR I-1126.

²³ Case 29/69 *Erich Stauder v City of Ulm* [1969] ECR I-419.

²⁴ *Handelsgesellschaft* (n 22).

²⁵ Case 4/73 *Nold v Commission* [1974] ECR I-491.

²⁶ *Handelsgesellschaft* (n 22) para 4.

²⁷ *Nold* (n 25) para 13.

²⁸ *Nold* (n 25) para 13.

²⁹ Case 36/75 *Roland Rutili v The Minister for the Interior* [1975] ECR I-1219 para 32.

German Constitutional Court stated in the *Solange II* case that it considered the fundamental rights protection of the EU to be acceptable according to national standards, and that the Court would no longer accept complaints alleging Community law failed to comply with fundamental rights.³⁰

In the 90s, the EU had gained the character of a constitutional order,³¹ and thus it was considered necessary for it to have its own bill of fundamental rights. The Charter of Fundamental Rights of the European Union was solemnly proclaimed by the European Parliament, the Council and the Commission in 2000.³² It was not to be legally binding upon the Member States. Along with the European Parliament and the European Commission, representatives from the governments of the Member States and their national parliaments prepared the Charter,³³ and national constitutions presumably have had an impact on its contents.

Although the EU Charter was not binding initially, the ECJ still sporadically referenced it,³⁴ the first time being in a case from 2006.³⁵ The EU Charter became legally binding by the entry into force of the Lisbon Treaty, on 1 December 2009.³⁶ The Charter consists of seven titles: I Dignity, II Freedoms, III Equality, IV Solidarity, V Citizen's Rights, VI Justice and VII General Provisions Governing the Interpretation and Application of the Charter.

1.2.3 The European Economic Area

The Agreement on the European Economic Area (the "EEA" or the "Agreement") is an agreement between the three non-EU States Iceland, Luxembourg and Norway and the EU and its Members States. It came into force on 1 January 1994, and consists of 129 Articles, 22 annexes and 49 Protocols.

³⁰ *Solange II* [1986] BVerfGE 73.

³¹ See Draft Treaty Establishing a Constitution for Europe [2003].

³² Charter of Fundamental Rights of the European Union [2000] OJ C 364/01.

³³ The EU Network of Independent Experts on Fundamental Rights, *Commentary of the Charter of Fundamental Rights of the European Union* (June 2006) 15.

³⁴ Grainne De Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 MJECL 168, 169.

³⁵ Case C-540/03 *European Parliament v. Council of the European Union* [2006] ECR I-5769, para 25.

³⁶ Treaty of Lisbon (n 17), cf. the EU Charter, bottom of final page.

The primary objective of the Agreement is to include the EEA EFTA States in the internal market of the EU on equal terms as the EU Member States, without making them EU Member States.³⁷ Further, the Parties to the EEA Agreement have not transferred any legislative powers to supranational organs, thus preserving their autonomy.³⁸

With the entry into force of the Agreement, an institutional framework was established to control compliance within the EEA.³⁹ Several institutions were formed in what is referred to as the “EFTA-pillar”,⁴⁰ which mirrors the EU institutions in a smaller scale. In this pillar we find *inter alia* the EFTA Court, which fulfils the judicial function in the EFTA pillar and works in parallel with the CJEU.⁴¹ In addition, the institutional framework includes common EEA-organs, which constitute the bridge between the EU- and the EFTA-pillar and is made up of organs consisting of representatives from both pillars.

The EFTA Court is mainly competent to deal with infringement actions brought by the EFTA Surveillance Authority against an EEA EFTA State regarding the implementation, application or interpretation of EEA law rules, for giving advisory opinions to courts in the EEA EFTA States on the interpretation of EEA rules and for appeals concerning decisions taken by the EFTA Surveillance Authority.⁴²

The EEA has a dynamic character,⁴³ which means that it is meant to develop continuously over time in accordance with relevant EU law.⁴⁴ This is natural since EU law, as shown above, is continuously developing. The EEA Agreement must keep up with the EU development for the Agreement to function. As the EEA EFTA States are not EU Member States, they do not participate in the legislative process of the EU, even on those rules that are

³⁷ Utenriksdepartementet, *EU/EØS-håndboken 2016* (Utenriksdepartementet 2016) 7.

³⁸ Se Protocol 35 on the Implementation of EEA Rules the EEA Agreement [1994].

³⁹ See EEA Agreement Part VII.

⁴⁰ Fredrik Sejersted, Finn Arnesen, Ole-Andreas Rognstad & Olav Kolstad 'EØS-rett' (Universitetsforlaget 2011) 34.

⁴¹ Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice [1994] OJ L 344/3.

⁴² The EFTA Surveillance Authority has supervisory tasks comparable to those of the Commission. See the EEA Art. 108(1) and (2) and the Surveillance and Court Agreement Articles 27-41.

⁴³ EEA preamble paragraph 4.

⁴⁴ Sejersted, Arnesen, Rognstad & Kolstad (n 40) 87.

going to be binding on them. However, they may contribute by giving expert consultation or other inputs in the preparatory stage.⁴⁵ Once the whole legislative procedure is finalised and the EU has adopted a new act, the EEA Committee has competence to decide to incorporate it into the EEA Agreement via Art. 102 EEA.

Interestingly, despite the dynamic character of the secondary legislation of the EEA Agreement, the main part of the EEA has not been changed since it was signed.

Closely linked to the dynamic character of the EEA is its principle of homogeneity,⁴⁶ which is also a central aspect of the Agreement. This principle entails that the EEA rules shall be interpreted the same way in all the European Economic Area and that the EEA rules shall be interpreted the same way as the EU rules from which they derive.⁴⁷

1.3 Human Rights

The ECHR and the EU Charter both protect human rights. Although most people have a conception of what human rights are at their core, it is safe to say that it is a term of unclear boundaries.

The ECHR contains mainly civil and political rights, which have been classified as first generation human rights.⁴⁸ Rights of a social, cultural and economic character have been classified as second generation human rights, and several rights of this classification have been included in the EU Charter.

The classification of human rights in ‘generations’ does not reveal much about the human rights in question, but generally, the first generation of human rights comes before the second in a developing society, as the second generation includes obligations on a State which

⁴⁵ Utenriksdepartementet (n 37) 8.

⁴⁶ Art. 1 EEA cf. the preamble recital 4 and 16.

⁴⁷ Sejersted (n 40) 87.

⁴⁸ This is a classification coined by Karel Vasak, a terminology that seems to have been widely endorsed. See Karel Vasak ‘A 30 Year Struggle’ [1977] *The Unesco Courier* 29, page 29. However, there are diverging classifications out there, e.g. Aall classifies political rights as second generation human rights, see Jørgen Aall, *Rettsstat og menneskerettigheter* (4th edn, Fagbokforlaget 2015) 23. This thesis will adhere to the classification of Vasak, as this is popularly accepted.

require economic resources and an active State⁴⁹ taking responsibility for its citizens' wellbeing.⁵⁰

There is also a third generation of human rights, called 'rights of solidarity'.⁵¹ Such rights include 'the right to development, the right to a healthy and ecologically balanced environment, the right to peace and the right to ownership of the common heritage of mankind'.⁵² This type of human rights is characterized by the fact that they require co-operation on a community level, i.e. pose obligations on individuals and states as well as on public and private institutions.

It should be mentioned that European human rights do not necessarily represent a universal human rights standard, as culture and point of view vary on the different continents.⁵³

1.4 Relevance

The treaty of Lisbon came into force in 2009. Consequently, the status of the EU Charter as legally binding is relatively fresh. Before the treaty of Lisbon there was no codified human rights framework generally applicable within the EU. The ECJ operated with general principles of law in the area of human rights, based to a large degree on the ECHR.

As will be described in Chapter 2, the introduction of the EU Charter and the elevated status it was granted through the Lisbon Treaty created uncertainty as to the interaction between the two main human rights frameworks in Europe within the EU. Now the ECJ has developed its own, more autonomous doctrines on human rights, and deals with questions not yet raised in the ECtHR.⁵⁴ This fact puts into question of the relevance of the ECHR as the leading

⁴⁹ Vasak (n 49) 29. Vasak describes the second generation of human rights as 'positive', in that they require action from the State.

⁵⁰ Aall (n 49) 23. Aall describes stages of development of a society in three steps, from a constitutional State, via a democracy, to a welfare State, and draws a connection to what generation of human rights are guaranteed in the State.

⁵¹ Vasak (n 50) 29.

⁵² Ibid.

⁵³ Aall (n 49) 22.

⁵⁴ Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds) *The EU Charter of Fundamental Rights as a Binding Instrument: Five Years Old and Growing* (Hart Publishing 2015) 53

European human rights court within the EU, when the EU Charter contains several additional rights. Is there a need for an update of the ECHR?

Within the EU organs the question is how the EU Charter shall be applied and interpreted to protect the interests of the Union and of human rights and freedoms and at the same time harmoniously coexist with the ECHR.

For the EU Member States, there is now an increased number of rules which must be taken into consideration when interpreting and applying human rights. There might be uncertainty as to how the two human rights frameworks relate to each other in the way of hierarchy and content. Further, Member States are under an obligation to ensure that its legislation is in accordance with EU legislation, which in turn must not violate the EU Charter. In fact, violation of the EU Charter's legal norms by secondary EU legislation can lead to annulment of the latter according to Art. 263 TFEU.

At the same time, and as will be elaborated on in Chapter 2, the EU Member States have an obligation to act according to the ECHR, which in turn has a great influence on the EU Charter. It is evident that there is a strong connection between the ECHR and the EU Charter, illustrated by the several references to the ECHR within EU primary legislation. But the fact remains that the systems in which legally binding interpretation is made of these frameworks, are quite different. This might lead to differences in the level of protection afforded by each framework, and to questions about which standard should be applied.

How to solve an accession by the EU to the ECHR is also a relevant topic at the time of writing. Recently, a draft accession agreement was deemed incompatible with the EU system by the ECJ. An accession to the ECHR could be beneficial because the EU has grown to be a supranational institution that deals with vast areas of law, and yet there is no external human rights control of the EU's actions. However, following the statements in the ECJ's opinion on the draft agreement, there are significant challenges that need to be overcome before an accession may take place.⁵⁵

⁵⁵ See Opinion 2/13 of the Court (18 December 2014) EU:C:2014:2454.

For the EEA EFTA States, who are closely connected to substantial parts of EU law, a question brought on by the changes by the Lisbon treaty is how the EU Charter affects the EEA Agreement and the EEA EFTA States' obligations under it.

1.5 Method

As this thesis is written in English, the method of reference used is the Oxford University Standard for the Citation of Legal Authorities (“OSCOLA”).⁵⁶ This is done to create a better flow within the thesis.

The discussed legislation is mostly international, which has significance for the method of interpretation. In cases where the same rules apply over a vast area of law and for many different states, there is a need for the Courts to monitor compliance with said rules to afford the states a certain margin of appreciation. This is necessary for pragmatic reasons such as the functioning of the systems and because in many cases, the states themselves are better to assess the legal situation within the state.

The legislative processes are also different in the ECHR, the EU Charter and in domestic systems and this has an impact on the interpretation method. Considerations of the accessibility of the rules and the predictability for those who are obliged by and have their rights guaranteed by the ECHR and the EU Charter may entail that documents produced in the legislative process do not have the same weight when interpreting international rules as for instance the importance of preparatory papers when interpreting Norwegian domestic law.

The fact that there are many different countries that are bound by the ECHR and the EU Charter, and that the texts of the frameworks exists in several languages⁵⁷ means that the wording of the Articles should not be relied upon too heavily. Articles should instead be interpreted in light of the purpose of the provisions and case law. For this reason, case law from the ECJ and the ECtHR is an important source when interpreting the Articles of the frameworks, and the preambles should be taken into consideration as well.

⁵⁶ https://www.law.ox.ac.uk/sites/files/oxlaw/oscola_4th_edn_hart_2012.pdf accessed 9 March 2017

⁵⁷ For the ECHR. Only the English and the French are official, but unofficial versions in other languages exist.

When reading decisions by the ECJ, one should be aware of the lack of dissenting opinions, which may lead to unclear wording as a result of a compromise between the judges. The judgments by the ECtHR however, have a form that allows for dissenting opinions by the judges and may therefore present a more nuanced picture of the considerations made.

When interpreting international rules, it is necessary to be aware of the existence of generally applicable principles of international law, such as those derived from the Vienna Convention.⁵⁸ Such principles are, however, not mandatory, unless the Parties involved have bound themselves by ratifying the Convention or by other means. One principle relevant to this theme is the principle that treaty provisions should be interpreted in light of the object and purpose of the treaty.

