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Three 'Bills of Rights' for the European Union

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I. Introduction

The protection of human rights is a central task of modern constitutions.[1] In many constitutional orders, this protective task is transferred to the judiciary and involves the judicial review of governmental action.[2] This protection may be limited to judicial review of the executive.[3] However, in its substantive form it extends to the review of parliamentary legislation; and, where this is the case, human rights set 'substantive' limits within which democratic government must take place.[4] The European Union follows this second constitutional tradition.[5] It considers itself to be 'founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights'.[6] Human rights are thus given a 'foundational' place in the European Union. They are—literally—'fundamental' rights within the rights granted by European law.

What are the sources of human rights in the Union legal order? While there was no 'Bill of Rights' in the original Treaties,[7] three sources for European fundamental rights were subsequently developed. The European Court first

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[1] On human rights as constitutional rights, see A Sajó, *Limiting Government* (Central European University Press, 1999), Chapter 8.

[2] Cf M Cappelletti, *Judicial Review in the Contemporary World* (Bobbs-Merrill, 1971).

[3] For the classic doctrine of parliamentary sovereignty in the United Kingdom, see AV Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund, 1982).

[4] On the idea of human rights as 'outside' majoritarian (democratic) politics, see A Sajó (above n 1), Chapter 2, esp 57 *et seq*.

[5] A Ward, *Judicial Review and the Rights of Private Parties in EU Law* (Oxford University Press, 2007); as well as: Case 294/83 *Parti Écologiste 'Les Verts' v European Parliament* [1986] ECR 1339, para 23: 'a [Union] based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty'.

[6] Article 2(1) TEU.

[7] P Pescatore, 'Les Droits de l'homme et l'intégration européenne' (1968) 4 *Cahiers du Droit Européen* 629.

began distilling general principles protecting fundamental rights from the common constitutional traditions of the Member States. This *unwritten* bill of rights was inspired and informed by a second bill of rights: the European Convention on Human Rights. This *external* bill of rights was, decades later, matched by an *internal* bill of rights specifically written for the European Union: the Charter of Fundamental Rights. These three sources of European human rights are today codified, in reverse order, in Article 6 of the Treaty on European Union:

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. . .
2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

What is the nature and effect of each source of fundamental rights? This chapter investigates the Union's three bills of rights and the constitutional relations between them. Section II starts with the discovery of an 'unwritten' bill of rights in the form of general principles of European law. Section III analyses the Union's own 'written' bill of rights in the form of its Charter of Fundamental Rights. Section IV investigates the relationship between the Union and the 'external' bill of rights in the form of the European Convention on Human Rights. While the co-existence of an external and internal human rights bill is hardly unusual,[8] the presence of two *internal* human rights regimes is a special feature of the Union legal order. Not only is the relationship between the two internal bills complex; they both entertain a—highly—ambivalent relationship with the European Convention's external standard. Has the external standard been 'internalized' by Article 6(3) TEU? Let us look at these questions in turn.

[8] K Lenaerts and E de Smijter, 'A "Bill of Rights" for the European Union' (2001) 38 *Common Market Law Review* 273 at 292: 'It is not inconsistent for a—national or supranational—legal order to have its own catalogue of fundamental rights and at the same time to adhere to an international standard of protection of fundamental rights like the ECHR. As a matter of fact, all contracting parties to the ECHR have their own national catalogue of fundamental rights.'

II. The 'Unwritten' Bill of Rights: Human Rights as 'General Principles'

Neither the 1952 Paris Treaty nor the 1957 Rome Treaty contained any express reference to human rights.[9] The silence of the former might be explained by its limited scope.[10] The silence of the latter could have its origin in the cautious constitutional climate following the failure of the 'European Political Community'.[11] With political union having failed, the 'grander' project of a human rights bill was replaced by the 'smaller' project of economic integration.[12] Be that as it may, the European Court of Justice would—within the first two decades—develop an (unwritten) bill of rights for the European Union.[13] These fundamental rights would be *European* rights, that is: rights that were *independent* from national constitutions. The discovery of human rights as general principles of European law will be discussed in this second section. How are human rights derived; what are their limitations? And are there structural limits to European human rights in the form of international obligations flowing from the United Nations Charter?

A. The Birth of European Fundamental Rights

The birth of European fundamental rights did not happen overnight. The Court had been invited—as long ago as 1958—to review the constitutionality of a

[9] For speculations on the historical reasons for this absence, see P Pescatore, 'The Context and Significance of Fundamental Rights in the Law of the European Communities' (1981) 2 *Human Rights Journal* 295; as well as: MA Dauses, 'The Protection of Fundamental Rights in the Community Legal Order' (1985) 10 *European Law Review* 399. And for a new look at the historical material, see also: G de Búrca, 'The Evolution of EU Human Rights Law' in P Craig and G de Búrca, *The Evolution of EU Law* (Oxford University Press, 2011), 465.

[10] J Weiler, 'Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities' (1986) 61 *Washington Law Review* 1103 at 1011 *et seq*.

[11] This grand project had asked the Community 'to contribute towards the protection of human rights and fundamental freedoms in the Member States' (Article 2), and would have integrated the European Convention on Human Rights into the Community legal order (Article 3). On the European Political Community, see AH Robertson, 'The European Political Community' (1952) 29 *British Yearbook of International Law* 383.

[12] P Pescatore (above n 9), 296.

[13] The judicial motives of the European Court in developing human rights have been controversially discussed in the literature. It seems accepted that the Court discovered human rights as general principles—at least: partly—in defence to national Supreme Courts challenging the absolute supremacy of European law (cf J Weiler, above n 10). But apart from this 'defensive' use, the Court has also been accused of an 'offensive use' in the sense of 'employ[ing] fundamental rights instrumentally' by 'clearly subordinat[ing] human rights to the end of closer economic integration in the [Union]' (cf J Coppel and A O'Neill, 'The European Court of Justice: Taking Rights Seriously?' (1992) 29 *Common Market Law Review* 669, 670, and 692). This 'offensive' thesis has—rightly—been refuted (cf JHH Weiler and N Lockhart, '"Taking Rights Seriously" Seriously: The European Court and its Fundamental Rights Jurisprudence' (1995) 32 *Common Market Law Review* 51 (Part I) and 579 (Part II)).

European law against fundamental rights. In *Stork*,[14] the applicant had challenged a European decision on the ground that the Commission had infringed *German* fundamental rights. In the absence of a European bill of rights, this claim drew on the so-called 'mortgage theory'. Following this theory, the powers conferred onto the European Union were tied to a human rights 'mortgage'. Accordingly, *national* fundamental rights would bind the *European* Union, since the Member States could not have created an organization with more powers than themselves.[15] This argument was—correctly[16]—rejected by the Court. The task of the European institutions was to apply European laws 'without regard for their validity under national law'.[17,18] National fundamental rights were thus *no direct* source of European human rights.

This 'original' position of the European Union towards national fundamental rights never changed. However, the Court's view evolved with regard to the existence of implied *European* fundamental rights. Having originally found that European law did 'not contain any general principle, *express or otherwise*, guaranteeing the maintenance of vested rights',[19] the Court subsequently discovered 'fundamental human rights enshrined in the general principles of [European] law'.[20] This new position was spelled out in *Internationale*

[14] Case 1/58 *Stork & Cie v High Authority of the European Coal and Steel Community* [1958] ECR (English Special Edition) 17.

[15] The Latin legal proverb is clear: 'Nemo dat quod non habet.'

[16] For a criticism of the 'mortgage theory', see HG Schermers, 'The European Communities Bound by Fundamental Rights' (1990) 27 *Common Market Law Review* 249, 251; as well as: R Schütze, 'EC Law and International Agreements of the Member States—An Ambivalent Relationship?' (2006–07) 9 *Cambridge Yearbook of European Legal Studies* 387 at 399–402.

[17] Case 1/58 *Stork v High Authority* (above n 14), 26: 'Under Article 8 of the Treaty the High Authority is only required to apply Community law. It is not competent to apply the national law of the Member States. Similarly, under Article 31 the Court is only required to ensure that in the interpretation and application of the Treaty, and of rules laid down for implementation thereof, the law is observed. It is not normally required to rule on provisions of national law. Consequently, the High Authority is not empowered to examine a ground of complaint which maintains that, when it adopted its decision, it infringed principles of German constitutional law (in particular Articles 2 and 12 of the Basic Law).'

[18] See also: Joined Cases 36, 37, 38-59 and 40-59 *Geitling Ruhrkohlen-Verkaufsgesellschaft mbH, Mausegatt Ruhrkohlen-Verkaufsgesellschaft mbH and I. Nold KG v High Authority of the European Coal and Steel Community* [1959] ECR (English Special Edition) 423 at 438: 'The applicant supports its arguments with German case-law on the interpretation of Article 14 of the Basic Law of the Federal Republic, which guarantees private property. It is not for the Court, whose function is to judge the legality of decisions adopted by the High Authority and, as obviously follows, those adopted in the present case under Article 65 of the Treaty, to ensure that rules of internal law, even constitutional rules, enforced in one or other of the Member States are respected. Therefore the Court may neither interpret nor apply Article 14 of the German Basic Law in examining the legality of a decision of the High Authority.'

