

Virtues and vices of two layers of Fundamental Rights: lessons from the Protocol on the Charter of the Fundamental Rights of the EU

Virtudes e vícios de duas leis sobre Direitos Fundamentais: lições do Protocolo da Carta de Direitos Fundamentais da União Européia

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Abstract: During the last decades, a great many comprehensive and thematic instruments for the legal protection of human rights have been established. Three levels are necessary levels of protection, namely, the national, the international, and the supranational level. On these levels, however, one finds a plurality of bills of rights or other legal instruments for the protection of human rights respectively, which overlap and may conflict. This make the assessment of claims

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stemming from fundamental rights significantly more difficult and gives rise to legal uncertainty. In the first part the problem of different levels and layers of legal instruments for the protection of human rights will be explained and the foundations for an adequate system of legal protection of human rights will be laid. The second part gives an outline of the development of the legal protection of fundamental rights in the European Union. Finally, in the third part an analysis of the relation between the two layers of fundamental rights in the European Union is undertaken against the backdrop of the 'Protocol (No 30) on the Charter of the Fundamental Rights of the European Union'. The history of this protocol illustrates 'British exceptionalism' in the field of fundamental rights.

Keywords: human rights, fundamental rights, justiciable rights, European Union, Protocol on the Charter of Fundamental Rights of the European Union

Resumo: Durante as últimas décadas, muitos instrumentos abrangentes e temáticos para a proteção jurídica dos direitos humanos foram estabelecidos. São necessários três níveis de proteção, a saber, o nível nacional, o internacional e o supranacional. Nesses níveis, contudo, encontra-se respectivamente uma pluralidade de declarações de direitos ou outros instrumentos jurídicos para a proteção de direitos humanos que se sobrepõem e podem entrar em conflito. Isso torna a avaliação de pretensões baseadas em direitos fundamentais significativamente mais difícil e gera insegurança jurídica. Na primeira parte será explicado o problema dos diferentes níveis e camadas de instrumentos jurídicos para a proteção de direitos humanos e apresentado o fundamento para um sistema de proteção jurídica adequado dos direitos humanos. A segunda parte oferece um esboço

do desenvolvimento da proteção jurídica de direitos fundamentais na União Europeia. Finalmente, na terceira parte é realizada uma análise da relação entre as duas camadas de direitos fundamentais na União Europeia no contexto do “Protocolo (No 30) da Carta de Direitos Fundamentais da União Europeia. A história desse protocolo ilustra o “caráter excepcional da Grã-Bretanha” no campo dos direitos fundamentais

Palavras-chave: direitos humanos, direitos fundamentais, direitos que podem ser arguidos em juízo, União Europeia, Protocolo da Carta de Direitos Fundamentais da União Europeia

In this essay the relation between the two layers of fundamental rights in the European Union will be in the limelight. This relation can be illustrated by analyzing the ‘Protocol (No 30) on the Charter of the Fundamental Rights of the European Union’. The two layers of fundamental rights in the European Union are an instance of a greater phenomenon, namely, the plurality of legal instruments for the protection of human rights. Organs of state, constitutional bodies, or national agencies often find themselves under an obligation to comply with different layers of fundamental rights – for example, a national bill of constitutional rights on one hand and an international bill of rights that has been incorporated into the national legal system on the other. Two different layers of fundamental rights, however, may well yield different results with an eye as to whether there is a violation of fundamental rights. In such a case, there is often no easy answer which of the layers prevails.

In the first part (A.) the general problem of different levels and layers of legal instruments for the protection of human rights will be explained and some general founda-

tions for a proper system of legal protection of human rights will be laid. The second part (B.) gives an overview of the development of the legal protection of fundamental rights in the European Union and the third part (C.) is devoted to an analysis of the relation between the two layers of fundamental rights in the European Union against the backdrop of the 'Protocol (No 30) on the Charter of the Fundamental Rights of the European Union'. The history of this protocol illustrates 'British exceptionalism' in the field of fundamental rights. This is an instance of the greater phenomenon of British exceptionalism in general, which ultimately led to 'Brexit', the United Kingdom's withdrawal from the European Union. The analysis of two different layers of fundamental rights at the same level of the legal system will illustrate that filling gaps in one layer by the other layer counts as a virtue of such double structure, while the legal uncertainty to which this double structure gives rise must certainly be regarded as a vice.

A. Multiple Layers of Legal Instruments for the Protection of Fundamental Rights

It is a challenging interpretive task to impose order on the complex patchwork of legal instruments for the protection of human rights and to arrive at a consistent and coherent system. In this context, some fundamental insights into the nature of human rights and the structure of their protection will prove helpful.