The angle of this thesis will be theoretical, since the format and time limit do not allow for a satisfactory discussion of the important sides of the theme. Thus, to obtain a well-rounded thesis the discussion on *de lege ferenda* will be limited.

2 Legal framework and case law on the relationship between the EU Charter and the ECHR

2.1 Introduction

As mentioned in Chapter 1, the original Treaties constituting the European Community did not contain provisions on human rights, and inclusion of protection for human rights into the EC legislation became necessary to maintain and develop the Community. The ECJ looked toward the ECHR for guidance, as well as the Member States' constitutional human rights.⁵⁹ The influence of the ECHR is evident in that several of the provisions of the Charter resemble

⁵⁸ Vienna Convention on the Law of the Treaties (1969).

⁵⁹ See *Nold* (n 25) para 13, where the ECJ stated that the Court is 'bound to draw from constitutional traditions common to the Member States' when determining the content of EU human rights. The ECJ also acknowledged that international treaties on which the Member States have collaborated or of which they are signatories may supply guidelines for the ECJ.

or almost replicate provisions from the ECHR. Furthermore, the ECJ has stated that the ECHR has ‘particular relevance’ for the content of EU fundamental rights.⁶⁰

When looking at the relationship between the ECHR and the EU Charter, a good place to begin is in the rules and regulations that specifically regulate the relationship between the two frameworks. Such rules may be found within EU legislation or within the ECHR, or failing that, in relevant international law. In addition to that, there will be an examination of relevant case law from the ECJ, the ECtHR and the EFTA Court.

2.2 Within EU law

2.2.1 Pre Lisbon – Art. F(2) Maastricht Treaty

Before the amendments made by the Lisbon Treaty,⁶¹ Art. F(2) of the Treaty on European Union (“the Maastricht Treaty”)⁶² regulated the relationship between the EU and the ECHR. This provision corresponds largely to the current consolidated version of Art. 6(3) TEU.

Article F(2) stated that the Union shall respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law. With the amendments made by the Treaty of Amsterdam, the provision became justiciable by the ECJ regarding actions of the institutions of the EU.⁶³

This provision elevated the ECHR and the Member States’ constitutional human rights above other sources of human rights from which the EU could draw inspiration. Since all the EU Member States were Contracting Parties to the ECHR, this was not problematic, and it was even natural that the ECHR should be a central source of EU human rights. Consequently, the ECHR has been very important in the development of EU human rights.⁶⁴

⁶⁰ See Joined Cases 46/87 and 227/88 *Hoechst AG v Commission of the European Communities* [1989] ECR I-2863, para 13.

⁶¹ Treaty of Lisbon (n 17).

⁶² Treaty on European Union (Treaty on Maastricht) [1992] OJ C 191.

⁶³ Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts (2 October 1997), Art. L letter d.

⁶⁴ H. -J. Blanke and St. Mangiameli (eds), *The Treaty on European Union (TEU): A Commentary* (Springer-Verlag 2013) 294, para 10.

The reference in Art. F(2) to constitutional traditions common to the Member States, was a way of incorporating human rights into EU law prior to the EU Charter. In relation to the ECHR, the fact that Member States' constitutions have been given the same importance in this provision shows that EU fundamental rights have a somewhat different point of view than the ECHR, and emphasizes the autonomy of EU fundamental rights.

2.2.2 The TEU

The Lisbon Treaty⁶⁵ made amendments to Art. 6 TEU that are significant to both the ECHR and to the EU Charter. After the amendments, Article 6(3) TEU⁶⁶ now addresses the status of the ECHR within EU law. Its content corresponds to that of Art. F(2) of the Maastricht Treaty and does not bring about any changes in the status of the ECHR in EU law.

Article 6(1) TEU made the EU Charter legally binding and granted it the same legal value as the Treaties.⁶⁷ The EU Charter having the same legal value as the Treaties means that secondary EU legislation must be in accordance with the EU Charter and that Member States and EU organs must implement such legislation in accordance with the Charter.

The status of the EU Charter is now elevated to a status within the EU that the ECHR has not reached. Furthermore, the EU Charter has the highest rank within the EU hierarchy, which gives it a strong power of impact within the EU. The EU Charter becoming legally binding has probably rendered Art. 6(1) less important than before when the EU did not have its own human rights catalogue. However, the provision still has legal value and assures the 'maintenance of the fundamental rights protection standard as it was developed in the ECJ's case law' according to Grabenwarter and Pabel.⁶⁸ In any case the provision is a demonstration of how important the ECHR has been in the development of the fundamental rights of the EU.

2.2.3 Opinion 2/94

Article 6(2) TEU obliges the EU to accede to the ECHR, using the phrase 'shall accede to'. This provision was included in the TEU by the Lisbon Treaty, pursuant to an opinion by the ECJ on the accession of the EU to the ECHR, where it stated that the Union lacked

⁶⁵ Treaty of Lisbon Art. 3b(8).

⁶⁶ The amended version of Art. F.

⁶⁷ The Treaty on European Union & the Treaty on the Functioning of the European Union, see TEU Art. 1(3).

⁶⁸ *Blanke & Mangiameli* (eds) (n 65) 335, para 91.

competence to accede to the ECHR.⁶⁹ Now the Union has both competence and an obligation to accede, and an accession agreement was drafted in 2013. However, the ECJ gave in 2014 another Opinion⁷⁰ stating that the draft accession agreement was not compatible with Art. 6(2) TEU or the annexed Protocol 8.⁷¹

At the time of writing, the EU is still not party to the ECHR, but the obligation to accede remains. There is reason to argue that this obligation strengthens the influence of the ECHR within the EU, since it would be counterproductive toward the obligation laid down in the TEU for the EU's organs to act in a way that would make future accession more difficult. As pointed out by Grabenwarter and Pabel, the obligation to take measures to ensure the carrying out of tasks which 'flow from the Treaties', also befalls the Member States of the EU via Art. 4(3) TEU on the principle of sincere cooperation.⁷²

2.2.4 The EU Charter

Article 6(1) TEU states that the EU Charter shall be interpreted in accordance with provisions in Title VII of the Charter and with "due regard" to the Charter Explanations, which is an official document intended to explain the Articles of the EU Charter, (the "Explanations").⁷³

The EU Charter itself contains regulations with influence on the relationship between the Charter and the ECHR. Within the provisions of the EU Charter, Art. 52(3) describes the relationship between the Charter and the ECHR, and states:

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the *meaning and scope* of those rights shall be

⁶⁹ Opinion 2/94, *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I- 01759 para 6.

⁷⁰ Opinion 2/13 (n 56).

⁷¹ Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (26 October 2012) OJ C 326/1.

⁷² *Blanke & Mangiameli* (eds) (n 65) 311, para 43.

⁷³ Explanations relating to the Charter of Fundamental Rights [2007] OJ C 303/17. This document was created by the Praesidium of the Convention which drafted the EU Charter in 2000.

the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.⁷⁴

All the rights contained in the ECHR have a corresponding right within the EU Charter.⁷⁵ It should also be noted that the Explanations regarding the EU Charter Art. 52(3) states that the meaning and scope are to be determined by both the ECHR and its Protocols as well as case law of the ECtHR and the ECJ.⁷⁶ This means that those EU Member States that have not ratified all the ECHR Protocols, may find their human rights obligations to be dictated by ECHR Protocol provisions that they have deliberately avoided. This fact could be an argument for the ECJ not relying upon provisions of Protocols that not all EU Member States have ratified, as suggested by Advocate General Cruz Villalón.⁷⁷ However, it seems that *de lege lata* grants the relevant provisions of the ECHR Protocols the same status as those provisions of the ECHR that have been ratified by all Member States.

The fifth recital of the preamble of the EU Charter says that the Charter shall be interpreted with ‘due regard to the explanations’, referring to the Explanations. It is also stated in the preamble that the Charter ‘reaffirms [...] the rights as they result, in particular, from the [...] case law of the Court of Justice of the European Union and of the European Court of Human rights’.

Since neither the preamble to the EU Charter nor the Explanations are legally binding, there is no obligation arising from the EU Charter to take into consideration case law from the ECtHR when determining the meaning and scope of Charter rights which are also guaranteed by the ECHR. However, the inclusion of a reference to ECtHR case law is in line with the EU policy of having respect for the rights and freedoms guaranteed in the ECHR.⁷⁸

The second part of Art. 52(3) of the EU Charter allows for the EU protection of human rights to be more extensive than that of the ECHR, even in those cases where the meaning and scope of the rights otherwise shall be the same. This provision asserts the human rights standard of

⁷⁴ Added highlight.

⁷⁵ Peers, Hervey, Kenner & Ward (eds) ‘The EU Charter of Fundamental Rights: A Commentary’ (Hart Publishing 2014) 1527 section 53.11.

⁷⁶ Explanations (n 74) 17, third paragraph.

⁷⁷ Case C-617/10 *Fransson* [2013] EU:C:2013:105 paragraphs [71]-[87].

⁷⁸ See e.g. that the ECHR rights are considered general principles of EU law according to Art. 6 TEU

the ECHR, as interpreted by the ECtHR, as the minimum permitted within the EU, where the same rights are protected in both frameworks.

Article 52(4) of the EU Charter is based on Art. 6(3) TEU⁷⁹ and states that in so far as the ECJ recognises rights as they result from common constitutional traditions of the Member States, they shall be interpreted in harmony with those traditions. In cases where those rights are also protected by the ECHR there is a possibility for conflict, as the ECJ is obliged to interpret the right to have the same meaning and scope as laid down in the ECHR, but also in harmony with Member States' constitutions. In such cases of conflict, the EU Charter Art. 52(3) affords a solution, entailing that the source offering the best protection will prevail. It should be noted that if the interpretation deriving from Member States' constitutions is applied, it is not applied directly as a national rule, but as a Charter provision interpreted in light of such national rules.

The EU Charter Art. 52 should be read in light of Art. 53 on the level of protection. This Article states that nothing in the Charter shall be interpreted as restricting or adversely affecting human rights as recognised in *inter alia* EU law, Member States' constitutions and the ECHR. In relation to the relationship between the EU Charter and the ECHR, this Article prevents any situation where the ECHR provisions might be interpreted restrictively in light of any right contained in the Charter.⁸⁰ Compared to the EU Charter Art. 52(3), it does not add much on the relationship between the Charter and the ECHR.⁸¹

The scope of application of the EU Charter is mainly laid down in Art. 51 on the "Field of application". This provision has relevance toward the ECHR in that, outside of EU law, the

⁷⁹ Explanations (n 74) 18.

⁸⁰ See Peers, Hervey, Kenner & Ward (eds) (n 76) 1527 section 53.11. De Witte points out that in a situation where an EU Charter right which is also guaranteed by the ECHR may be restricted by the interpretation of a different Charter right which does not have a corresponding protection in the ECHR, Art. 53 prohibits such restriction on the ECHR right.

⁸¹ Article 53 is thus examined further in Chapter 3.

Charter will not apply and presumably the ECHR will be of greater importance for the EU Member States.⁸² This provision is more thoroughly considered in Chapter 3.

2.3 Within the EEA

2.3.1 The formal status of the two frameworks in the EEA

As far as the EEA EFTA States are concerned, their link to the EU Charter is hinged on their relationship with the EU through the EEA Agreement. As mentioned above, all EEA EFTA States are Parties to the ECHR, which means that the relationship between the EU Charter and the ECHR is relevant within the EEA. The EEA Agreement does of course not regulate the relationship between the two human rights frameworks, but it might say something about their status within the EEA.

The EU Charter is not formally binding within the EEA, as it has not been included in the Agreement. Neither is there any provision guaranteeing protection for human rights on a general basis in the EEA. However, recital 1 of the Preamble to the EEA states that it aims to achieve ‘a Europe based on peace, democracy and human rights’, thus showing that human rights do have a place within the EEA. Further, fundamental rights relating to non-discrimination based on nationality and on equal rights for the genders are included in the provisions of the EEA.⁸³

Despite the ECHR being binding upon the EEA EFTA States, it is not formally binding on the EEA organs, since they are not Parties to the Convention.