[19] Ibid, 439 (emphasis added).

[20] Case 29/69 *Stauder v City of Ulm* [1969] ECR 419, para 7. This approach had been suggested by Advocate General Lagrange in *Geitling* (above n 18, 450): '[While] it is not for the Court, whose function it is to judge the legality of the authorizations, to apply, *or at least to do so directly* rules of national law, even constitutional rules, in force in one or other of the Member States. It may allow itself to be influenced by such rules in so far as, where appropriate, it may see in them the expression of a general principle of law which may be taken into consideration in applying the Treaty.'

Handelsgesellschaft.[21] Again rejecting the applicability of national fundamental rights to European law, the judgment nonetheless confirmed the existence of an 'analogous guarantee inherent in [European] law'.[22] Accordingly: 'respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice'.[23] Whence did the Court derive these fundamental rights? The famous answer was that the Union's (unwritten) bill of rights would be '*inspired* by the constitutional traditions *common* to the Member States'.[24] While thus not a direct source, national constitutional rights constituted an indirect source for the Union's fundamental rights.

What was the nature of this indirect relationship between national and European rights? How would the former influence the latter? A constitutional clarification was offered in *Nold*.[25] Drawing on its pervious jurisprudence, the Court held:

> [F]undamental rights form an integral part of the general principles of law, the observance of which it ensures. In safeguarding these rights, the Court is bound to draw *inspiration* from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the constitution*s* of those States. Similarly, international treaties for the protection of human rights on which the Member States have collaborated or which they are signatories, can supply *guidelines* which should be followed within the framework of [European] law.[26]

In searching for fundamental rights inside the general principles of European law, the Court would thus draw 'inspiration' from the common constitutional traditions of the Member States. One—ingenious—way of identifying an 'agreement' between the diverging national constitutional traditions was to use international *agreements* of the Member States. One such international agreement was the European Convention on Human Rights. Having been ratified by all Member States and dealing especially with human rights,[27] the Convention would soon assume a 'particular significance' in identifying fundamental rights for the European Union.[28] And yet: none of this conclusively

[21] Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.
[22] Ibid, para 4.
[23] Ibid. [24] Ibid. [25] Case 4/73 *Nold v Commission* [1974] ECR 491.
[26] Ibid, para 13 (emphasis added).
[27] When the EC Treaty entered into force on 1 January 1958, five of its Member States were already parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950. Ever since France joined the Convention system in 1974, all EU Member States have also been members of the European Convention legal order. For an early reference to the Convention in the jurisprudence of the Court, see Case 36/75 *Rutili v Ministre de l'Intérieur* [1975] ECR 1219, para 32.
[28] Cf Joined Cases 46/87 and 227/88 *Höchst v Commission* [1989] ECR 2859, para 13: 'The Court has consistently held that fundamental rights are an integral part of the general principles of law the observance of which the Court ensures, in accordance with constitutional traditions common to the Member States, and the international treaties on which the Member States have collaborated or of

characterized the legal relationship between European human rights, national human rights, and the European Convention on Human Rights.

Let us look at the question of the Union human rights standard first (i), before quickly looking at the constitutional doctrines governing limits to European human rights (ii).

(i) The European Standard—An 'Autonomous' Standard

Fundamental rights express, together with the institutional structures of a polity, the fundamental values of a society. Each society may wish to protect distinct values and give them a distinct level of protection.[29] Not all societies may thus choose to protect a constitutional 'right to work',[30] while most liberal societies will protect 'liberty'; yet, the level at which liberty is protected might vary.[31]

Which fundamental rights exist in the European Union, and what is their level of protection? From the very beginning, the Court of Justice was not completely free to invent an unwritten bill of rights. Instead, and in the words of the famous *Nold* passage, the Court was '*bound to* draw inspiration from constitutional traditions common to the Member States'.[32] But how binding would that inspiration be? Could the Court discover human rights that not all Member States recognize as a national human right? And would the Court consider itself under the obligation to use a particular national standard for a human right, where 'its scope and the criteria for applying it vary'?[33]

The relationship between the European and the various national standards is not an easy one. Would the obligation to draw inspiration from the constitutional traditions *common* to the States imply a common *minimum* standard? Serious practical problems follow from this view. For if the European Union consistently adopted the lowest common denominator to assess the legality of its acts, it would run the risk of undermining its legitimacy by employing—with one exception—a lower human rights standard than its Member States. This would inevitably lead to charges that the Court refuses to take human rights seriously. Should the Union thus favour the *maximum* standard among the

which they are signatories. The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter referred to as "the European Convention on Human Rights") is of particular significance in that regard.'

[29] 'Constitutions are not mere copies of a universalist ideal, they also reflect the idiosyncratic choices and preferences of the constituents and are the highest legal expression of the country's value system.' Cf B de Witte, 'Community Law and National Constitutional Values' [1991/2] 2 *Legal Issues of Economic Integration* 1 at 7.

[30] Article 4 of the Italian Constitution states: 'The Republic recognises the right of all citizens to work and promotes those conditions which render this right effective.'

[31] To illustrate this point with a famous joke: 'In Germany everything is forbidden, unless something is specifically allowed, whereas in Britain everything which is not specifically forbidden, is allowed.' (The joke goes on to claim that: 'In France everything is allowed, even if it is forbidden; and in Italy everything is allowed, especially when it is forbidden.').

[32] *Nold* (above n 25), para 13.

[33] Case 155/79 *AM & S Europe Limited v Commission* [1982] ECR 1575, para 19.

Member States,[34] as 'the most liberal interpretation must prevail'?[35] This time, there are serious theoretical problems. For the maximalist approach assumes that courts always balance private rights against public interests. But this is not necessarily the case;[36] and, in any event, the maximum right standard is subject to a communitarian critique.[37] However, the final flaw in *both* the minimalist and the maximalist approaches lies in their subjecting the Union legal order 'to the constitutional dictate of individual Member States'.[38] The Court has consequently rejected both approaches.[39]

What about the European Convention on Human Rights as a shared Union standard? The Convention has developed into a standard that is (partly) independent from what the Court sees as the constitutional traditions of the Member States.[40] What is the status of the Convention in the Union legal order? The relationship between the Union and the European Convention has remained ambivalent.[41] The Court of Justice has not applied the 'succession theory' to the ECHR—and that for good reasons. Acceptance of functional succession would have implied that the Union had 'replaced' the Member States through an exclusive transfer of power with regard to human rights policy. In implicitly rejecting the succession theory,[42] the ECJ thus never considered itself materially bound by the interpretation given to the Convention by the European Court of Human Rights. The interpretative freedom created the possibility of a distinct

[34] In favour of a maximailist approach, see L Besselink, 'Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union' (1998) 35 *Common Market Law Review* 629.

[35] This 'Dworkinian' language comes from Stauder (above n 20), para 4.

[36] The Court of Justice was faced with such a right-right conflict in Case 159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* [1991] ECR 4685, but (in)famously refused to decide the case for lack of jurisdiction.

[37] J Weiler, Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights, in: N Neuwahl and A Rosas (eds), *The European Union and Human Rights* (Brill, 1995), 51 at 61 'If the ECJ were to adopt a maximalist approach this would simply mean that for the [Union] in each and every area the balance would be most restrictive on the public and general interest. A maximalist approach to human rights would result in a minimalist approach to [Union] government.'

[38] Ibid, 59.

[39] For the early (implicit) rejection of the minimalist approach, see Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727, para 32 (emphasis added)—suggesting that a fundamental right only needs to be protected in '*several* Member States'.

[40] The Court has developed the ECHR into a standard that seems somewhat 'independent' from the constitutional traditions common to the Member States. Thus in *Hauer* (ibid), the Court began by looking at the ECHR (paras 17–19) and only after a finding that the Convention would not generate a sufficiently precise standard would the Court turn to the 'constitutional rules and practices of the nine Member States' (paras 20–21).

[41] We shall see below in Section IV that even an (eventually) legally binding EU Charter of Fundamental Rights will entertain an 'ambivalent' relationship with the ECHR.

[42] Cf *Nold* (above n 25). An early commentator—referring to *Nold*—thus argued: 'The Court could have followed the precedent of the *Third International Fruit Case* in which it decided that the EU was bound by the GATT. It should then have held that the Communities were bound by the European Convention on Human Rights now that all its Member States were parties to it', see HG Schermers, *Community Law and International Law* (1975) 12 *Common Market Law Review* 77, 83.