2.3.2 Homogeneity and the dynamic character of the EEA

In relation to the EU, Art. 1(1) EEA states the objective of ‘creating a homogeneous European Economic Area’, which is connected to the reference in the preamble recital 4 to the objective of establishing a dynamic and homogenous EEA. In line with this objective, Article 6 EEA and Art. 3 of the Surveillance and Court Agreement,⁸⁴ which are materially identical, state that the provisions of the Agreement which in substance correspond to EU law, shall be

⁸² See the Commission’s Annual Report on the Charter (2015) 23, fourth section. It states here that outside situations relating to EU law, Member States are alone in ensuring that their obligations regarding fundamental rights are respected.

⁸³ See Arts 4, 69 and 70 EEA.

⁸⁴ Surveillance and Court Agreement (n 41).

interpreted in conformity with the relevant case law of the EU Courts, given prior to the date of signature of the EEA.

It should be noted that this time-limitation in practise has been eliminated by the EFTA Court, which puts emphasis on the principle of homogeneity when it states that it has ‘consistently taken into account the relevant rulings of the CJEU given after the said date’.⁸⁵ Consequently, all ECJ case law that is relevant for the EEA must be taken into regard, regardless of the time it was handed down.

In Chapter 3 EEA there are rules to ensure homogeneity within the EEA States and between the EEA and the EU. Article 102(1) EEA concerns the objective of homogeneity and a dynamic EEA. It obliges the EEA Joint Committee to make amendments of Annexes of the Agreement ‘as closely as possible’ to the adoption of the relevant provision by the EU. This provision does not encompass the Main Part of the EEA.

It could be argued that the EU Charter contains provisions that are relevant to the EEA Agreement in that they are meant to apply to all areas of EU law. However, EU law is not entirely the same as EEA law. Furthermore, one of the objectives of the EEA Agreement is that it is not supposed to be the same as the EU, but a way of including the EEA EFTA States into the internal market of the EU without them being bound by all other EU legislation.

All the EEA EFTA States and citizens are, contrary to the EEA organs, bound by the ECHR and are thus sufficiently regulated according to the ECtHR. Fløistad points toward the fact that there is no legislative process within the EEA as there is in the EU, since all EEA legislation is made in the EU. Thus, there is not a corresponding need for the EEA organs to be bound by a human rights framework.⁸⁶

References to the EU Charter are included within some of the EU legislation falling under the EEA Agreement.⁸⁷ In such cases, the EFTA Court and the EEA EFTA States must figure out how to apply the particular legislation while respecting the principle of homogeneity.

⁸⁵ Joined Cases E-9/07 and E-10/07, *L’Oréal* [2008] (1 July 2008 EFTA), para 28.

⁸⁶ Karin Fløistad 'Fundamental rights and the EEA Agreement' (2000) ARENA Report 1, 37.

⁸⁷ See for instance Council Directive (EU) 2010/24 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures [2010] OJ L84/1, preamble recital 21.

2.4 In the ECHR

Since the ECHR is an older framework than the EU Charter, naturally there are no rules within the Convention directly regulating its relationship to the EU Charter. However, some rules may have an impact on the relationship, and the Charter is mentioned in the amended Art. 59(2) ECHR.

As amended by Protocol 14 Art 17, Art 59(2) ECHR allows for the EU's accession to the ECHR by stating that '[T]he European Union may accede to this Convention'. This Article makes an exception for the EU, as it is not a State, to accede the ECHR. As concluded by a CDDH report in 2002, further modification to the ECHR would be necessary before the EU may become a Contracting Party to it. However, these changes could be done by an amending Protocol or through an accession treaty between the EU and the ECHR Contracting Parties.⁸⁸

Further, Art. 1 ECHR obliges the Contracting Parties to secure everyone the rights of the Convention. This includes an obligation to not enter into treaties that will oblige the Party to violate any Convention right. Although this rule does not regulate the relationship between the two frameworks, it is relevant because it entails that, if the EU does not match the minimum standards of the ECHR, it would be a violation of Art. 1 for the Contracting Parties to be EU Members.⁸⁹

2.5 Case law

2.5.1 The ECtHR

The *Bosphorus*⁹⁰ case, concerning a violation of the ECHR right to peaceful enjoyment of property, illustrates how the ECtHR considers its position in relation to the EU Charter. The question in the case was whether a confiscation of a leased Yugoslavian aircraft in Ireland, authorized by a EC Regulation, constituted a violation. Prior to the judgment by the ECtHR,

⁸⁸ Report adopted by the Steering Committee for Human Rights(CDDH) 'Study of technical and legal issues of a possible EC/EU accession to the European Convention on Human Rights' (28 June 2002) DH-II(2002)006 [2002] Chapter II.

⁸⁹ *M & Co v the Federal Republic of Germany* App no 13258/87 (Commission Decision 9 February 1990), note 32 at 8.

⁹⁰ *Bosphorus Hava Yollari Ve Ticaret Anonim Sirketi v Ireland* App no 45036/98 (ECtHR 30 June 2005).

the ECJ had decided on the same question and found that the limitations made on the right were justified and that there was no human rights violation.⁹¹ The ECtHR on the other hand, concluded that there had been a violation of the ECHR.

The ECtHR stated that EU Member States remain individually responsible for compliance with the ECHR where competence has passed to the EU, but the ECtHR would only interfere where the protection afforded by the EU was not equivalent to that provided under the ECHR. Equivalence was regarded as comparability rather than congruence and the ECtHR would only interfere if it thought the protection within EU was ‘manifestly deficient’.⁹²

Thus, the ECtHR laid down a rule on when it will interfere with the Parties’ implementation of EU law. The rule contains two criteria: first, that the protection afforded within the EU is less extensive than within the ECHR and second, that such protection is manifestly deficient. Inherent in this is that there is a presumption for that EU law is equivalent with the ECHR protection and this presumption has been called the “Bosphorus presumption”.⁹³

In the recent case of *Avotins*, the ECtHR reiterated two conditions for the application of the Bosphorus presumption.⁹⁴ There may be no margin of appreciation for the national authorities in the implementation of the EU legislation, and the supervisory mechanisms provided for by the EU must have been exhausted.⁹⁵ If these are not fulfilled, the Party of the case will not benefit from the Bosphorus presumption.

Such a high threshold for interfering in EU law could be undesirable since it endangers human rights that should be guaranteed by the ECHR. If the EU accedes to the ECHR, such a special treatment compared to the other Parties would not sit well, even in the light of the uniqueness of the EU, as it weakens the protection of human rights.

The first time the ECtHR mentioned the charter in a case before it was, as far as the author

⁹¹ See Case C-84/95 *Bosphorus AS v Ireland* [1996] ECR I-3953, paras. 19-27.

⁹² *Bosphorus* (n 92), paras. 154-155.

⁹³ See e.g. *Avotins v Latvia* App no 17502/07 (ECtHR 23 May 2016) para 73.

⁹⁴ *Ibid.*

⁹⁵ *Avotins* (n 94) para. 105.

could find, in a dissenting opinion in *Frette v France* in 2002.⁹⁶ It was only mentioned once as a supporting argument.

Case *A and B v Norway*⁹⁷ concerned an alleged breach of the *ne bis in idem* rule of Art. 4 Protocol 7 ECtHR, made by the Norwegian authorities. In interpreting the content of the rule, the ECtHR referred to landmark case law from the ECJ, and statements made by an Advocate General in the relevant case.⁹⁸ This shows a hermeneutical approach by the ECtHR, in that it interprets the provision of the ECHR in light of the interpretation of the provision of the EU Charter that is based on the ECHR provision in question. The decision illustrates how the EU Charter may influence the ECHR. It is also interesting to note that Norway is not an EU Member State, and thus not bound by the EU Charter, and yet the decision in a case against the State was informed by EU case law on fundamental rights.

There are several examples of the ECtHR referring to the EU Charter when interpreting the content of ECHR rights.⁹⁹ This is a display of the respect the ECtHR has for the EU fundamental rights, and helps ensure more homogeneity within European fundamental rights protection. It is also beneficial for those relying on fundamental rights of the EU Charter that the ECtHR does not stray away from the interpretations of the ECJ, thus obliging the latter to, in accordance with the EU Charter Art. 52(3), avert from its previous case law.

2.5.2 The ECJ

The ECJ has affirmed that in cases falling outside the scope of the EU Charter,¹⁰⁰ where the fundamental right in question is enshrined in the ECHR, it is for the national court or the ECtHR to examine whether there has been a fundamental rights violation “in the light of” the relevant ECHR right.¹⁰¹ The ECJ has also confirmed that derogation from the rights of the

⁹⁶ *Frette v France* App no 36515/97 (ECtHR 26 February 2002), joint partly dissenting opinion of Judge Sir Nicolas Bratza and Judges Fuhrman and Tulkens, para 2b.

⁹⁷ *A and B v Norway* App nos 24131/11 and 29758/11 (ECtHR 15 November 2016).

⁹⁸ *Ibid* paras. 51-52 and 118.

⁹⁹ See i.e. *Ibrahim and Others v the United Kingdom* App. Nos. 50541/08, 50571/08, 50573/08 and 40351/09 (ECtHR 13 September 2016); *Tarakhel v Switzerland* App. no. 29217/12 (ECtHR 4 November 2014); *Magyar v Hungary* App. no. 18030/11 (ECtHR 18 November 2016).

¹⁰⁰ EU Charter Art. 51(1).

¹⁰¹ Case C-256/11 *Dereci and Others v Bundesministerium für Inneres* [2011] ECR I-11316, para. 72.

Charter is within the scope of EU law.¹⁰² Thus, regulations by Member States within the scope of EU law must comply with the ECHR, also if the regulation constitutes a derogation.

In case C-617/10 *Fransson*,¹⁰³ the ECJ stated categorically that the ECHR ‘does not constitute, if the European Union has not acceded to it, a legal instrument which has been formally incorporated into [EU] law’.¹⁰⁴ A consequence of this is that the examination of questions regarding EU law must be ‘undertaken solely in the light of the fundamental rights guaranteed by the Charter’.¹⁰⁵ Thus, the ECJ cannot refer to the ECHR when making its decisions. This does not preclude the Court from referencing the ECHR when interpreting the EU Charter, but the decision may not be based on the ECHR directly.

When the ECJ applies EU Charter rights that correspond to the ECHR, it refers to the EU Charter Art. 52(3) and the ECHR (with case law) during the interpretation stage, before referring to the principle laid down in *Fransson* and basing its judgment *solely* on the EU Charter right.¹⁰⁶

The Case C-399/11 *Melloni*¹⁰⁷ was a preliminary ruling regarding whether the EU Charter Art. 53 could be interpreted as allowing a Member State to limit EU Charter rights for the benefit of national constitutional rights. Art. 53 also concerns the ECHR and this case is thus relevant to the relationship between the frameworks.

The ECJ stated that national constitutions may not, based on Art. 53, be given priority above the EU Charter if this means that other rights protected in the Charter are undermined. As grounds for this the ECJ referred to the principle of primacy of EU law, which would otherwise be undermined, and that allowing such limitations would entail ‘casting doubt on the uniformity of the standard of protection of fundamental rights’ and ‘undermine the

¹⁰² See Case C-260/89 *ERT* [1991] ECR I-2925, paras. 44 and 45.

¹⁰³ *Åkerberg Fransson* (n 78)

¹⁰⁴ *Ibid* para 44.

¹⁰⁵ Case C-601/15 *J. N.* [2016] EU:C:2016:84 paras. 45-46.

¹⁰⁶ See e.g. Case C-279/09 *DEB* [2010] ECR I-13849; Case C-601/15 *J. N.* [2016] EU:C:2016:84.

¹⁰⁷ Case C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] EU:C:2013:107.

principles of mutual trust and recognition’ and therefore ‘compromise the efficacy of that framework decision’.¹⁰⁸

The ECJ’s arguments on this could be transferred to the ECHR. Although presumably the risk of differences in protection between the EU Charter rights and the ECHR is smaller than between the former and different national Constitutions,¹⁰⁹ the rule according to the *Melloni* case is that the EU Member States cannot rely on the ECHR to make limitations on EU Charter rights. Whether this is the intention of the ECJ is to be clarified in future case law.

Case C-157/14 *Neptune*¹¹⁰ illustrates how the ECJ may handle a case concerning a Charter Article which does not correspond to the ECHR, in that case Art. 16 on the right to conduct a business. The case concerned the right to write certain slogans on a product according to the EU Charter Arts. 11 and 16, and Art. 10 ECHR, which corresponds to the EU Charter Art. 11.