Union standard, but equally entailed the danger of diverging interpretations of the European Convention in Strasbourg and Luxembourg.[43]

Have subsequent Treaty amendments changed the indirect relationship between the Union fundamental rights and the ECHR into a direct relationship? The argument had been made following the Maastricht Treaty. The (old) Article 6(2) EU expressly called on the Union to respect fundamental rights 'as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms'. Some commentators consequently began to argue that '[t]he ECHR is now *formally* integrated into EC law'.[44] More moderate voices limited the binding effect to its material integration.[45] However, neither view was accepted by the Court;[46] and that—again—for good reasons.[47] Yet: the Lisbon amendments might have changed this overnight. For there now exist strong textual reasons for claiming that the European Convention is materially (!) binding on the Union. Indeed: according to the (new) Article 6(3) TEU, fundamental rights as guaranteed by the Convention 'shall constitute general principles of the Union's law'. Will this formulation not mean that all Convention rights *are* general principles of Union law? If so, the Convention standard would henceforth provide a direct standard for the Union. But if this route were chosen, the Convention standard would—presumably—provide a *minimum* standard only.[48]

[43] See in particular: Joined Cases 46/87 and 227/88 *Hoechst AG v Commission* [1989] ECR 2859. For an excellent analysis see R Lawson 'Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg', in R.A. Lawson & M. de Blois (eds.) The Dynamics of the Protection of Human Rights in Europe - Essays in Honour of Professor Henry G. Schermers vol. III (Martinus Nijhoff Publishers, 1994), 219, esp 234–50.

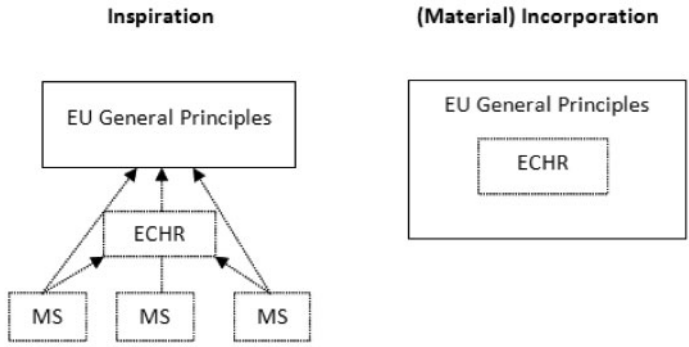
[44] LB Krogsgaard, 'Fundamental Rights in the European Community after Maastricht' (1993) 19 *Legal Issues of Economic Integration* 99, 108 (emphasis added).

[45] FG Jacobs, 'European Community Law and the European Convention on Human Rights' in D Curtin and T Heukels (eds), *Institutional Dynamics of European Integration*, Vol II (Martinus Nijhoff, 1994), 561 at 563: 'As a result of the development of the case-law, now confirmed by the Single European Act and the Treaty on European Union, the Community can be said to be subject *in effect* to, if not bound formally by, the European Convention on Human Rights.'

[46] This position has been confirmed by the ECJ in Case C–112/00 *Schmidberger, Internationale Transporte und Planzüge v Austria* [2003] ECR I–5659, paras 71–72 (emphasis added): '[a]ccording to settled case-law, fundamental rights form an integral part of the general principles of law, the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect . . . *The principles established by that case-law were reaffirmed* in the preamble to the Single European Act and subsequently in [Article 6(2)] of the Treaty on European Union.'

[47] It had been argued that the (old) Article 6(2) EU incorporated the ECHR by express reference (cf R. Uerpmann-Wittzack, 'The Constitutional Role of Multilateral Treaty Systems' in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (Hart, 2006), 145 at 172–4). However, the extension of the *Fediol* doctrine—developed in the *Community* legal order for *Community* agreements—seems hardly convincing. In the absence of a stronger reason, the better view therefore held that the (old) Article 6(2) EU had not changed the constitutional status quo (cf N Neuwahl, 'The Treaty on European Union: A Step Forward in the Protection of Human Rights?' in N Neuwahl and A Rosas (above n 37), 1 at 14).

[48] This solution appears to be chosen for the Charter, see Section III below.



In conclusion, the Union standard for the protection of fundamental rights is an *autonomous* standard. While drawing inspiration from the constitutional traditions common to the Member States and the European Convention on Human Rights, the Court of Justice has—so far—not considered itself directly bound by a particular national or international standard. The Court has thus been free to distill and protect what it sees as the shared values among the majority of people(s) within the Union and thereby assisted—dialectically—in the establishment of a shared identity for the people(s) of Europe.[49]

(ii) Limitations, and 'Limitations on Limitations'

Within a European philosophical tradition, certain rights are absolute rights: they cannot—under any circumstances—be legitimately limited.[50] However, with the exception of the most fundamental of fundamental rights, human rights are *relative* rights that may be legitimately limited in accordance with the public interest. Private property may thus be taxed and individual freedom be restricted, if such actions are justified by the common good.

Nonetheless: liberal societies would cease to be liberal if they permitted unlimited limitations to human rights. Many legal orders consequently recognize limitations on public interest limitations. These 'limitations on limitations' to fundamental rights can be relative or absolute in nature.[51] First, according to the

[49] T Tridimas, 'Judicial Federalism and the European Court of Justice' in J Fedtke and BS Markezinis (eds), *Patterns of Federalism and Regionalism: Lessons for the UK* (Hart, 2006), 149 at 150—referring to the contribution of the judicial process 'to the emergence of a European *demos*'.

[50] The European Court of Justice followed this tradition and recognized the existence of absolute rights in *Schmidberger* (above n 46, para 80): 'the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction'. Nonetheless, even the exercise of absolute rights may need to be regulated to solve true right conflicts, cf L Zucca, *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA* (Oxford University Press, 2008).

[51] This term 'limitations on limitations' is my—poor—rendition of the German constitutional concept of '*Schranken-Schranken*'.

principle of proportionality, each restriction of a fundamental right must be 'proportionate' in relation to the public interest pursued.[52] The principle of proportionality is a relative principle. It balances interests: the greater the public interest protected, the greater the right restrictions permitted. In order to limit this relativist logic, a second principle may come into play. According to the 'essential core' doctrine,[53] any limitation of human rights—even proportionate ones—must never undermine the 'very substance' of a fundamental right. This sets an absolute limit to all governmental power by identifying an essential core that is 'untouchable'.

Has the European legal order recognized limits to human rights? From the very beginning, the Court clarified that human rights are 'far from constituting unfettered prerogatives',[54] and that they may thus be subject 'to limitations laid down in accordance with the public interest'.[55] What about 'limitations on limitations'? While the principle of proportionality is almost omnipresent in the jurisprudence of the Court,[56] the existence of an 'essential core' doctrine is still unclear. True, the Court has used formulations that come—very—close to the doctrine,[57] but its relationship to the proportionality principle is ambivalent.[58] However, the Court may have recently confirmed the autonomous existence of the doctrine by recognizing an 'untouchable' core of European citizenship rights in *Zambrano*.[59] Two Columbian parents had challenged the rejection of their Belgian residency permits on the ground that their children had been born in Belgium and thereby assumed Belgian and—consequently—European citizenship.[60] Would having one's parents removed not undermine the fundamental status coming with European citizenship? The Court took this

[52] Case 44/79 *Hauer* (above n 39), para 23.

[53] For the German constitutional order, see Article 19(2): 'The essence of a basic right must never be violated.'

[54] Case 4/73 *Nold v Commission* (above n 25), para 14. [55] Ibid.

[56] On the proportionality principle, T Tridimas, *The General Principles of EU Law* (Oxford University Press, 2007), Chapters 3–5.

[57] The European Courts appear to refer to the doctrine, see only: *Nold* (above n 25, 14): 'Within the [Union] legal order it likewise seems legitimate that these rights should, if necessary, be subject to certain limits justified by the overall objectives pursued by the [Union], on condition that the substance of these rights is left untouched'; as well as: Case 5/88 *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609, para 18: '[R]estrictions may be imposed on the exercise of those rights, in particular in the context of a common organization of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the [Union] and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights.'

[58] This excellent point is made by P Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (Oxford University Press, 2010), 224, stating that the Court often merges the doctrine of proportionality and the 'essential core' doctrine.

[59] Case 34/09 *Zambrano v Office national de l'emploi* (nyr). Admittedly, there are many questions that this—excessively—short case raises (cf Editorial: Seven Questions for Seven Paragraphs (2011) *European Law Review* 161).

[60] Article 20(1) TFEU states: 'Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.'

view. Even if the measures were proportionate as such, they would 'have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status of citizens of the Union'.[61] This argument comes close to the essential core doctrine.

B. United Nations Law: External Limits to European Human Rights?

The European legal order is a constitutional order based on the rule of law.[62] This implies that an individual, where legitimately concerned,[63] must be able to challenge the legality of a European act on the basis that its human rights have been violated. Should there be exceptions to this constitutional rule? This question is controversially debated in comparative constitutionalism.[64] It has received much attention in the European legal order in a special form: will European fundamental rights be limited by international obligations flowing from the United Nations Charter?

The classic answer to this question was offered by *Bosphorus*.[65] The case dealt with a European regulation implementing the United Nations embargo against the Federal Republic of Yugoslavia.[66] Protesting that fundamental rights to property were violated, the plaintiff challenged the European legislation. The Court had no qualms in judicially reviewing the European legislation—even if a lower review standard was applied.[67] The constitutional message behind the

[61] *Zambrano* (above n 59), para 42; and see also para 44: 'In those circumstances, those citizens of the Union would, as a result, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union.'

[62] Case 294/83 *Parti Écologiste 'Les Verts' v European Parliament'* [1986] ECR 1339.

[63] Some have argued in favour of the creation of an 'Individual Human Rights Complaint Procedure' in addition to the classic judicial review procedure, see B de Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights' in P Alston (ed), The *EU and Human Rights* (Oxford University Press, 1999), 859 at 893 *et seq*.

[64] For a discussion of the idea of an 'emergency constitution' in a comparative constitutional perspective, see CL Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Harcourt, Brace & World, 1963).

[65] Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others*, [1996] ECR 3953.

[66] Council Regulation (EEC) No 990/93 of 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro) (OJ [1993] L 102, 14) was based on UN Security Council Resolution 820 (1993).

[67] For a critique of the standard of review, see I Canor, 'Can Two Walk Together, Except They Be Agreed?' The Relationship between International Law and European Law: The Incorporation of United Nations Sanctions Against Yugoslavia into European Community Law through the Perspective of the European Court of Justice' (1998) 35 *Common Market Law Review* 137–87 at 162: 'However, it can be sensed from the decision of the Court that it was so 'impressed' by the importance of the aims of the Regulation, that is was prepared to justify *any* negative consequences . . . This attitude implies that no serious balancing test was carried out by the Court, and that it expressed an almost total indifference to the way the [Union] organs exercised their discretion in the political—foreign affairs—sphere when implementing the Resolution. It should not be the case that by invoking foreign affairs needs, the Council and the Commission is given *carte blanche* to infringe individual rights.'

classic approach was clear: where the Member States decided to fulfil their international obligations under the United Nations *qua* European law, they would have to comply with the constitutional principles of the Union legal order, and in particular: European human rights.

This classic approach was challenged by the General Court in *Kadi*.[68] The applicant was a presumed Taliban terrorist, whose financial assets had been frozen as a result of European legislation reproducing United Nations Security Council resolutions.[69] Kadi claimed that his fundamental rights of due process and property had been violated. The Union organs intervened in the proceedings and argued that 'the Charter of the United Nations prevail[s] over every other obligation of international, [European] or domestic law' to the effect that European human rights should be inoperative.[70] To the surprise—or better: shock—of many European constitutional scholars,[71] the General Court accepted this argument. How did the Court come to this conclusion? It had recourse to a version of the 'succession doctrine'.[72] While this conclusion was in itself controversial,[73] the dangerous part of the judgment related to the consequences of that conclusion. For the General Court recognized 'structural limits, imposed by general international law' on the judicial review powers of the European Court.[74] In the words of the Court:

> Any review of the internal lawfulness of the contested regulation, especially having regard to the provisions or general principles of [European] law relating to the protection of fundamental rights, would therefore imply that the Court is to consider, indirectly, the lawfulness of those [United Nations] resolutions. In that hypothetical situation, in fact, the origin of the illegality alleged by the applicant would have to be sought, not in the adoption of the contested regulation but in the resolutions of the Security Council which imposed the sanctions. In particular, if the Court were to annul the contested regulation, as the applicant claims it should, although that regulation seems to be imposed by international law, on the ground that that act infringes his fundamental rights which are protected by the [Union] legal order, such annulment

[68] Case T-315/01 *Kadi v Council and Commission* [2005] ECR II-3649.

[69] The challenge principally concerned Council Regulation (EC) 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaeda network, and the Taliban, and repealing Regulation 467/2001, [2002] OJ L139/9. The Regulation aimed to implement UN Security Council Resolution 1390 (2002) laying down the measures to be directed against Usama bin Laden, members of the Al-Qaeda network, and the Taliban and other associated individuals, groups, undertakings, and entities.

[70] Case T-315/01 *Kadi*, paras 156 and 177.

[71] P Eeckhout, *Does Europe's Constitution Stop at the Water's Edge: Law and Policy in the EU's External Relations* (Europa Law Publishing, 2005); as well as: R Schütze, On 'Middle Ground': The European Community and Public International Law, *EUI Working Paper* 2007/13.

[72] Case T-315/01 *Kadi*, paras 193 *et seq*.

[73] On the 'succession doctrine' in international and European law, see R Schütze, 'The "Succession Doctrine" and the European Union' in T Arnull *et al* (eds), A Constitutional Order of States: Essays in Honour of Alan Dashwood' (Hart, 2011), 459.

[74] Case T-315/01 *Kadi*, para 212.

would indirectly mean that the resolutions of the Security Council concerned themselves infringe those fundamental rights.[75]

The General Court thus declined jurisdiction to review the European legislation *because it would entail an indirect review of the United Nations resolutions*. The justification for this self-abdication was that United Nations law was binding on all Union institutions, including the European Courts. From a constitutional perspective, this reasoning was prisoner to a number of mistakes.[76]

In its appeal judgment,[77] the Court remedied these constitutional blunders and safely returned to the traditional *Bosphorus* approach. The Court held 'that the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the [European Treaties], which include the principle that all [Union] acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treat[ies]'.[78] The United Nations Charter, while having special importance within the European legal order,[79] would—in this respect—not be different from other international agreements.[80] Like 'ordinary' international agreements, the United Nations Charter might, at most, have primacy over European legislation but '[t]hat primacy at the level of [European] law would not, however, extend to primary law, in particular to the general principles of which fundamental rights form part'.[81] European human rights would thus *not* find a structural limit in the international obligations stemming from the United Nations.[82] The Union was firmly based on the rule of law, and this meant that all European legislation—regardless of its 'domestic' or international origin—would have to respect fundamental human rights.[83]

[75] Ibid, paras 215–216 (references omitted).

[76] First, even if one assumes that the Union succeeded the Member States and was thus bound by United Nations law, according to the classic constitutional principles of the Union legal order, the hierarchical status of international agreements is *below* the European Treaties. It would thus be European human rights that limit international agreements—not the other way around. The Court's position was based equally on a second mistake: the General Court believed that the United Nations Charter prevails over every international and domestic obligation (ibid, para 181). But this is simply wrong with regard to the 'domestic law' part. The United Nations has never claimed 'supremacy' within domestic legal orders, and after the constitutionalization of the European Union legal order, the latter now constitutes such a 'domestic' legal order vis-à-vis international law.

[77] Case C-402/05P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR 6351.

[78] Ibid, para 285. [79] Ibid, para 294 ('special importance').

[80] Ibid, para 300: '[I]mmunity from jurisdiction for a [Union] measure like the contested regulation, as a corollary of the principle of the primacy at the level of international law of obligations under the Charter of the United Nations, especially those relating to the implementation of resolutions of the Security Council adopted under Chapter VII of the Charter, cannot find a basis in the EU Treaty.'

[81] Ibid, para 308. [82] Ibid, para 327.

[83] The Court in fact identified a breach of the right of defence, especially the right to be heard (ibid, para 353), as well as an unjustified violation of the right to property (ibid, para 370).

III. The 'Written' Bill of Rights: The Charter of Fundamental Rights

In light of the unwritten character of the general principles, the desire for a *written* bill of rights for the European Union first expressed itself in arguments favouring accession to the European Convention on Human Rights.[84] Yet an alternative strategy became prominent in the late twentieth century: the Union's own bill of rights. The initiative for a 'Charter of Fundamental Rights' came from the European Council, which transferred the drafting mandate to a 'European Convention'.[85] The idea behind an internal codification was to strengthen the protection of fundamental rights in Europe 'by making those rights more visible in a Charter'.[86]

The Charter was proclaimed in 2000, but was *not* legally binding. Its status was indeed similar to the European Convention on Human Rights. It provided valuable inspirations, but imposed no formal obligations on the European institutions.[87] This ambivalent status was immediately perceived as a constitutional problem.[88] However, it took almost a decade before the Lisbon Treaty recognized the Charter as having 'the same legal value as the Treaties'. This third section looks at the structure and content of the Charter, before investigating its relationship with the European Treaties. The latter is a problem, since Article 6(1) TEU 'appends' the—amended[89]—Charter to the European Treaties. Thus, not unlike the American 'Bill of Rights',[90] the Charter is placed *outside* the general constitutional structure.

[84] Commission, Memorandum on the Accession of the European Communities to the European Convention for the Protection of Human Rights and Fundamental Freedoms [1979], Bulletin of the European Communities, Supplement 2/79, 11 et seq.