The ECJ referred to the EU Charter Art. 52(3) and stated that Art. 11 had the same meaning and scope as Art. 10 ECHR. In relation to this, it was clear that Art. 11 covered the use by a business of labelling and advertising, which was the core of the case. It was then reiterated that the right in Art. 16 must be seen in the light of its ‘social function’.¹¹¹ The ECJ has in case-law stated that such rights which have a social function are not to be considered as absolute. See Case C-544/10 *Weintor*, where the Court states that ‘it must be borne in mind that [...] the freedom to pursue a trade or profession, like the right to property, is not an absolute right but must be considered in relation to its social function’.¹¹²

The approach of the ECJ in this case shows that the obligation under Art. 52(3) may have an influence also on those Articles of the Charter that do not correspond to the ECHR. This is because the ECHR right in many cases may encompass the rights enshrined in the non-corresponding provisions of the EU Charter.

¹⁰⁸ *Melloni* (n 108), paras. 55-64.

¹⁰⁹ See Art. 6(3) TEU and the EU Charter Art. 52(3).

¹¹⁰ Case C-157/14 *Neptune v. Ministre de l’Économie et des Finances* [2015] EU:C:2015:823.

¹¹¹ *ibid* para 66.

¹¹² See Case C-544/10 *Deutsches Weintor eG v Land Rheinland-Pfalz* [2012] EU:C:2012:526 para. 54 cf. Case C-210/03 *The Queen v Secretary of State for Health* [2004] ECR I-11893, para 72.

Further, the fact that the ECJ uses the characterisation of ‘social’ to indicate that it is a principle and thus derogable, shows that the social rights enshrined in the Charter may be intended to be merely principles, and thus have a lower level of protection according to Art. 52(5).

The ECJ does not rely on the ECHR in all cases regarding fundamental rights. An example of this is Case C-395/15 *Daouidi*¹¹³ regarding prohibition of discrimination based on disability. This freedom is not enshrined in the ECHR, and there were other international human rights sources covering the right. Thus, the ECJ did not find it necessary to refer to the ECHR when making its decision, or indeed during the interpretation of the provision.

2.5.3 The EFTA Court

Within the EEA, there have been some decisions regarding human rights. The EU Charter is as mentioned not legally binding on the EEA EFTA States. However, since the Charter has an impact on EU law, it is natural that EEA law will also be influenced by it. The EFTA Court has confirmed that the obligation to comply with fundamental rights ‘manifestly comes within the scope of EEA law’.¹¹⁴ Furthermore, all EEA Member States are also Parties to the ECHR, making it reasonable for the EFTA Court to base EEA human rights on the ECHR. This is also in many cases what the EFTA Court has done.¹¹⁵

The EFTA Court has also affirmed that the Agreement must be interpreted in accordance with the case law from the ECJ regardless of when it was handed down.¹¹⁶ This does not mean that the EFTA Court is bound by interpretations of the ECJ, it merely notes its importance in relation to the principle of homogeneity, which would be best upheld if EEA fundamental rights were equal to EU fundamental rights.¹¹⁷

¹¹³ Case C-395/15 *Mohamed Daouidi* [2016] EU:C:2016:917.

¹¹⁴ Joint Cases E-3/13 and E-20/13 *Olsen and Others* [2014] EFTA Ct. Rep 400, para. 227.

¹¹⁵ See e.g. Case E-8/97 *TV 1000 Sverige AB v the Norwegian Government represented by the Royal Ministry of Cultural Affairs* [1997] EFTA Ct. Rep. 68, para. 26 especially.

¹¹⁶ Case E-2/94 *Scottish Salmon Growers Association Ltd V EFTA Surveillance Authority* [1995] EFTA Ct. Rep. 59, paras. 10-13.

¹¹⁷ See the EFTA Courts’ statement in Case E-18/11 *Irish Bank Resolution Corporation V Kaupping* [2012] EFTA Ct. Rep. 592, para. 122: ‘[T]he objective of establishing a dynamic and homogeneous

Further, it has stated, in the *Ásgeirsson* case that the EEA shall be interpreted in light of fundamental rights, and that the ECHR and ECJ case law “are important sources for determining the scope of these rights”.¹¹⁸ An interesting point is that the EFTA Court in this case still chose to refer to the ECHR and the ECtHR rather than the EU Charter and ECJ case law, even though the Charter was binding at this point.

The cases mentioned so far were all except *Ásgeirsson* raised before EFTA Court before the EU Charter came into existence. This shows that there was room for human rights considerations within the EEA even before they were codified within a separate framework in the EU. This seen together with the principle of homogeneity speaks in favour of the EU Charter having influence on the relevant fundamental rights within the EEA.

Indeed, after the EU Charter came into being, it has been mentioned in the decisions of the EFTA Court on several occasions. An early mention was in Case E-2/02 *Bellona*,¹¹⁹ where one of the applicants referred to the EU Charter. In this case, the Court did not make further mention of the Charter.

In the recent Case E-4/11 *Clauder*, the EFTA Court itself referred to the EU Charter, stating that ‘The Court notes that in the European Union the same right is protected by Article 7 of the Charter’.¹²⁰ However, it does not base its judgment upon the provision of the EU Charter.

For EU Charter rights that have a corresponding provision in the ECHR, there should not be a lot of controversy, considering that all the EEA EFTA States in any case are bound by the ECHR. In the Case E-10/14 *Deveci*,¹²¹ the EFTA Court handled a situation regarding EU legislation that included a reference to a provision of the EU Charter which does not have a corresponding provision in the ECHR, namely the EU Charter Art. 16 (freedom to conduct a business). The Norwegian government expressed concern about accepting such rights not included in the ECHR (or in other human rights frameworks to which the EEA EFTA States

European Economic Area can only be achieved if EFTA and EU citizens and economic operators enjoy, relying upon EEA law, the same rights in both the EU and EFTA pillars of the EEA.’

¹¹⁸ Case E-2/03 *Ásgeirsson and Others* [2003] EFTA Ct. Rep 185, para 23.

¹¹⁹ Case E-2/02 *Bellona v ESA* [2003] EFTA Ct. Rep 53, para. 28.

¹²⁰ Case E-4/11 *Clauder* [2012] EFTA Ct. Rep. 216.

¹²¹ Case E-10/14 *Enes Deveci and Others v Scandinavian Airlines* [2014] EFTA Ct. Rep. 1364.

are Parties).¹²² The reason behind the concern was that this would challenge State sovereignty and the principle of consent. The EFTA Court did not address the question of Art. 16 in this case and simply stated that the freedom to conduct a business was inherent in the EEA Agreement itself.¹²³

Consequently, it is not entirely clear how and whether the fundamental rights of the EU Charter that not correspond to the ECHR may be implemented in the EEA. Homogeneity may be at risk if the interpretation on these rights diverge in the EEA.

2.6 The Vienna Convention¹²⁴

The Vienna Convention ("VCLT") Art. 1 states that the VCLT applies to 'treaties between States'. Consequently, it will not apply to treaties with other subjects of international law, such as the EU. However, it does apply to the ECHR, and its contents is regarded as general principles of international law. It is therefore applicable when interpreting international treaties, when there are no other rules specifically regulating the same area of law. In this case, the principles may consequently be of relevance insofar as certain elements are not regulated by the ECHR, the EU Charter or other provisions.

Article 30 governs the situation where a new treaty regulates the same subject-matter as an already existing treaty. Paragraph 2 states that when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, another earlier or later treaty, the provisions of that treaty prevails.

Article 30 paragraph 4 states that when the parties to the later treaty do not include all the parties to the earlier one then; a) between States Parties to both treaties the same rule applies as in paragraph 3,¹²⁵ or b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and

¹²² Ibid, paras. 40, 44 and 46.

¹²³ *Bellona* (n 120), para. 64.

¹²⁴ Vienna Convention (n 59).

¹²⁵ When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.

obligations. In this case, where all the parties to the EU Charter are also parties to the ECHR, letter a applies.

3 Comparison of the Charter and the ECHR

3.1 Introduction

This chapter includes a comparison of some of the Articles of the EU Charter and the ECHR, focusing on how the level of protection may be different in each human rights framework. A beneficial way of illustrating this is to categorize the EU Charter Articles according to the level of inspiration drawn from the ECHR, as this will enlighten the differences in level of protection for the EU Charter rights with the same “meaning and scope”¹²⁶ as an ECHR provision, and those inspired by other sources.

The categorisation of rights applied under the “The Rights” subchapter of this thesis is inspired by the EU Charter Art. 52 and the Explanations’¹²⁷ statements thereto. It thus includes the following categories: Charter Articles of which the meaning and the scope correspond to provisions of the ECHR; Charter Articles of which the meaning corresponds, but not the scope, Charter Articles inspired by case law of the ECtHR;¹²⁸ Charter Articles inspired by EU primary law;¹²⁹ Charter Articles inspired by ECJ case law and Member States’ Constitutions;¹³⁰ and Charter Articles inspired by other human rights sources.

In the following, the Explanations is frequently referenced. Though not legally binding,¹³¹ it is described in the preamble as ‘[A] valuable tool of interpretation intended to clarify the provisions of the Charter’.¹³² According to the EU Charter art. 52(7), the ‘[E]xplanations [...] shall be given due regard by the courts of the Union and of the Member States’. A similar

¹²⁶ The EU Charter Art. 52(1).

¹²⁷ Explanations (n 74).

¹²⁸ EU Charter (n 1) Art. 52(3) cf. the Explanations (n 74) 17.

¹²⁹ EU Charter (n 1) Art. 52(2) cf. the Explanations (n 74) 17.

¹³⁰ EU Charter (n 1) Art. 52(4) cf. the Explanations (n 74) 17.

¹³¹ Explanations (n 74) preamble.

¹³² Explanations (n 74) 1, first paragraph.

wording has been included in Art. 6(3) TEU. The fact that reference to this document is incorporated both in the TEU and in the Charter, confirms its importance.¹³³

The Explanations give guidance about the connection each article has to the ECHR, making it valuable to take into consideration when looking at the relationship of these two frameworks.

3.2 General observations

Before comparing the Articles of the EU Charter and the ECHR, it is necessary to consider other, more general factors regarding the systems of the EU and the Council of Europe, which may have an impact on the level of protection provided by each provision.

3.2.1 Scope

Firstly, the ECHR has more ratifications than the EU Charter, as all 47 Member States of the Council of Europe are bound by the ECHR¹³⁴ (with some exceptions regarding certain Protocols),¹³⁵ whilst the 28 EU Member States are bound by both the Charter and the ECHR.¹³⁶ Since this thesis focuses on the situation within the EU, this difference in scope is not relevant to the level of protection of human rights, as both frameworks may be applied within all EU Member States.

According to the EU Charter Art. 51(1), the provisions of the Charter are addressed to ‘the institutions, bodies, offices and agencies of the Union (...) and to the Member States only when implementing Union law’. This means that the EU institutions etc. are bound by the Charter in all their activities, and the Member States only so when acting within the scope of EU law.

¹³³ The ECJ has used the Explanations to interpret provisions of the EU Charter, see e.g. *Fransson* (n 78).

¹³⁴ Simplified Chart of signatories and ratifications <http://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/chartSignature/3> accessed March 15 2017.

¹³⁵ See Council of Europe, ‘Our Member States’, (n 7): Among the EU Member States, Greece, Turkey and the United Kingdom are not bound by Protocol 4 ECHR, whilst Germany, the Netherlands and the United Kingdom have not ratified Protocol 7. Protocols 9, 10, 12, 14, 15 and 16 have also not yet been ratified by several of the Member States.

¹³⁶ See Art. 6(1) TEU.

What falls within the scope of EU law, is defined in “TITLE I” of TFEU cf. Art. 1 TFEU, but the boundaries are in practice not entirely clear. It might also seem as though the threshold for falling under EU law is lower when the case concerns human rights.¹³⁷

The fact that the Charter only applies in cases regarding EU law puts a limitation on the reach of the Charter rights.¹³⁸ A corresponding limitation is not applicable to the ECHR rights, as those rights shall be guaranteed for everyone within the High Contracting Parties’ jurisdiction regardless of area of law.¹³⁹ Consequently, outside the realm of Union law, individuals in EU Member States must rely on ECHR (or other human rights sources) rather than the EU Charter to guarantee their human rights. However, as mentioned above, it appears the ECJ is willing to stretch the limits of EU law as far as it can in the cases regarding human rights. A reason for this might be the understanding of fundamental rights as universal and transcending of different areas of law, as well as their importance in a developed society.

For the European Union, the EU Charter applies to its institutions, bodies, offices and agencies. It should be noted that the Explanations on Art. 51(1) states that the EU constellations are the prime addressees of the Charter.¹⁴⁰ This fact differentiates the EU Charter protection of human rights from that of the ECHR as the guarantee for protection in the EU also applies at a European level. In fact, the European Union is the ‘only international/supranational organisation providing for fundamental rights protection against its own conduct’.¹⁴¹

To be able to provide protection for fundamental rights against itself as a supranational organisation is surely a positive thing. However, the European Union and its organs are not

¹³⁷ Case C-600/00 *Mary Carpenter v Home Secretary* [2004] ECR I-6279. The case concerned the interpretation of EC law on free movement and residence within the Community for nationals of Member States regarding establishment and the provision of services. In this case, the ECJ found that it was sufficient that the applicant’s husband was working with procurement of advertising in several other Member States, for EU law on human rights to be applicable, even though the applicant herself was not a national of a Member State.

¹³⁸ See e.g. Art. 51(2) which states that the Charter does not affect the field of application of EU law of the powers and tasks of the Union .

¹³⁹ European Convention on Human Rights (1953) Art. 1.

¹⁴⁰ Explanations (n 74) 16, first paragraph.

¹⁴¹ *Blanke & Mangiameli* (eds) (n 65) 289.

purely human rights oriented, which begs the question of whether fundamental rights may suffer due to other interests that the deciding organs of the EU find more important in a certain case. In this perspective, it can be argued that ECtHR has more legitimacy structurally speaking, in that its sole objective is to ‘ensure the observance of the engagements taken by the High Contracting Parties in the Convention and the Protocols thereto’.¹⁴²

Another difference between the scope of the EU Charter and the ECHR is that the Charter guarantees protection for a larger number of rights, and includes rights which are not protected by the ECHR, such as the right to engage in work, rights of the elderly, right of access to a free placement service and the right to health care.¹⁴³ These rights are of a social nature and thus falls outside the core of the ECHR, which guarantees mostly civil and political rights.

A consequence of this difference in range of rights is that within the scope of EU law, the social rights have been elevated in influence and importance. This also means that the Member States have an increased obligation to respect human rights of a social nature within the scope of EU law. A possibility to be considered is that there might be a flow of influence from the EU to the rest of Europe, to elevate social human rights. Regarding the ECHR and the Council of Europe, a possibility is to include more social rights into the Convention through Protocols or possibly via an amendment of the ECHR. Another possibility is to attempt to get the European Social Charter’s¹⁴⁴ influence on par with the ECHR, as this Charter is a ‘Council of Europe treaty that guarantees fundamental social and economic rights as a counterpart to the European Convention on Human Rights’.¹⁴⁵

¹⁴² Art. 19 ECHR.

¹⁴³ TC Hartley, *The Foundations of European Union Law* (OUP 2014) 156.

¹⁴⁴ European Social Charter (1996) ETS 163.

¹⁴⁵ Council of Europe, ‘The European Social Charter’ <https://www.coe.int/en/web/turin-european-social-charter> accessed 16 March 2017. See also Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (Council of Europe 1995). The European Social Charter has only 34 ratifications from the Member States of the Council of Europe, most of which have attached some form of reservation. The system of monitoring the Social Charter is also different from the ECHR. For instance, instead of a court making decisions on the provisions of the European Social Charter, there is the European Committee of Social Rights, which has the task of monitoring that the

The interpretation of the EU Charter rights is limited by Art. 53, which states that nothing in the Charter can restrict or affect human rights as recognised by EU law, national agreements to which the EU or all Member States are party or by national constitutions of the Member States. In relation to the ECHR, this means that the EU Charter rights may not be applied in a way that makes more extensive limitations in rights guaranteed by the ECHR than is permitted for within the ECHR.

Here there is also reason to point out the fact that the ECHR's scope covers all the EEA States, while the EU Charter does not officially apply to the EEA EFTA States. Neither instrument is binding upon the EFTA organs. However, as mentioned above, fundamental rights are important to the EEA, thus it could be argued that it is necessary with fundamental rights protection also binding on the EEA organs. In relation to the EU, the principle of homogeneity speaks in favour of interpretation in accordance with EU law. One way to guarantee homogeneity is to include the EU law on human rights, including the Charter, for cases where the ECJ has not yet decided. However, this appears to be unrealistic in the near future, due to the sizable amendment to the EEA this would constitute.

3.2.2 Absolute vs. conditional rights

There is a distinction both within the ECHR and the EU Charter between absolute rights, which in principle may not be derogated from, and conditional rights, which under certain conditions may be subject to derogation.

An example of a non-derogable right within the ECHR is Art. 3: the right not to be subject to torture or inhuman treatment. The corresponding rights within the EU Charter will also be non-derogable, as well as the rest of the provisions within the EU Charter Title I.¹⁴⁶

Since the EU Charter contains a wider variety of rights than the ECHR, absolute rights that are only included in the EU Charter could pose limitations on derogable rights guaranteed in both frameworks. This could cause a clash between the scope and/or meaning of rights that

states are upholding the Social Charter and its Protocols, and of making decisions that must be respected by the States concerned.

¹⁴⁶ Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 ECLR 375, 388.

are guaranteed by both frameworks.

An example is the EU Charter Art. 1 cf. the Explanations¹⁴⁷ comments on human dignity, which state that human dignity may not be violated, even where this would be restricting another right. This basically means that any right leading to a violation of human dignity is in breach of the EU Charter. It should be noted here that in the case of such a discordance between the two frameworks, the EU Charter Art. 53 would oblige the applicants of the Charter to not interpret ECHR-based Charter provisions restrictively, since ‘[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights’ as recognised in *inter alia* the ECHR.

Another point is the distinction within the EU Charter between rights and principles. The EU Charter Art. 51(1) states that while rights shall be respected, principles shall be *observed*. This shows a distinction in legal force between principles and rights.

The EU Charter Art. 52(5) continues by stating that *principles* ‘shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality’. This means that principles ‘become significant to Courts only when such acts are interpreted or reviewed. They do not however give rise to direct claims for positive action by the Union’s institutions or Member State authorities’.¹⁴⁸ This provision narrows the scope of which provisions of the EU Charter may give direct rise to claims. Lenaerts points out that this provision was included to satisfy those EU Member States who had problems accepting the including of social and economic rights into the Charter,¹⁴⁹ and thus this provision is aimed at rights enshrined in Title IV of the Charter. However, there is no clarification within the Charter of which exact provisions shall be principles; only the Explanations give a few examples.¹⁵⁰

This means that EU Charter principles have a lower level of protection than the rights. This distinction may have an impact on the level of protection that an EU Charter right has compared to an ECHR right. However, since this provision is aimed at social and economic rights, which are generally not enshrined in the ECHR, the difference made by this provision

¹⁴⁷ Explanations (n 74) 1.

¹⁴⁸ Explanations (n 74) 19.

¹⁴⁹ *Lenaerts* (n 147) 8 ECLR 375, 399 et seq.

¹⁵⁰ Explanations (n 74) 35.

is limited.

3.2.3 Locus Standi

Within the EU, *locus standi* is largely regulated in Art. 263 TFEU, regarding the ECJ's obligation to review the legality of binding EU acts intended to produce legal effects vis-à-vis third parties. According to Paragraph 2, Member States, as well as the European Parliament, Council and Commission shall always have standing before the ECJ. Paragraph 3 gives limited standing to some of the lower organs of the EU, whilst paragraph 4 concerns individual applicants.

Article 263(4) TFEU states that 'any natural or legal person may ... institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures'.¹⁵¹ Thus, there is no individual complaint procedure before the ECJ regarding breaches of EU legislation (such as the EU Charter) made by a Member State.

In order for an individual to obtain this, he or she must make use of the preliminary rulings procedure in Art. 267 TFEU, hoping that the domestic court decides to refer the question to the ECJ. According to Art. 267(2), a domestic court of last instance is obliged to make a preliminary application whilst the lower ones may choose to do so according to national legislation.

In the ECHR Art. 33 and 34 regulate locus standi. Article 33 states that any Contracting Party have standing before the ECtHR regarding alleged breach of the provisions therein and in the Protocols thereto. Regarding individual applications, Art. 34 states that such may be received by the ECtHR if the claimant(s) is 'victim' of a violation by a Contracting Party of the ECHR or its Protocols.

The lack of an individual complaint procedure on the EU Charter means that it is more difficult for individuals to ascertain their rights according to the Charter, than it is under the ECHR. However, there are other factors that come into play. For instance, for individual applications under the ECHR, the principle of subsidiarity and Art. 35(1) ECHR requires that

¹⁵¹ This provision shall be interpreted in the light of Case C-222/83 *Municipality of Differdange v Commission* [1984] ECR I-2889, para. 9.

an individual must exhaust all national remedies before going to the ECtHR. Unfortunately, the ECtHR has a massive backlog of cases, meaning means that it is a lengthy process to have your rights determined by the ECtHR.

Finally, the fact that the ECHR contains additional admissibility criteria in Art. 35(2) and (3), should be noted, as there are no such criteria in the EU Charter. Article 35(2) obliges the ECtHR to dismiss individual applications which are anonymous or have already been examined substantially by the Court or submitted to another procedure of international examination and thus contains no new information. Article 35(3) ECHR states that the ECtHR must dismiss any application which is manifestly ill-founded or an abuse of the right to individual application.

An admissibility criterion allowing the ECJ to dismiss a case if it is ‘manifestly inadmissible’ may be found in the Rules of Procedure of the ECJ Art. 53(2).

3.2.4 Contextual difference

The contextual difference between the EU Charter and the ECHR is partly that rights guaranteed in the latter framework are protected by a court which is a specialized human rights court, dedicated to questions regarding the interpretation and application of the framework, whilst the first framework is protected by a court which also makes decisions on a wide range of other areas of law.

This might lead to questions about the competence of the ECJ to act as a human rights court. In addition to this, in a case before the ECJ, the human rights question will often only be a part of the conflict that needs resolving, and a decision on whether the fundamental right has been violated does not necessarily dictate the outcome of the case. In cases before the ECtHR, the human rights issue will be the only issue on which the Court may decide.¹⁵² The fact is that the ECtHR is a narrower and therefore more focused court.

Another part of the contextual difference is the aims of the institutions that created these human rights frameworks. In the preamble of the ECHR recital 4 it is stated that the Council of Europe aims to achieve ‘greater unity between its members’, by the ‘maintenance and further realisation of Human Rights and Fundamental Freedoms’. Reference is also made to

¹⁵² Arts. 32 and 19 ECHR.

the value of the ‘effective political democracy’. The preamble reads that the sole objective of the ECHR is the guaranteeing of human rights and fundamental freedoms to create unity in European States.

Further, the Articles of the ECHR include derogations from the non-absolute rights under conditions which take into consideration such measures that are necessary in a democratic society and with respect to the rule of law,¹⁵³ or in a time of emergency.¹⁵⁴

In comparison, the preambles of the EU Charter refer to a larger number of considerations, such as the four freedoms¹⁵⁵ and the powers and tasks of the Union.¹⁵⁶ The EU Charter has one generally applicable derogation provision in Art. 52(1) which allows derogation according to the rule of law and with respect for the essence of the rights and freedoms within the EU Charter. Further, limitation may only be made if necessary and if they meet the objectives generally recognised by the Union.

It becomes apparent that the EU Charter does not have the entirely same objectives as the ECHR. The fact that Art. 52(1) of the EU Charter mentions objectives recognised by the Union can be interpreted in light of the preamble, which refers to the four freedoms. A possible interpretation of this is that economic considerations relating to the four freedoms may in some situations have primacy over human rights within the EU.¹⁵⁷ Burchill uses the ECJ’s statements in the Cases C-438/05 *Viking*¹⁵⁸ and C-341/05 *Laval*¹⁵⁹ as examples of cases where the ECJ has put economic considerations relating to the four freedoms above human rights.¹⁶⁰ It should be noted that these decisions were handed down after the EU Charter was proclaimed, but before it became legally binding, and perhaps the fundamental rights therein would have stronger impact post-Lisbon. However, as mentioned above, the preamble and

¹⁵³ See Arts. 2, 5, 8, 9, 10 and 11 ECHR.

¹⁵⁴ Art. 15 ECHR.

¹⁵⁵ EU Charter preamble recital 3.

¹⁵⁶ *Ibid*, recital 5.

¹⁵⁷ See Richard Burchill ‘Assessing the EU’s position on human rights: Is it a desirable one?’ in J. Wetzel (ed) *The EU as a Global Player in the Field of Human Rights* (Routledge 2011) .