[85] On the drafting process, see G de Búrca, 'The Drafting of the European Union Charter of Fundamental Rights' (2001) 26 *European Law Review* 126.

[86] Charter, Preamble 4. For a criticism of the idea of codification, see J Weiler, 'Does the European Union Truly Need a Charter of Rights (2000) 6 *European Law Journal* 95 at 96: '[B]y drafting a list, we will be jettisoning one of the truly original features of the current constitutional architecture in the field of human rights—the ability to use the legal system of each of the Member States as an organic and living laboratory of human rights protection which then, case by case, can be adapted and adopted for the needs of the Union by the European Court in dialogue with its national counterparts.' However, not all of us may wish to live in a laboratory, and the criticism neglects that under Article 52 (2) of the Charter, the general principles continue to allow for the organic growth of an unwritten human rights under the European Treaties.

[87] See only: Case C-540/03 *Parliament v Council* [2006] ECR 5769, para 38: 'the Charter is not a legally binding instrument'.

[88] The Charter was announced at the Nice European Council, and its status was one of the questions in the 2000 Nice 'Declaration on the Future of the Union'.

[89] The 'Convention' drafting the 'Constitutional Treaty' amended the Charter. The amended version was first published in [2007] OJ C303/1 and can now be found in [2010] OJ C83/389.

[90] The American 'Bill of Rights' is the name given to the first ten amendments to the 1787 US Constitution.

A. The Charter: Structure and Content

The Charter 'reaffirms' the rights that result 'in particular' from the constitutional traditions common to the Member States, the European Convention on Human Rights, and the general principles of European law.[91] This formulation suggested two things. First, the Charter aims to codify existing fundamental rights and would thus not create 'new' ones.[92] And, secondly, it codified European rights from *various* sources—that is: not solely from the general principles found in the European Treaties.[93] To help identify the sources behind individual Charter articles, the Member States decided to give the Charter its own commentary.[94] These 'Explanations' are not strictly legally binding, but they must be given 'due regard' in the interpretation of the Charter.[95]

The structure of the Charter is as follows:

Preamble	
Title I—Dignity	**Title IV—Solidarity**
Title II—Freedoms	**Title V—Citizens' Rights**
Title III—Equality	**Title VI—Justice**
Title VII—General Provisions Article 51—Field of Application Article 52—Scope and Interpretation of Rights and Principles Article 53—Level of Protection Article 54—Prohibition of Abuse of Rights	

The Charter thus divides the Union's fundamental rights into six classes. The classic liberal rights are covered by Titles I to III as well as Title VI. The controversial Title IV codifies the rights of workers; yet, provision is also made for the protection of the family and the right to health care.[96] Title V deals with 'citizens' rights', that is: rights that a polity provides exclusively to its members.[97] This includes the right to vote and to stand as a candidate in

[91] Charter, Preamble 5.

[92] Cf Protocol (No 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, Preamble 6: 'the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles'.

[93] This explains why the Charter contains fundamental rights that seem out of context when it comes to the competences of the European Union.

[94] Article 6(1) TEU—second indent. These so-called 'Explanations' are published in [2007] OJ C303/17.

[95] Article 6(1) TEU, and Article 52(7) Charter: 'The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union of of the Member States.'

[96] See, respectively: Articles 33 and 35 of the Charter.

[97] Not all rights in this title appear to be citizens' rights. For example, Article 41 of the Charter protecting the 'right to good administration' states (emphasis added): '*Every person* has the right to

elections.[98] The general principles on the interpretation and application of the Charter are set out in the final Title VII. These general provisions establish four fundamental principles. First, the Charter is addressed to the Union and will only exceptionally apply to the Member States.[99] Secondly, not all provisions within the Charter are 'rights' in that they grant directly effective entitlements to individuals. Thirdly, the rights within the Charter can, within limits, be restricted by Union legislation.[100] Fourthly, the Charter tries to establish harmonious relations with the European Treaties, the European Convention, as well as the constitutional traditions common to the Member States.[101]

In the context of this Chapter, only principles two and three warrant special attention.[102]

(i) (Hard) Rights and (Soft) Principles

It is important to note that the Charter of Fundamental Rights makes a distinction between (hard) rights and (soft) principles.[103] Hard rights are rights that will have direct effects and can, as such, be invoked before a court. Not all provisions within the Charter are rights in a strict sense. Indeed, the Charter also recognizes the existence of 'principles' in its Title VII.[104]

What are the principles in the Charter, and what is their effect? The *Explanations* to the Charter offer a number of illustrations, in particular: Article 37 of the Charter dealing with 'Environmental Protection'. The provision reads: 'A high level of environmental protection and the improvement of the quality of the environment *must be integrated into the policies of the Union* and ensured in accordance with the principle of sustainable development.'[105] This wording contrasts strikingly with that of a classic right provision.[106] For it constitutes less a *limit* to than an *aim* for governmental action. Principles therefore come close to orienting objectives, which 'do not however give rise to direct claims for positive action by the Union institutions'.[107] They are not subjective rights, but objective guidelines that need to be observed.[108] Thus: '[t]he

have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.'

[98] Article 39 Charter.

[99] Article 51 Charter.

[100] Article 52(1) Charter.

[101] Article 52(2)–(4) as well as (6) of the Charter. But see also: Article 53 on the 'Level of Protection', which will be discussed below.

[102] On the relationship between the Charter and the European Treaties, see: below.

[103] The distinction seems to contradict the jurisprudence of the Court with regard to fundamental *rights* as general *principles* in the context of the European Treaties. However, the best way to understand the distinction between 'rights' and 'principles' is not to see them as mutually exclusive, cf M Dauses (above n 9), 406 *et seq*.

[104] Articles 51(1) and 52(5) of the Charter.

[105] Emphasis added.

[106] Cf Article 2 of the Charter: 'Everyone has the right to life.'

[107] Explanations (above n 94), 35.

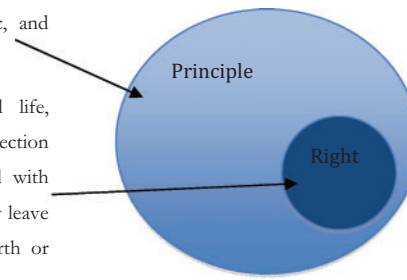
[108] Article 51(1) of the Charter: 'respect the rights, observe the principles'.

provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions[.]' 'They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.'[109] The difference between rights and principles—under the Charter—is thus between a hard and a soft judicial claim. An individual will not have an (individual) right to a high level of environmental protection, but it may claim that the Union violated the (governmental) principle when adopting too low an environmental standard. In line with the classic task of legal principles,[110] the courts must thus generally draw 'inspiration' from the Union principles when interpreting European law.

But how is one to distinguish between 'rights' and 'principles'? Sadly, the Charter offers no catalogue of constitutional principles. Nor are its principles neatly grouped into a section within each substantive title. And even the wording of a particular article will not conclusively reveal whether it contains a right or a principle. But most confusingly of all, even a single article 'may contain both elements of a right and of a principle'.[111] How is this possible? The best way to make sense of this is to see rights and principles not as mutually exclusive concepts, but rather as distinct but overlapping legal constructs. 'Rights' are situational crystallizations of principles, and therefore derive from principles. A good illustration may be offered by Article 33 of the Charter on the status of the family and its relationship to professional life:

Family and Professional Life

1. The family shall enjoy legal, economic, and social protection.
2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.



(ii) Limitations, and 'Limitations on Limitations' on Charter Rights

Every legal order protecting fundamental rights recognizes that some rights can be limited to safeguard the general interest or to protect someone else's rights. For a written catalogue of fundamental rights, these limitations may be separately recognized for each constitutional right. While the Charter partly follows

[109] Article 52(5) of the Charter.
[110] Cf R Dworkin, *Taking Rights Seriously* (Duckworth, 1996).
[111] Explanations (above n 94), 35.

this technique for some articles,[112] it also contains a provision that collectively clarifies the limits to all fundamental rights. These general limits to all Charter rights are set out its Article 52:

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be *provided for by law* and *respect the essence of those rights and freedoms*. Subject to the principle of *proportionality*, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.[113]

The provision presumes that each right within the Charter can be limited—a presumption that is (arguably) incorrect.[114] But, be that as it may, any legitimate limitation must be provided for 'by law'. This (new) requirement outlaws autonomous executive interventions into fundamental rights. And in doing so, it imports a constitutional controversy that has plagued German constitutionalism.[115] The problem is this: will a limitation of someone's fundamental rights require the (democratic) legitimacy behind formal legislation, that is, a European law adopted under the 'legislative procedure'? This view would significantly shift the balance between the protection of fundamental rights and the pursuit of the common good through the Union. The Court may thus favour a material concept of 'law' to widen legitimate limitations of fundamental rights. Alternatively, if it wishes to require formal democratic legitimation,[116] the Court should apply the formal concept of 'law' only to the most fundamental of fundamental rights; or only to the severest interferences into fundamental rights.

Article 52 (1) of the Charter expressly mentions two constitutional limitations on right limitations. One limitation is relative, while the other is absolute in nature. According to the principle of proportionality, each restriction of fundamental rights must be necessary in light of the general interest of the Union or the rights of others. And, the provision now also confirms—it seems—the independent existence of an absolute limit by insisting that each limitation must always 'respect the essence' of the right in question.

[112] Cf Article 17 (Right to Property) of the Charter states in its paragraph 1: 'No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.'

[113] Article 52(1) Charter (emphasis added).

[114] This might be mistaken with regard to absolute rights found in the Charter. Indeed, Article 1 expressly states: 'Human dignity is inviolable.'

[115] See only: K Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (Müller, 1999), 220.

[116] In favour of this view: D Triantafyllou, 'The European Charter of Fundamental Rights and the "Rule of Law": Restricting Fundamental Rights by Reference' (2002) 39 *Common Market Law Review* 53–64 at 61: 'Accordingly, references to "law" made by the Charter should ideally require a co-deciding participation of the European Parliament[.]' The exception the author allows for relates to the 'solidarity rights' within the Charter.

B. Relations with the European Treaties (and the European Convention)

The Charter is not 'inside' the Treaties but 'outside' them. The question therefore arises as to its relationship with the European Treaties. According to Article 6 (1) TEU, the Charter has the same legal value as the Treaties and its relationship to the latter is governed by Title VII of the Charter. Within this Title, Article 52 (2) specifically governs the relationship between the Charter and the Treaties. It states: 'Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.'

The provision establishes a hierarchy between the Charter and the European Treaties. Where the former codifies a fundamental right treated by the Treaties, the latter will have precedence. The Charter here adopts the Latin rule of *lex specialis derogat lex generalis*: the more specific law controls the more general law. But this elegant theoretical solution suffers from a number of practical uncertainties. For how are we to identify the rights the Charter 'recognizes' within the European Treaties? The *Explanations* are not of much assistance. A question to be resolved in future jurisprudence will thus be: has the Charter recognized rights from the constitutional traditions of the Member States *outside* those already recognized as general principles within the European Treaties?[117] If that was the case, those Charter rights stemming directly from the common constitutional traditions of the Member States, and without equivalent general principle in the Treaties, would not be subject to the conditions and limits defined by the latter. And even if the Court found that a Charter right did correspond to a general principle in the Treaties, the latter might have a narrower scope that the former. In such cases, the question arises whether the entire Charter right is subject to the limitations established by the Treaties for the general principle.[118]

The Charter's relation to the European Convention is even more puzzling. The Charter seemingly offers a simple solution in its Article 52 (3):

> 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

[117] Article 52(4) of the Charter states: 'In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.' The Explanations (above n 94, 34) tell us that Article 52(4) has been based on the wording of Article 6(3) TEU and demands that 'rather than following a rigid approach of 'a lowest common denominator', the Charter rights concerned should be interpreted in a way offering a high standard of protection which is adequate for the law of the Union and in harmony with the common constitutional traditions'.

[118] This excellent point is made by K Lenaerts and E de Smijter (above n 8), 282–4. The authors compare the scope of the respective non-discrimination rights in the Charter (ibid, Article 21) and in the Treaties (ibid, Article 19 TFEU). The scope of the former seems indeed broader than the scope of the latter, and the question therefore arises whether the Court will subject the 'additional' scope to Article 52(2) of the Charter.

meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

The provision *materially* incorporates the European Convention on Human Rights into the Charter. On its surface, the first sentence of the provision thereby appears to extend the *lex specialis* rule established in the previous paragraph for the European Treaties to the European Convention on Human Rights. It thus seems that for those Charter rights that correspond to Convention rights, the conditions and limits of the latter will apply.[119] But the logic of Convention precedence is contradicted by the second sentence. For if we allow Charter rights to adopt a higher standard of protection than that established in the European Convention,[120] it must be the Charter that constitutes the *lex specialis* for the European Union. The wording of Article 52(3) is thus—highly—ambivalent. The best way to resolve the textual contradiction is to interpret the provision to mean that 'the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR'.[121] Convention rights will thus offer a baseline—a minimum standard—for the meaning of Charter rights.

[119] The Explanations (above n 94, 33) contain a list of rights that 'at the present stage' must be regarded as corresponding to rights in the ECHR. For a recent case on the first sentence of Article 52(3), see Case C-279/09 *Deutsche Energiehandels- und Beratungsgesellschaft mbH* (nyr).

[120] It has been argued that the contradiction would dissolve if 'Union law' is understood as referring to the European Treaties or European legislation—and not to the Charter (T Schmitz, 'Die Grundrechtscharta als Teil der Verfassung der Europäischen Union' [2004] *Europarecht* 691 at 710). But there are serious textual, historical, and teleological arguments against this view. First, why should Article 52(3) *of the Charter* not deal with the relationship between the Charter and the ECHR? Put differently: if the second sentence were confined to the higher standard established by the European Treaties, why was this not clarified in Article 6(2) TEU or Article 6(3) TEU? Historically, the European Convention Working Group had expressly argued for a higher standard within the Charter (cf Working Group II (Final Report), (2002) CONV 354/02, 7: 'The second sentence of Article 52 § 3 of the Charter serves to clarify that this article does not prevent more extensive protection already achieved or which may subsequently be provided for (i) in Union legislation and (ii) in some articles of the Charter which, although based on the ECHR, go beyond the ECHR because Union law acquis had already reached a higher level of protection (e.g., Article 47 on effective judicial protection, or Article 50 on the right not to be punished twice for the same offence). Thus, the guaranteed rights in the Charter reflect higher levels of protection in existing Union law.)' Thirdly, there are good teleological arguments for allowing a higher Charter standard, cf D Chalmers *et al*, *European Union Law* (Cambridge University Press, 2010), 244: 'The ECHR covers forty-six states. It is committed to a less intense form of political integration and governs a more diverse array of situations than the European Union. It is not clear that the judgments of a court such as the European Court of Human Rights, operating in that context, should be accepted almost unquestioningly.'

[121] Explanations (above n 94), 33. The Explanations subsequently distinguish between a list of Charter rights 'where both the meaning and the scope are the same as the corresponding Articles of the ECHR', and those Charter rights 'where the meaning is the same as the corresponding Articles of the ECHR, but where the scope is wider' (ibid, 33–4).

IV. The 'External' Bill of Rights: the European Convention on Human Rights

The discovery of an unwritten bill of rights and the creation of a written bill of rights for the Union had been 'domestic' achievements. While inspired by 'international treaties for the protection of human rights on which the Member States have collaborated or [to] which they are signatories',[122] these developments were *internal* to the Union and did 'not result in any form of external supervision being exercised over the Union's institutions'.[123] Until recently,[124] the Union was indeed said not to be party to a single international human rights treaty.[125] And by insisting on the applicability of *its* internal human rights over any external international standard, the Court has even been accused of a 'chauvinist' and 'parochial' attitude.[126]

[122] *Nold* (above n 25). This has been confirmed by the Charter (Preamble 5, emphasis added): 'This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions *and international obligations* common to the Member States[.]'

[123] I De Jesús Butler and O de Schutter, 'Binding the EU to International Human Rights Law' (2008) 27 *Yearbook of European Law* 277 at 278. This statement is correct only if limited to *direct* external supervision.

[124] The Union has now acceded the United Nations Convention on the Rights of Persons with Disabilities, cf [2010] OJ L23/35. According to Article 1 of the Convention: 'The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.' On the negotiating history of the Convention, see G de Búrca, 'The European Union in the Negotiation of the UN Disability Convention' (2010) 35 *European Law Review* 174.

[125] I De Jesús Butler and O de Schutter, 'Binding the EU to International Human Rights Law' (above n 123), 298.