¹⁵⁸ Case C-438/05, *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line* [2007] ECR 10779.

¹⁵⁹ Case C-341/05, *Laval v Svenska Byggnadsarbetareförbundet* [2007] ECR 11767.

¹⁶⁰ *Burchill* (n 158) 24.

Art. 52(1) still allow limitations on those rights to meet objectives recognised by the EU, hereunder presumably the four freedoms.

Burchill makes the point that at the core of the EU is the internal market, which is based on market considerations, and the EU has grown from there. Basically, it did not come from a human rights starting point, like the ECHR did. This should influence how the fundamental rights of the EU Charter will be interpreted, and from a human rights point of view it is an argument for the need of external control of the EU in the area of human rights.

Here the contextual difference of the EEA is relevant toward its relationship with the EU. The EEA does not operate with supremacy of EEA law, and there is thus not the same danger of constitutions being overridden to the detriment of human rights. Also, historically, the EEA is a way for the EFTA States to be included in the internal market without being bound by all the other structural and material rules of the EU. These are arguments against applying the EU Charter within the EEA.

On the other hand, the human rights protection of the EEA will, like the EU Charter, be interpreted in light of the purpose of the Agreement. The EEA is mainly concerned about the internal market, in an even higher degree than the EU, meaning that there is a risk of human rights being adversely affected for the benefit of economic interests.¹⁶¹

3.2.5 Derogation

There are a few different ways that an ECHR Contracting Party or an EU Member State may make exceptions from the non-absolute rights and freedoms in the ECHR and the EU Charter. Some provisions contain express permission for limitations under certain conditions. These shall be considered first. There are also separate derogation provisions in both frameworks, which will be looked at second. Finally, there will be a consideration of the rules on reservations and the provisions on prohibition of abuse of rights.

¹⁶¹ See e.g. Case E-2/11 *STX and Others* [2012] EFTA Ct. Rep. 4 and Case E-14/15 *Holship* [2016], not yet reported.

Within the ECHR there are several Articles including express permission to make limitations to the right guaranteed by that Article in the protection of “legitimate interests”.¹⁶² These are Arts. 8, 9, 10, 11 and Protocol No 4 Art. 2. Protocol 1 Art. 1 to the ECHR on the peaceful enjoyment of property should also be mentioned, as it includes a limited amount of interests that may be legitimate to warrant limitation on the right to peaceful enjoyment of property. The actions which may be legitimised by these interests must in all cases be “necessary in a democratic society”, and must be prescribed by law. It is for the ECtHR to decide whether these criteria are fulfilled.¹⁶³

Within the EU Charter, no such limitations are incorporated into the text of any of the Articles. However, all the above-mentioned ECHR Articles except Protocol 4 Art. 2, have a corresponding provision within the EU Charter based on the ECHR provision. In accordance with the EU Charter Art. 52(3) and the Explanations on the relevant Charter Articles, the meaning and scope of those Charter Articles shall be the same as those of the ECHR. Consequently, there may not be any more extensive limitations to the corresponding rights of the EU Charter than allowed under the ECHR. The Explanations mention that the EU Charter Art. 12, which corresponds to the Art. 11 ECHR, has a wider scope, since it also applies on EU level.¹⁶⁴

Thus, in the case of the rights protected in Art. 8 to 11 ECHR and Protocol 1 Art. 1 to the ECHR, the same rules for limitation applies for the corresponding provisions within the EU Charter, with exceptions allowing for more extensive protection within the EU.

Within the ECHR, Art. 15 is a derogation clause allowing Contracting States to derogate from their obligations under the ECHR in time of emergency.¹⁶⁵ This Article does not have a corresponding provision within the EU Charter. It allows Contracting Parties to derogate in

¹⁶² For in-depth analysis of the legitimate interests and the requirements of rule of law and of necessity, see Stephen Greer, *Human rights files no 15, The Exceptions to Articles 8 to 11 of the European Convention on Human Rights* (Council of Europe Publishing 1997).

¹⁶³ See Case of *The Sunday Times v The United Kingdom* App no 6538/74 (ECtHR 26 April 1979) para. 59 et seq.

¹⁶⁴ Explanations (n 74) 6.

¹⁶⁵ For more about ECHR Art. 15, see Council of Europe 'Guide on Article 15 of the European Convention on Human Rights' (CoE 2016) available at http://www.echr.coe.int/Documents/Guide_Art_15_ENG.pdf accessed 11 April 2017.

‘time of war or other public emergency threatening the life of the nation’ to the extent ‘strictly required’, provided that such measures are ‘not inconsistent with its other obligations under national law’.

The Article allows for derogation from all the substantive rights in the ECHR, except for those mentioned in Art. 15(2). The non-derogable rights are Art. 2 on the right to life, Art. 3 on the prohibition of torture and inhuman treatment, Art. 4 on slavery and Art. 7 on the rule of law. No derogation may be made from the Articles of Protocol No 6 or from Article 4 or Protocol No 7 to the ECHR, which concern death penalty and the right not to be tried or punished twice, respectively.

It should be noted that this derogation clause only allows for derogation to the extent strictly required, which means that it is ideally only allowing necessary derogation for a limited amount of time. However, case law has shown that the time period can last for several years, and the ECtHR has never explicitly stated that the emergency must be temporary for the clause to apply.¹⁶⁶

Within the EU Charter the derogation clause is Art. 52(1). Although it does not state explicitly that any of the EU Charter Articles may be non-derogable, the wording of the provision opens up for it. Additionally, the ECJ has accepted the existence of non-derogable rights within the EU Charter.¹⁶⁷ It is not thus said that those non-derogable rights are the same as in the ECHR, meaning that Art. 52(1) could have a different scope than Art. 15 ECHR.

This provision has a different approach than the ECHR derogation clause since there is no requirement of any extraordinary crisis or war for it to be applicable. Instead there is a requirement that any limitation must be provided for by law and respect the essence of the rights and freedoms included in the Charter.

Further, the limitations must be ‘necessary and genuinely meet the objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others’. This includes such interests that are especially relevant for the EU, such as interests regarding

¹⁶⁶ Council of Europe ‘Guide on Article 15 of the European Convention on Human Rights’ (CoE 2016) available at http://www.echr.coe.int/Documents/Guide_Art_15_ENG.pdf on page 6 para 9, accessed 11 April 2017.

¹⁶⁷ *Peers, Hervey, Kenner & Ward* (eds) (n 76) 1469-1470.

the four freedoms and the internal market. There is also no mention of the “democratic society” which is so central in the ECHR. However, since there is mention of democracy several other places within the EU Treaties and the EU Charter, this might not have been considered necessary.

In its wording, Art. 52(1) is more similar to the inherent limitation clauses of Art. 8 to 11 ECHR than to Art. 15 ECHR. According to the Explanations, the provision is based on case law of the ECJ, which indicates that the interpretation of the criteria of the provision is autonomous within the EU. However, the wording ‘according to law’ is echoing the ECHR, and thus it is arguable that the same requirements for the quality of the ‘law’ which apply in the ECHR, should also apply for the EU Charter. According to Peers, Steve and Sacha Prechal, the ECJ has not yet confirmed whether this is the case.¹⁶⁸

Regarding the reference to objectives of general interest recognised by the Union, the Explanations refer to Arts. 3 and 4(1) TEU as well as Arts. 35(3), 36 and 346 TFEU, for clarification of the contents of those interests. The listed Articles mention several interests, both private and public such as economic interests relating to the internal market, social rights, rights relating to freedom and security, public morality etc.

Regarding the reference to Art. 35(3) TFEU, there seems to be a mistake within the Explanations since the provision does not exist.¹⁶⁹

Article 54 of the EU Charter on the prohibition on abuse of rights corresponds to Art. 17 ECHR.¹⁷⁰ However, there are some differences which may be of importance when interpreting these provisions. For instance, the EU Charter Art. 52(1) states that ‘any limitation on the exercise of the rights and freedoms recognised by this Charter must (...) respect the essence of those rights and freedoms’. This poses an additional limitation on the application of Art. 54.

Another difference lies in the fact that the EU Charter operates with rights, freedoms and principles,¹⁷¹ whilst neither the Charter Art. 54 nor Art. 17 ECHR mention principles.

¹⁶⁸ Peers, Hervey, Kenner & Ward (eds) (n 76) 1473.

¹⁶⁹ See also Peers, Hervey, Kenner & Ward (eds) (n 76) 1475, Section 52.48.

¹⁷⁰ Explanations (n 74) 19.

¹⁷¹ See the EU Charter Art. 52(5).

Furthermore, the ECHR does not even operate with principles as such. Woods theorises that the reason for leaving out principles in Art. 54 is that they cannot in themselves form a basis for an attack on the Charter or its essence.¹⁷²

3.3 The rights

Not all the Charter rights have relevance outside the EU context. In relation to the EEA, Nils Wahl points to some provisions guaranteeing rights for the EU citizens,¹⁷³ namely the EU Charter Art. 39, 40, 42, 43, 44 and 46. Such provisions will not have any relevance toward the ECHR either. Consequently, this comparison will not include those rights.

Below is a selection from the remaining pool of rights, chosen because of their general importance in the EU or because of their ability to illustrate the different levels of protection that may be guaranteed under the EU Charter and the ECHR.

3.3.1 Charter Articles of which the meaning corresponds to provisions in the ECHR, but not the scope

3.3.1.1 The right to effective remedy

This right to effective remedy is protected by art. 13 ECHR and by the EU Charter Art. 47(1). According to the annual report by the European Commission,¹⁷⁴ the EU Charter Art. 47 is the provision which was referred to the most times by the ECJ in 2015.

Article 13 ECHR states that if someone has their rights or freedoms under the ECHR violated, they shall have an ‘effective remedy before a national authority’.

The EU Charter Article 47(1) states that everyone whose rights and freedoms guaranteed by Union law are violated, shall have ‘effective remedy’ before a ‘tribunal’.

¹⁷² Peers, Hervey, Kenner, Ward (eds) (n 76) 1550, section 54.36.

¹⁷³ Nils Wahl, ‘Unchartered Waters: Reflections on the Legal Significance of the Charter under EEA Law and Judicial Cross-Fertilisation in the Field of Fundamental Rights’ in the EFTA Court (ed), *The EEA and the EFTA Court: Decentred Integration: to Mark the 20th Anniversary of the EFTA Court* (Hart Publishing 2014) 295.

¹⁷⁴ European Commission, ‘2015 report on the application of the EU Charter of fundamental rights’ (Luxembourg 2016 Publications Office of the European Union) 27.

In accordance with the EU Charter Art. 52(3) cf. Art. 6(2) TEU, the scope and meaning of the right to effective remedy in the EU Charter Art. 47(1) shall be the same as in Art. 13 ECHR, if it is the same right guaranteed in both provisions. The Explanations on Article 47(1) do not explicitly state that the scope and meaning shall be interpreted the same. Rather, it merely states that the EU Charter Art. 47(1) is ‘based on Article 13 of the ECHR’,¹⁷⁵ and that the protection under Art. 47(1) is more extensive.

The fact that the remedy according to the ECHR is to be decided by a ‘*national authority*’, is a manifestation of the principle of subsidiarity in the ECHR system and means that it depends on each Contracting Party’s legal system what is a ‘national authority’. The EU Charter, however, uses the wording ‘*tribunal*’, which in accordance with a natural understanding and the EU Explanations¹⁷⁶ means that the party that demands remedy, has the right to have his claim assessed and decided upon by a court.

Having the contents of your rights decided before a court will naturally provide more protection for the rule of law, as there will be guaranteed procedural rules laid down to ensure a fair trial. That may not be the case if for instance any regular administrative authority could make the decision. The Member States also have an obligation to ‘provide remedies sufficient to ensure effective legal protection within the scope of EU law’,¹⁷⁷ which means that if sufficient procedure is not laid down within the legal system of the Contracting Party, there will be a breach of the Charter provision.

Thus, the procedural safeguards under the EU Charter are somewhat more extensive than under the ECHR.

3.3.1.2 The right to a fair trial

This right is protected within the ECHR by Art. 6(1). It is the provision of the ECHR that the ECtHR found to be breached by the Contracting Parties the most frequently in 2016.¹⁷⁸

¹⁷⁵ Explanations (n 74) 13.

¹⁷⁶ Explanations (n 74) 13, final paragraph.

¹⁷⁷ TEU (n 18) Art. 19(1) paragraph 2.

¹⁷⁸ Council of Europe, ‘Annual Report 2016 on the European Court of Human Rights’ (2017) p. 191.

In the EU Charter, the right to a fair trial is governed by Article 47(2) and according to the annual report by the European Commission,¹⁷⁹ the EU Charter Art. 47 is the provision which has been referenced the most by the ECJ in 2015.

When addressing the EU Charter Article 47(2), and its relationship to Art. 6(1) ECHR, the Explanations state that ‘in all respects other than their scope, the guarantees afforded by the ECHR apply in a similar way to the Union’.¹⁸⁰ When seen in context with the EU Charter Art. 51(3), the statement in the EU Explanations may be interpreted as meaning that the EU Charter Art. 47(2) guarantees the same right as Art. 6(1) in the ECHR.

Since the meaning of these provisions are consequently presumed to be the same, it is the scope of the protection of the right to a fair trial within each human rights framework which is interesting to compare.

Article Art. 6(1) ECHR guarantees the right to a fair trial for ‘everyone’, ‘in the determination of his civil rights and obligations or of any criminal charge against him’. The EU Charter on the other hand, guarantees the right to a fair trial to ‘everyone’ regardless of context. In this instance, the ECHR has a more restricted field of application, as the EU Charter does not require there to be a determination of civil rights and obligations or of criminal charge. According to the Explanations the lack of such a restriction in the EU Charter is explained by the fact that the Union is a ‘community based on the rule of law’, which means that the rule of law shall apply in every case.

Consequently, an individual within the jurisdiction of an EU Member State may, in a dispute regarding his or her rights and freedoms guaranteed by Union law, have more extensive protection for the right to a fair trial in the EU Charter than in the ECHR.

¹⁷⁹ European Commission, ‘2015 report on the application of the EU Charter of fundamental rights’. Luxembourg 2016, Publications Office of the European Union, p.27.

¹⁸⁰ Explanations (n 74) 14.

3.3.2 A Charter Article of which both the meaning and scope correspond to provisions in the ECHR

3.3.2.1 Prohibition of collective expulsion

This right, or State obligation, is governed in the EU Charter by Art. 19(1), which states that '[c]ollective expulsions are prohibited'. According to the Explanations regarding Art. 19(1), this Article shall have the same meaning and scope as Protocol 4 Art. 4 ECHR, which also has the same wording.¹⁸¹

When applying the Protocol 4 Art. 4 to the ECHR, Art. 13 ECHR on effective remedy and Protocol 7 Art. 1 on grounds for expulsion lay down procedural rules regulating how States may reach decisions in cases about expulsion of aliens.¹⁸² This means that when interpreting and applying the Charter Art. 19(1), Art. 13 ECHR and its Protocol 7 Art. 1 must be taken into consideration.

However, since the EU Charter has its own provision on effective remedy (Art. 47(1)), it follows from the EU Charter Art. 51(2), and the fact that the Charter is primary law in the EU, while the ECHR is not, that Art. 47(1), rather than Art. 13 ECHR, should be applied when determining whether there has been a breach of the EU Charter Art. 19(1). As seen above, the scope of the EU Charter Art. 47(1) does not coincide entirely with that of Art. 13 ECHR. This means that although the meaning and scope of Art. 19(1) is the same as the right guaranteed by the ECHR, the procedural requirements may differ slightly when applying Art. 19(1) rather than Art. 13.

Regarding the Protocol 7 Art. 1 to the ECHR, there is no corresponding provision in the EU Charter. Consequently, the content of this article must be inherent within the EU Charter Art. 19(1), via its link to Protocol 4 Art. 4 of the ECHR and due to the EU Charter Art. 52(3).

Thus, the level of protection is similar in this instance between the EU Charter and the ECHR, however, the procedural right differs in that it is somewhat more extensive under the Charter.

¹⁸¹ For the EU Member States Greece and the United Kingdom, the inclusion of this Article in the Charter increased their obligations to prohibit collective expulsion, as these two States have not ratified ECHR Protocol 4, see *Peers, Hervey, Kenner, Ward* (eds) (n 76) 546, section 19.06

¹⁸² *Peers, Hervey, Kenner, Ward* (eds) (n 76) 552-553, section 19.32.

However, in this situation, the internal market-based character of the Union may have a detrimental effect on the level of protection of the right. Guild mentions that the EU organ FRONTEX may assist Member States in carrying out returns, pursuant to denying asylum, using i.e. charter flights, to achieve greater efficiency and thus lower the costs. Since the Member States are paying for the plane tickets in advance, the right of the asylum seeker to have his or her application individually considered might be in jeopardy.¹⁸³

It should be noted that migration policy is not included in the EEA Agreement, an EU rules relating to this will therefore not apply within the EEA.¹⁸⁴

3.3.3 Charter Articles inspired by ECtHR case law

3.3.3.1 The right to have access to legal aid

This right is governed by the EU Charter Art. 47(3) and Article 48(2). Article 47(3) states that legal aid shall be ‘made available to those who lack resources, in so far as such aid is necessary to ensure effective access to justice’. Article 48(2) guarantees respect for the rights of defence of anyone who has been charged with a criminal offence, and according to the Explanations,¹⁸⁵ corresponds to Art. 6(3) ECHR and shall have the same meaning and scope.

Within the ECHR the related provision regulating the right of legal aid is Art. 6(3) c, which only applies to are charged with a criminal offence. It states that such a person shall have the right to defend himself in person or through legal assistance or if he has not sufficient means, he shall be given such assistance free when the interests of justice so require. Consequently, under the ECHR the Contracting Parties are obliged to offer legal aid for those who cannot afford it in criminal cases “when the interests of justice so require”. Factors such as the accused’s ability to understand the case and to defend himself, as well as what is at stake for the accused, are relevant when deciding whether legal aid is required.¹⁸⁶

Article 47(3) of the EU Charter has no corresponding provision within the ECHR for civil disputes. However, a certain right to legal aid in civil disputes has been interpreted into Art.

¹⁸³ Peers, Hervey, Kenner, Ward (eds) (n 76) 561 section 19.58.

¹⁸⁴ See e.g. E-26/13 *Íslenska ríkið Atli Gunnarson* [2014] EFTA Ct. Rep. 254, para. 74.

¹⁸⁵ Explanations (n 74) 13.

¹⁸⁶ Case of *Sdravko Stanev v Bulgaria* App no 32238/04 (ECtHR 6 November 2012), para. 38 .

6(1) ECHR by the ECtHR, as seen in the case of *Airey v. Ireland*, in which the Court decided that if legal aid is necessary to ensure a fair trial, then the Contracting Party is obliged to provide it.¹⁸⁷

For civil disputes, legal aid may only be required in cases where the trial otherwise would be unfair or a lack of legal aid would hinder an ‘effective access to court’. As the Court points out in *Airey v Ireland*, other methods than legal aid may be sufficient to ensure a fair trial in civil cases, such as a simplified procedure.¹⁸⁸

In comparison Art. 47(3) of the EU Charter does not distinguish between civil and criminal cases. The Explanations on Art. 47(3) makes a reference to the case of *Airey v Ireland*, which means that the provision should be interpreted in light of ECtHR case law on the subject.¹⁸⁹ However, as the EU Charter Art. 52 states, EU law is not prevented from providing more extensive protection, which means that there is nothing hindering the EU Charter in also guaranteeing such a right in civil cases.

Ward makes the point that the ECHR right to legal aid has been interpreted as being of an economic and social nature, whilst the EU Charter right, being included in the procedural chapter of the Charter, is of a procedural nature.¹⁹⁰ This would mean that there would be necessary with different reasons to limit the respective rights.

¹⁸⁷ *Case of Airey v. Ireland* App. no. 6289/73 (ECtHR 9. October 1979), paras. 26-28. The case concerned a woman of Irish nationality who wanted to get out of her marriage to an allegedly violent and alcoholic man. She was unable to attain a solicitor willing to act on her behalf in judicial separation proceedings because she would not be able to pay the costs involved. The Court found that the national process for separation cases required the parties to be represented by a solicitor and that although the ECHR does not contain provisions guaranteeing the right to legal aid in civil disputes, ECHR Art. 6(1) did in this case require the State of Ireland to provide the woman with legal aid.

¹⁸⁸ See *Airey v Ireland* (n 188), para 26.

¹⁸⁹ See also *DEB* (n 107) paras 36 & 37.

¹⁹⁰ *Peers, Hervey, Kenner, Ward* (eds) (n 76) 1272 paras 47.241-242. To support this argument, see the inclusion of rules on legal aid within the Consolidated Version of the Rules of Procedure of the European Court of Justice [2012] OJ L 265, Chapter 4.

3.3.3.2 The prohibition of expulsion or extradition to a dangerous State

The EU Charter Article 19(2) states that no one may be ‘removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment’. According to the Explanations, this Article incorporates relevant case law from the ECtHR on Art. 3 ECHR, regarding non-refoulement.¹⁹¹

In the ECHR, the right not to be sent to a dangerous State may be guaranteed by Art. 3 ECHR, by which it is apparent that the EU Charter Art. 19(2) is inspired by, and thus presumably the content of the right is in accordance with Art. 3 ECHR. A difference between the two frameworks in this instance stems from the fact that a decision to expel an alien is not a ‘determination of a civil right or obligation or of a criminal charge’. Thus, under the ECHR, Art. 6 on fair trial will not apply to such cases. Art. 47 of the EU Charter however, applies to every right and freedom ‘guaranteed by law of the union’. Thus, the procedural rights regarding fair trial will be guaranteed in cases regarding expulsion under the Charter but not under the ECHR.

Within the ECHR, Protocol 7 Art. 1 provides procedural rules for cases regarding expulsion. According to Protocol 7 Art. 1(1) letter (a) to (c) expulsion must be in accordance with law, and the alien shall be allowed to be heard on his reasons against the expulsion, shall have the right to have his case reviewed and shall be represented before the competent authorities for the abovementioned purposes. Consequently, the procedural rights are far more extensive under the EU Charter, as Art. 47 guarantees several more rights, among which to be heard by a Court.

Further, Protocol 7 Art. 1(2) ECHR allows for expulsion without granting the procedural rights if ‘necessary in the interests of public order’ or ‘reasons of national security’. In comparison, the right to a fair trial under the EU Charter does not contain such additional limitation clauses.

¹⁹¹ *Ahmed v Austria* App no 25964/94 (ECtHR 17 December 1996); *Soering v the UK* App no 14038/88 (ECtHR 07 July 1989).

Consequently, an asylum seeker will have better procedural safeguards for his or her case under the EU Charter than under the ECHR. Thus, the risk of arbitrariness is higher under the ECHR.

3.3.4 A charter Article inspired by EU primary legislation

3.3.4.1 The right to asylum

Within the EU Charter Art. 18 protects the right to asylum. There is no corresponding right included in the ECHR and the praesidium that drafted the EU Charter had raised concern about including this Article in the Charter,¹⁹² thus extending this individual right to EU citizens.¹⁹³

According to the Explanations on Art. 18, the provision is based on the former EEC Art. 63 (now Art. 78 TFEU), which eluded to the Refugee Convention and its 1967 Protocol.¹⁹⁴

Article 18 states that the Treaties and the Refugee Convention shall be given due respect. Article 1A of the Refugee Convention states that anyone who has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a social group or political opinion is a refugee. Presumably, this is also the definition adhered to in the EU Charter Art. 18.

The Refugee Convention only recognises non-refoulement, and the right to seek but not enjoy asylum.¹⁹⁵ The right to non-refoulement is guaranteed in the EU Charter by Art. 19(2), and it is thus evident that Art. 18 guarantees individuals the right to enjoy asylum, since it would otherwise would be left pointless. The Refugee Convention does however lay down the definition of a refugee and the content of the right.

There is no such corresponding right in the ECHR, indeed the ECtHR has stated that the right to political asylum is not contained in either the ECHR or its Protocols. However, as shown

¹⁹² See CHARTE 4284/00 CONVENT 8, 496-528.

¹⁹³ *Peers, Hervey, Kenner, Ward* (eds) (n 76) 531, section 18.28.

¹⁹⁴ Geneva Convention Relating to the Status of Refugees [1951] and Protocol Relating to the Status of Refugees [1967].