[126] G de Búrca, 'The European Court of Justice and the International Legal Order After *Kadi*' (2010) 51 *Harvard International Law Journal* 1 at 4. The author dislikes the Court's 'robustly dualist' (ibid, 23) reasoning, which gave priority to the Union's own fundamental rules. Be that as it may, it is hard to see why a 'significant feature' of the *Kadi* judgment 'was the lack of direct engagement by the Court with the nature and significance of the international rules at issue in the case, or with other relevant sources of international law' (ibid, 23). The accusation is, in my opinion, too harsh in light of the extensive discussion of the United Nations system in paragraphs 319 *et seq* (emphasis added), where the Court treated the matter as follows: 'According to the Commission, *so long as* under that system of sanctions the individuals or entities concerned have an acceptable opportunity to be heard through a mechanism of administrative review forming part of the United Nations legal system, the Court must not intervene in any way whatsoever ... [T]he existence, within that United Nations system, of the re-examination procedure before the Sanctions Committee, even having regard to the amendments recently made to it, cannot give rise to generalised immunity from jurisdiction within the internal legal order of the [Union]. Indeed, such immunity, constituting a *significant derogation* from the scheme of judicial protection of fundamental rights laid down by the [EU Treaties], appears unjustified, for clearly that re-examination procedure does not offer the guarantees of judicial protection. In that regard, although it is now open to any person or entity to approach the Sanctions Committee directly, submitting a request to be removed from the summary list at what is called the "focal" point, the fact remains that the procedure before that Committee is still in essence diplomatic and intergovernmental, the persons or entities concerned having no real opportunity of asserting

This bleak picture *is* distorted; at the very least, when it comes to one international human rights treaty that has always provided an external standard to the European Union: the European Convention on Human Rights. From the very beginning, the Court of Justice took the Convention very seriously,[127] sometimes even too seriously.[128] And for some time now, there has also been some form of external review of Union acts by the European Court of Human Rights. Nonetheless, there *are* many normative complexities with the European Convention as the Union's external bill of rights as long as the Union has not acceded to the latter. This fourth section looks at the external standard imposed by the Convention prior to and after accession by the Union.

A. The Convention Human Rights Standard for Union Acts

The Union is (still) not a formal party to the European Convention. And the European Convention system has not found the European Union to have (partly) 'succeeded' its Member States.[129] Unless the Union found itself to be

their rights and that committee taking its decisions by consensus, each of its members having a right of veto. The Guidelines of the Sanctions Committee, as last amended on 12 February 2007, make it plain that an applicant submitting a request for removal from the list may in no way assert his rights himself during the procedure before the Sanctions Committee or be represented for that purpose, the Government of his State of residence or of citizenship alone having the right to submit observations on that request. Moreover, those Guidelines do not require the Sanctions Committee to communicate to the applicant the reasons and evidence justifying his appearance in the summary list or to give him access, even restricted, to that information. Last, if that Committee rejects the request for removal from the list, it is under no obligation to give reasons. It follows from the foregoing that the [Union] judicature must, in accordance with the powers conferred on it by the [EU Treaties], ensure the review, in principle the full review, of the lawfulness of all [Union] acts in the light of the fundamental rights forming an integral part of the general principles of [European] law, including review of [Union] measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.' This passage appears like a—fairly—direct and significant engagement with the status of international law. And in a later publication, Professor de Búrca softened her charge that the European Union ignores or snubs international or regional human rights law, cf G de Búrca (above n 9), 489.

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

[128] Cf Case C-145/04 *Spain v United Kingdom* [2006] ECR 7917. In that case, Spain had—rightly—argued that the extension of the right to vote in elections to the European Parliament to persons who are not citizens of a Member State violates Article 20 TFEU. Yet the Court, expressing '[a]t the outset' (ibid, para 60) its wish to comply with the judgment of the European Court of Human Rights in *Matthews v United Kingdom*, misinterpreted the federal foundations of the European Union to pursue this aim to its very end (paras 94–95). On the idea that federal citizenship necessarily builds on the citizenship of the Member States, see C Schönberger, *Unionsbürger: Europas föderales Bürgerrecht in vergleichender Sicht* (Mohr Siebeck, 2006).

[129] *Confédération Française Démocratique du Travail v European Communities* (alternatively, their Member States) (1978) 13 DR 231, 240: 'In so far as the application is directed against the European Communities as such the Commission points out that the European Communities are not a Contracting Party to the European Convention on Human Rights (Art 66 of the Convention). To this extent the consideration of the applicant's complaint lies outside the Commission's jurisdiction ratione personae.'

materially bound, the Convention's external supervision could not directly apply to the Union. Could the Member States thus escape their international obligations under the Convention by transferring decision-making powers to the European Union? In order to avoid a normative vacuum, the European Convention system has accepted the *indirect* review of Union acts by establishing a doctrine of (limited) direct responsibility of Member States for acts of the Union (i). This complex construction is likely to disappear after accession (ii).

(i) Before Accession: (Limited) Indirect Review of Union Acts

Having originally found that the Union constituted an autonomous subject of international law whose actions could not be attributed to its Member States,[130] the European Commission of Human Rights and its Court subsequently changed views. In *M & Co v Germany*,[131] the Commission found that, whereas 'the Convention does not prohibit a Member State from transferring powers to international organisations', 'a transfer of powers does not necessarily exclude a State's responsibility under the Convention with regard to the exercise of the transferred powers'.[132] This would not, however, mean that the State was to be held responsible for all actions of the Union: 'it would be contrary to the very idea of transferring powers to an international organisation to hold the Member States responsible for examining [possible violations] in each individual case'.[133]

What, then, were the conditions for this limited indirect review of Union acts? Consistent with its chosen emphasis on *State* responsibility, the Commission would not concentrate on the concrete decision of the Union, but on the State's decision to transfer powers to the Union. This transfer of powers was deemed 'not incompatible with the Convention provided that within that organisation fundamental rights will receive an *equivalent protection*'.[134] Member States would consequently not be responsible for every—compulsory—European Union act that violated the European Convention.[135] In

[130] Ibid. The Commission held that the complaint was 'outside its jurisdiction ratione personae since the [Member] States by taking part in the decision of the Council of the European [Union] had not in the circumstances of the instant case exercised their "jurisdiction" within the meaning of Art 1 of the Convention'.

[131] *M & Co v Federal Republic of Germany* (1990) 64 DR 138.

[132] Ibid, 145.

[133] Ibid, 146.

[134] Ibid, 145 (emphasis added).

[135] The decision thus introduced a distinction between the State execution of compulsory Union acts—for which there would only be limited review—and voluntary or discretionary State acts that would be subject to a full review. In *Matthews v the United Kingdom* (1999) 28 EHRR 361 the European Court of Human Rights rejected to view Council Decision 76/787, [1976] OJ L278 and the 1976 Act concerning elections to the European Parliament as acts of the European Union. In the (correct) view of the Court they 'constituted international agreements which were freely entered into by the United Kingdom'. The Court consequently found that the UK, together with all the other Member States, was fully responsible under Art 1 of the Convention (ibid, para 33). The Court here dealt with European primary law that was 'authored' by the Member States—not the European Union. (On the European law principles governing the authorship of an act, see R Schütze, 'The Morphology of Legislative Powers in the European Community: Legal Instruments and the Federal

Bosphorus,[136] the European Court of Human Rights justified this 'middle ground' position as follows:

> The Convention does not, on the one hand, prohibit Contracting Parties from transferring sovereign power to an international (including a supranational) organisation in order to pursue co-operation in certain fields of activity. Moreover, even as the holder of such transferred sovereign power, that organisation is not itself held responsible under the Convention for proceedings before, or decisions of, its organs as long as it is not a Contracting Party. On the other hand, it has also been accepted that a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 makes no distinction as to the type of rule or measure concerned and does not exclude any part of a Contracting Party's 'jurisdiction' from scrutiny under the Convention.
>
> *In reconciling both these positions and thereby establishing the extent to which a State's action can be justified by its compliance with obligations flowing from its membership of an international organisation to which it has transferred part of its sovereignty, the Court has recognised that absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention . . . In the Court's view, State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides*. By 'equivalent' the Court means 'comparable'; any requirement that the organisation's protection be 'identical' could run counter to the interest of international co-operation pursued.[137]

In this indirect review of acts by a 'supranational' Union, the Court would thus not apply its 'normal' standard.[138] Where the Union protected human rights in

Division of Powers' (2006) 25 *Yearbook of European Law* 91, 98 *et seq*). The same reasoning applies, *mutatis mutandis*, to discretionary national acts. Discretionary national acts are national acts—not Union acts—and therefore subject to a full review; cf *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* (2006) 42 EHRR 1, paras 148 and 157.

[136] *Bosphorus*, ibid.

[137] Ibid, paras 152–155 (emphasis added).