¹⁹⁵ Refugee Convention (n 195) Art. 33 cf. Laurens Lavrysen 'European Asylum Law and the ECHR: An Uneasy Coexistence' (2011) 4 *GoJIL* 217, 223.

above, the expulsion of an asylum seeker may be in violation of Art. 3 ECHR.¹⁹⁶ There is also prohibition of refolement to death penalty.¹⁹⁷

Consequently, an asylum seeker has a better chance of acquiring asylum under the EU Charter than under the ECHR, because the Charter recognises a greater number of reasons for allowing asylum. Furthermore, the Charter recognises the right to asylum as an individual right, and not just as a right for a State to refuse extradition of a person to the state of their nationality, which has been the traditional understanding of asylum.¹⁹⁸

3.3.5 Charter Articles inspired by the ECJ case law and by Member States' Constitutions

3.3.5.1 Human dignity

Article 1 of the EU Charter states that '[h]uman dignity is inviolable. It must be respected and protected'. This right is based on ECJ case law,¹⁹⁹ Member States' Constitutions²⁰⁰ and the UDHR, which enshrines it in its preamble. Further, the EU Charter preamble recital 2 states that the Union is founded on *inter alia* dignity. This aligns with the fact that Art. 2 TEU now mentions human dignity as one of the Union's founding values.

Also two of the Charter Articles (Arts. 25 and 31) also mention dignity especially. Finally, Title 1 of the EU Charter is named 'Dignity', and it enshrines core human rights such as the right to life and the prohibition of slavery. According to the Explanations, none of the rights laid down in the Charter may harm the dignity of a person, and dignity must be respected even when a right is restricted. Thus, dignity plays a great part of EU fundamental rights and can indeed have an influence on all the rights therein. Most especially, it would be influential

¹⁹⁶ *Vilvarajah and Others v the United Kingdom* App. nos. 13163/87; 13164/87; 13165/87; 13447/87; 13448/87 (ECtHR 30 October 1991) para 102 and 103; *Ahmed v Austria* App no 25964/94 (ECtHR 17 December 1996) paras. 38 et seq.

¹⁹⁷ *Al-Saadoon and Mufdhi v. the United Kingdom* App no 61498/08 (ECtHR 2 March 2010), para. 120.

¹⁹⁸ *Peers, Hervey, Kenner, Ward* (eds) (n 76) 530 section 18.27.

¹⁹⁹ *Case C-377/98 Netherlands v European Parliament and Council* [2001] ECR I-7079 grounds 70-77.

²⁰⁰ *Blanke & Mangiameli* (eds) (n 65) 11, sections 01.17-01.19.

on the core rights enshrined in the ‘Dignity’ section. However, being part of the foundation of the Union, it may also influence the other Charter Article.

A search on the word dignity in ECJ case law in relation to fundamental rights from 2009 to March 2017, shows that dignity is often mentioned in relation to interpretation of EU legislation. However, the ECJ does not often attempt to map out the exact content of the right. The role of the right seems to be defined by each case.

Within the ECHR, the only mention of dignity is in the preamble to Protocol 13 on prohibition against death penalty, which again is connected to the right to life. However, dignity does have a place in the case law of the ECtHR, where it is often used as support of an argument. In line with the EU Charter, the ECtHR often uses dignity arguments in relation to core rights such as the right to life and the prohibition of torture,²⁰¹ but it has also influenced other rights, such as the right to freedom.²⁰² Although the right is not as visible as in the EU Charter, the ECtHR has stated that it is ‘the very essence’ of the Convention.²⁰³

One difference between the protection in the EU Charter and in the ECHR is that dignity seems to have a higher hierarchical status within the Charter. This might mean that dignity arguments may be used to the detriment of other rights, which might not happen in the ECHR. Dupré points out that it might affect end-of-life cases, in that Art. 1 of the Charter interpreted in accordance with Art. 2 may allow for an interpretation that it is a human right to live in dignity, and thus perhaps to die when that becomes impossible.²⁰⁴

3.3.5.2 The right to conscientious objection

The EU Charter Art. 10(1) corresponds to Art. 9 ECHR on the freedom of thought, conscience and religion. However, Art. 10(2) recognises the right to conscientious objection. The area of national defence is not really within the ECJ’s area of jurisdiction and violations of this provision may thus prove difficult to enforce.

²⁰¹ *Jalloh v Germany* App no 54810/00 (ECtHR 11 July 2006), para 82.

²⁰² *Yaroslav Belousov v Russia* App nos 2653/13 and 60980/14 (ECtHR 4 October 2016).

²⁰³ *Goodwin v the UK* App no 28957/95 (ECtHR 11 July 2002), para. 90; *Fernandes de Oliveira v Portugal* App. no. 78103/14 (ECtHR 28 March 2017), para. 67.

²⁰⁴ *Blanke & Mangiameli* (eds) (n 65) 16, section 01.29.

However, including it into the Charter shows that it is a human right that the EU Member States should respect. No such corresponding right is included in the text of ECHR, but the ECtHR has concluded that the right to conscientious objection is protected under Art. 9 ECHR.²⁰⁵ Consequently, the right to conscientious objection might be better protected under the ECHR, due to the limitation of the scope of EU law.

3.3.6 A Charter Article inspired by other human rights sources

3.3.6.1 Protection of the elderly

The protection of the elderly is guaranteed by the EU Charter Art. 25. Within the ECHR there is no Article expressly guaranteeing this right, but as will be seen below, there exists some protection for such rights also under that framework.

According to the Explanations Art. 25 of the EU Charter draws on Art. 23 of the revised European Social Charter (“ESC”)²⁰⁶ and Arts. 24 and 25 of the Community Charter of the Fundamental Social Rights of Workers (“CFSRW”).²⁰⁷ Thus, presumably these three Articles and case law regarding them will be influential on the content of the EU Charter protection.

Article 23 ESC states that the authorities must enable elderly to remain “full members of society for as long as possible”, and emphasises the possibility of living a decent life, having independency, suitable housing, health care and the respect for privacy and self-determination for those living in institutions. Articles 24 and 25 CFSRW guarantees respectively enough pension to provide for a “decent standard of living” after retirement or, if the individual does not have right to pension, sufficient recourses, medical and social assistance to respond to the individual’s needs.

It is likely that this is close to the standard that will be set in the EU Charter as well.²⁰⁸ There is as of now little case law relating to the EU Charter Art. 25, and it will be up to the ECJ to deduct the standard provided by it.

²⁰⁵ *Bayatyan v Armenia* App no 23459/03 (ECtHR 1 June 2011).

²⁰⁶ European Social Charter (1996) ETS 163.

²⁰⁷ Community Charter of the Fundamental Social Rights of Workers [1989].

²⁰⁸ *Peers, Hervey, Kenner, Ward* (eds) (n 76) 700, section 25.22.

There is no corresponding provision within the ECHR, however case law from the ECtHR shows that in questions regarding protection of the elderly, the ECtHR has often relied on Art. 3 ECHR and sometimes Art. 2.²⁰⁹ Other provisions may come into play as well, depending on the case.

A consequence of relying on Art. 3 ECHR is that the criteria for admissibility become thereafter. According to Art. 35(3)(a) ECHR, the ECtHR must declare inadmissible applications which are ‘manifestly ill-founded’. The criterion in Art. 3 is ‘torture or [...] inhuman or degrading treatment or punishment’, which means that the situation must be serious for the elderly applicant for the application to be admissible.²¹⁰ Relying on Art. 2 will require a situation where the life of the elderly is at stake, or even lost.²¹¹ This might leave protection for rights of the elderly who are in a less extreme situation outside the control of the ECtHR. Furthermore, even if the application is not considered to be manifestly ill-founded, the situation needs to be severe for the Court to decide that there has been a violation.

Within the EU Charter there is as mentioned no corresponding admissibility provision. The admissibility criteria of the ECJ relates to the jurisdiction of the Court,²¹² locus standi of the applicant, and whether the time limit has been upheld.²¹³

As seen above, the standard guaranteed by the EU Charter cf. the ESC and the CFSRW is that the elderly must have several rights relating to dignity, as well as social and economic support, to amount to a ‘decent standard of living’. By comparison to the requirements according to Arts. 2 and 3 ECHR, the threshold for deciding that the right has been violated, is lower according to the EU Charter. The protection of rights of the elderly is stronger under the EU Charter than the ECHR. This is because the right has been better defined and elevated

²⁰⁹ See e.g. Concil of Europe’s Factsheet ‘Elderly People and the European Convention on Human Rights’ http://www.echr.coe.int/Documents/FS_Elderly_ENG.pdf

²¹⁰ See e.g. *Budina v Russia* App no 45603/05 (ECtHR 18 June 2009)

²¹¹ See e.g. *Watts v the United Kingdom* App no 53586/09 (ECtHR 4 May 2010).

²¹² Art. 5(2) TEU.

²¹³ *Hartley* (n 144) 60.

as an important obligation of a state. Further, the emphasis on dignity in the EU Charter Art. 1 may strengthen the protection.

4 Concluding Remarks

Regarding the level of protection for human rights in the EU, the EU Charter seems to have succeeded in affording a higher level of protection than the ECHR for certain fundamental rights. This is in accordance with what the EU Charter Art. 52(3) foreshadowed. This has been achieved partly due to stronger procedural rights for applicants, for instance regarding Art. 47 of the EU Charter compared to Art. 6(1) ECHR.

Another reason for the success is that certain social and solidarity rights which are not mentioned in the text of the ECHR, have been elevated by their explicit incorporation into the EU Charter. It should be mentioned that several rights not explicitly mentioned in the ECHR, are still protected by it, as illustrated by ECtHR case law. See for instance the situation regarding protection of the rights of the elderly, which under the ECHR is protected by Art. 3 on torture and degrading or inhuman treatment. In the case of protection of the rights of the elderly, it is likely that Art. 3 affords somewhat less extensive protection than the EU Charter Art. 25.

The context of the EU Charter being part of the EU should be noted, since the EU did not start out as a human rights foundation, but rather an economic cooperation. This might have a detrimental effect on the level of protection of human rights under the Charter, since economic interests are of great importance within the EU system.

Regarding the scope of the frameworks, it is evident that the EU Charter guarantees protection for a wider range of rights. However, the level of protection guaranteed by some rights that do not have a corresponding right within the ECHR, may not be as high as for those protected within the ECHR. This is partly due to the fact that the EU Charter operates with ‘principles’, which are only to be ‘observed’, in contrast to ‘rights’, which are to be ‘respected’.

Another point is the fact that the ECtHR seems to associate ‘social’ rights with rights that are inherently derogable. It would make sense that social rights do not enjoy the same protection as those enshrined in the ECHR, since there presumably is less consensus among the EU Member States regarding the ‘additional’ rights of the EU Charter, than those which the

Member States have already adhered to through the ECHR. However, it does mean that the additional rights of the Charter may not enjoy as high a level of protection as the others.

The possibility to derogate from rights within each framework is to a certain degree coinciding due to *inter alia* Art. 53(2) of the EU Charter. However, the derogation clauses within each framework are materially different. The EU Charter requires that national law provides for the derogation, which may rule out certain derogations at the outset.

Furthermore, since no derogation may violate the essence of the rights and freedoms recognised therein, the freedom to derogate is further restricted. For instance, derogation violating human dignity as enshrined in the EU Charter Art. 1, would presumably not be allowed. The ECHR derogation clause protects the ECHR's core rights by naming Articles from which there can be no derogation. A strength of the ECHR-method is that those rights are ensured absolutely, however, the more abstract term used in the EU Charter could possibly cover more ground, and could easily be interpreted in a dynamic fashion.

Also in relation to the derogation clauses, it is necessary to point out that the EU might allow derogation based on economic interests. This is illustrated by the fact that derogation from the EU Charter is allowed only if the limitations meet the objectives of general interest recognised by the Union.

The lack of individual application procedure under the EU Charter makes it harder for the individual to ascertain his or her rights and obligations, since the applicant is depending on the relevant State to choose to make a preliminary reference. However, as illustrated above, an individual making an application to the ECtHR may have to wait for a substantial amount of time to get his or her case decided upon by the ECtHR. Furthermore, due to the structure of the EU, the ECJ has the power to decide that an act made by the EU organs is void, whereas the ECtHR may simply decide whether an Article of the ECHR has been violated.

As far as the EEA organs go, the need for human rights control over their actions is not as great as for the EU organs, since there is no new legislation being produced by them. The test for respect for fundamental rights will be done by the EU Charter within the EU. The principle of homogeneity and the dynamic character of the EEA should also be helpful to ensure that any needed human rights considerations will be included in the application of the EEA.

However, situations could occur where the EFTA Court is making decisions in an area of law where the ECJ has so far been silent. In such cases, having had the EU Charter included as a binding instrument into the EEA could have helped promote the principle of homogeneity.

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