[138] For a criticism of this point, see Joint Concurring Opinion of Judges Rozakis *et al* (ibid, paras 3–4): 'The right of individual application is one of the basic obligations assumed by the States on ratifying the Convention. It is therefore difficult to accept that they should have been able to reduce the effectiveness of this right for persons within their jurisdiction on the ground that they have transferred certain powers to the European [Union]. For the Court to leave to the [Union's] judicial system the task of ensuring 'equivalent protection, without retaining a means of verifying on a case-by-case basis that that protection is indeed "equivalent", would be tantamount to consenting tacitly to substitution, in the field of [European] law, of Convention standards by a [Union] standard which might be inspired by Convention standards but whose equivalence with the latter would no longer be subject to authorised scrutiny . . . In spite of its relatively undefined nature, the criterion "manifestly deficient" appears to establish a relatively low threshold, which is in marked contrast to the supervision generally carried out under the European Convention on Human Rights.'

an 'equivalent' manner to that of the Convention, the European Court of Human Rights would operate a 'presumption' that the States had not violated the Convention by transferring powers to the European Union. This presumption translates into a lower review standard for acts adopted by the European Union,[139] since the presumption of equivalent protection could only be rebutted where the actual treatment of human rights within the Union was 'manifestly deficient'.[140] The lower review standard represented a compromise between two extremes: no control, as the Union was not a member, and full control even in situations in which the Member States acted as mere agents of the Union. This compromise was 'the price for Strasbourg achieving a level of control over the EU, while respecting its autonomy as a separate legal order'.[141]

(ii) After Accession: (Full) Direct Review of Union Acts

The present Strasbourg jurisprudence privileges the European legal order in not subjecting it to the full external review by the European Court of Human Rights. However, this privilege is not the result of the Union being a 'model' member, but instead results from the Union *not* being a member of the European Convention system. Will the presumption that the Union—in principle—complies with the European Convention on Human Rights thus disappear with accession? It seems compelling that the *Bosphorus* presumption will cease once the Union accedes to the Convention. For '[b]y acceding to the Convention, the European Union will have agreed to have its legal system measured by the human rights standards of the ECHR' and will 'therefore no longer deserve special treatment'.[142] The replacement of an *indirect* review by a *direct* review should also—at least in theory—lead to the replacement of a *limited* review by a *full* review. Yet the life of law is not always logic, and the Strasbourg Court may well decide to cherish past experiences by applying a lower review standard to the (acceded) European Union. We must wait to see whether or not logic shall trump experience.

However, what is certain is that accession will widen the scope of application of the European Convention to include direct Union action. For in the past, the indirect review of Union acts was based on the direct review of Member State acts implementing Union acts. And this, by definition, required that a *Member State* had acted in some way.[143] Thus, in situations where the Union institutions had acted directly upon an individual without any mediating Member State

[139] J Callewaert, 'The European Convention on Human Rights and European Union Law: A Long Way to Harmony' (2009) *European Human Rights Law Review* 768, 773: 'through the Bosphorus-presumption and its tolerance as regards "non manifest" deficiencies, the protection of fundamental rights under [European] law is policed with less strictness than under the Convention'.
[140] *Bosphorus*, paras 156–157.
[141] S Douglas-Scott (above n 127), 639.
[142] T Lock, 'EU Accession to the ECHR: Implications for Judicial Review in Strasbourg' (2010) 35 *European Law Review* 777 at 798.
[143] Ibid, 779.

measures, this Union act could not—even indirectly—be reviewed.[144] In the absence of a connecting factor to one of the signatory States, the act was outside the Convention's jurisdiction.[145] This will definitely change once the Union accedes to the Convention. Henceforth all *direct* Union actions would fall within the jurisdiction of the Strasbourg Court. Thus, even if a lower external standard was to continue to apply to the European Union, it would apply to all Union acts—and not just acts executed by the Member States.

B. Union Accession to the European Convention: Constitutional Preconditions

To clarify the status of the European Convention in the European legal order, the Commission had, long ago, suggested that accession to the Convention should be pursued.[146] But under the original Treaties, the European Union lacked the express power to conclude human rights treaties. The Commission thus proposed using the Union's general competence: Article 352 TFEU; yet—famously—the Court rejected this strategy in Opinion 2/94.[147] Since accession by the Union would have '*fundamental institutional implications*' for the Union and its Member States it would go beyond the scope of Article 352 TFEU.[148] In the view of the Court only a subsequent Treaty amendment could provide the Union with the power of accession. This power has now been granted by the Lisbon amendment. According to Article 6 (2) TEU, the European Union 'shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms'. The 'shall' formulation indicates that the Union is even under a constitutional obligation to become a member of this international organization. However, this membership must not 'affect the Union's competences as defined in the Treaties',[149] and will need to pay due regard to the 'specific characteristics of the Union and Union law'.[150]

[144] Cf *Connolly v Fifteen Member States of the European Union* (Application No 73274/01).
[145] Article 1 of the ECHR states: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.'
[146] Commission, Memorandum: Accession of the European Communities to the European Convention on the Protection of Human Rights and Fundamental Freedoms (above n 84).
[147] Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Opinion 2/94, [1996] ECR 1759.
[148] Opinion 2/94, paras 35–36. [149] Article 6(2) TEU.
[150] 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, Article 1. According to the provision, this duty includes in particular: '(a) the specific arrangements for the Union's possible participation in the control bodies of the European Convention'; and '(b) the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate'. According to Article 2: 'The agreement referred to in Article 1 shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto, measures taken by Member States

How and when will the Union accede to the Convention? Membership of the European Convention is now open to the European Union.[151] However, accession will not solely depend on the Union institutions but also its Member States. First, the Council will need to conclude the agreement by a unanimous decision of its member governments,[152] having previously obtained the consent of the European Parliament.[153] But unlike ordinary international agreements of the Union,[154] the Union decision concluding the agreement will only enter into force 'after it has been approved by the Member States in accordance with their respective constitutional requirements'.[155] Why was the ratification by the Member States considered to be necessary?[156] The Member States will here be able to block Union accession twice: once in the Council and once outside it. And while they may be under a constitutional obligation to consent to accession as members of the Council, this is not the case for the second consent. For the duty to accede to the Convention expressed in Article 6(2) TEU will only bind the Union—and its institutions—but not the Member States as such.

V. Conclusion: Three Bills of Rights and their Relations

The protection of human rights is a central task of the European Constitution, where human rights are today given a 'foundational' place. Unfortunately, the Union has not reserved one place to human rights. It has instead developed three bills of right. Its unwritten bill of rights results from the general principles of Union law. The Charter of Fundamental Rights adds a written bill of rights for the Union. And the European Convention on Human Rights has always provided an external bill of rights—even prior to formal accession by the Union.

derogating from the European Convention in accordance with Article 15 thereof and reservations to the European Convention made by Member States in accordance with Article 57 thereof.'

[151] For a long time, accession to the European Convention was confined to States (cf Article 4 of the Statute of the Council of Europe). This has recently changed with the amendment to Article 59 of the Conventions, paragraph 2 of which now states: 'The European Union may accede to this Convention.' From the 'internal' perspective of European law, the new Article 6(2) TEU (after Lisbon) imposes a constitutional obligation to accede: 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.'

[152] Article 218(8) TFEU—second indent.

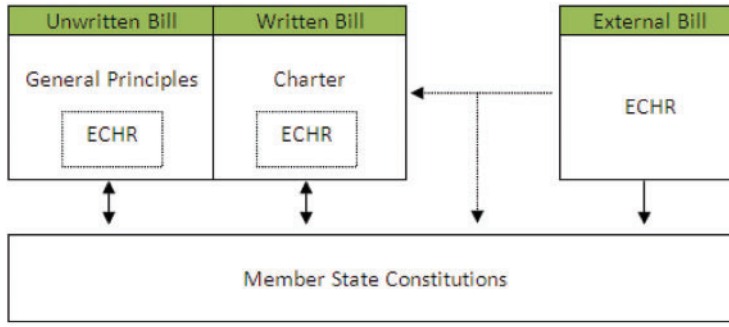
[153] Article 216(6)(a)(ii) TFEU.

[154] While the procedure resembles that for the conclusion of mixed agreements, it differs from the latter in that it makes the validity of the Union decision *legally* dependent on its prior ratification by the Member States.

[155] Article 218(8) TFEU—second indent.

[156] The answer may lie in the (fully) 'Unionizing' effect of formally incorporating the Convention into European and national law.

This chapter has analysed these three bills of rights and their respective relations to each other. The following picture has thereby emerged:



We saw above that the complexity of the European human rights regime is not rooted in the existence of an external bill of rights. (On the contrary, much legal complexity surrounding it will disappear once the Union becomes a formal party to the European Convention.) The principal technical problems lie in the Union's internal human right bills. For not only do they seem both to materially incorporate the ECHR—assuming that is what Article 6(3) TEU and Article 52 (3) of the Charter are designed to do—to achieve as 'harmonious' a relationship as possible.[157] The relationship between the two of them is likely to pose the greatest interpretative complexities in the future. Why does the Union need two internal bills of rights? True, the existence of an unwritten bill of rights may provide a better ground for the 'organic' growth of future human rights in the European Union, but why could this not have been achieved from within the Charter? The American Bill of Rights shows, with elegance and simplicity, how our Treaty drafters could have learnt much from a little comparative constitutionalism. For its penultimate provision states: '[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.'[158]

[157] The reason for this may lie in the hierarchical status that the Convention will have once the Union has acceded to it. For even if the Convention eventually becomes formally binding on the Union, it will—as an international agreement of the Union—be placed below the European Treaties (and the Charter). And in an attempt to create as 'harmonious' relations as possible, the Lisbon Treaty materially incorporates the Convention into *primary* Union law.

[158] Ninth Amendment to the US Constitution.