I The Patchwork of Legal Instruments for the Protection of Human Rights

The idea of human rights goes back to writings during the Enlightenment, most notably the works of Samuel Pufendorf, John Locke, Jean-Jacques Rousseau, and Immanuel Kant. This philosophical idea requires that it be implemented into political practice. This began with the Bill of Rights of Virginia and the United States Declaration of Independence, both stemming from 1776, and the Ten Amendments in 1791 to the United States Constitution of 1787 on one hand and with the French Declaration of the Rights the Man and of the Citizen (*Déclaration des Droits de l'Homme et du Citoyen*) of 1789 on the other. By the middle of the 20th century, nearly every constitution of a nation state provided for constitutional rights in one form or another, usually in the form of a bill of rights. Even constitutions at the state level in federal states often record fundamental rights. The Universal Declaration of Human Rights (UDHR), a resolution of the General Assembly of the United Nations in 1948,² marked the beginning of the development of legal instruments for the protection of fundamental rights in public international law. A great many of such legal instruments have been developed since, to mention here only the European Convention of Human

2 GA Res. 217 (III) of 10 December 1948. On the boundless literature on this landmark of the protection of human rights see, for example, P. R. Gandhi, 'The Universal Declaration of Human Rights at Fifty Years', *German Yearbook of International Law* 41 (1998), pp. 206-251; Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999); Jochen von Bernstorff, 'The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law', *European Journal of International Law* 19 (2008), pp. 903-924. See, on the process of drafting, William A. Schabas, *The Universal Declaration of Human Rights – The Travaux Préparatoires* (Cambridge University Press, 2013).

Rights (ECHR) of 1950, the American Convention of Human Rights (ACHR) of 1969, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both stemming from 1966. Along with these rather comprehensive instruments, there are thematic instruments such as the United Nations Convention against Torture of 1984 (UNCAT), the Council of Europe's European Convention for the Prevention of Torture or Inhuman or Degrading Treatment of 1987 (CPT) or United Nations Convention of the Rights of People with Disabilities (CRPD) of 2006.

Finally, in addition to the national and the international level, there is also the supranational level of law (at least in Europe). Fundamental rights in the European Union were recognized as mere general principles of Union law until 2009, when the Treaty of Lisbon of 2007, the EU's latest major reform treaty, became effective. This reform introduced a legally binding bill of rights, the 'Charter of Fundamental Rights of the European Union' of 2000, into primary Union law (in a slightly amended form).³

Without any doubt, too few legal instruments for the protection of human rights are a serious problem. This seems to suggest that any additional instrument is welcome. The growth of legal instruments for the protection of human rights has been, however, a contingent development rather than the unfolding of a clear and comprehensive system. At some points, historic opportunities presented themselves to arrive at either a bill of rights, a comprehensive convention or a pact or thematic instrument. These opportunities were seized by creating certain instruments, influenced by the interpretation of the idea of human rights, which (1) is depen-

3 This will be explained in greater detail in what follows, see, *infra*, section B. II.

dent on the prevailing morality in different parts of the world (cultural relativity) and (2) changes to some extent over time (temporal relativity).⁴ The result is that every state in the world is subject to a patchwork of international and national instruments for the protection of human rights, in some cases complicated further by supranational instruments.

The plurality of legal instruments is complemented by a plurality of courts (and other bodies), which lay claim to authoritative interpretation of a certain legal instrument. If a given case law lays claim to authoritative nature, this implies that other courts are bound – at least to a certain extent – by this interpretation, even if they disagree on the substantive issue of law at stake. For example, the interpretation of an international legal instrument by an international court may well claim to influence the decision of municipal courts, if the constitution of the state in question requires or permits such influence. To be sure, in interpreting an international legal instrument, an international court has to grant a certain extent of discretion to national authorities, which gives rise to a margin of appreciation. This is to say that an international court has to respect the decision of municipal authorities inside the margin of appreciation.⁵ The problem is, however,

4 The extent and nature of the phenomenon of cultural relativity of human rights depends on which justification for human rights is presupposed. This topic goes far beyond the scope of this essay. I shall simply assume that there is a certain but limited extent of cultural relativity in the field of human rights. See, for example, Jan-Reinard Sieckmann, 'Cultural Pluralism and the Idea of Human Rights', in: *Pluralism and Law*, A. Soeteman (ed) (Dordrecht, Boston, and London: Kluwer, 2001), pp. 235-249; James Griffin, 'The Relativity and Ethnocentricity of Human Rights', in: *Philosophical Foundations of Human Rights*, R. Cruft, S. M. Liao, and M. Renzo (eds) (Oxford University Press, 2015), pp. 555-569.

5 On the idea of a margin of appreciation in the case law of the European Court of Human Rights, see William A. Schabas, *The European Convention of Human Rights* (Oxford University Press, 2015), pp. 79-80 with further references. This idea was so important for the member states of the Council

that the question of the extent of discretion or the weight of the authoritative dimension of precedents is unclear and contested both in principle and in many given cases.

The plurality of legal instruments, combined with claims to authoritative interpretation by different courts, gives rise to a great deal of legal uncertainty in the interpretation of legal instruments for the protection of human rights. This is unfortunate for those who are asking themselves *bona fides* what human rights require in a given legal case. What is more, it is also unfortunate that this uncertainty can be abused by those who simply want to evade their human rights obligations as much as possible. In short: Legal uncertainty resulting from the patchwork of legal instruments for the protection of human rights has the potential to significantly weaken the protection of human rights.

II Insights into Human Rights and their Legal Protection

From the philosophical point of view, human rights are moral rights.⁶ They are – morally – valid by their sheer

of Europe that they amended the Preamble of the ECHR with ‘Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms’ of 2013. At the end of the Preamble, an additional recital is added: ‘Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention’.

6 See, for example, Martin Borowski, ‘Classifying and Qualifying Properties of Fundamental Rights’, in: *Human Rights and Ethics*, A. Ollero (ed) (Stuttgart: Steiner, 2007), pp. 37-45, at p. 37. See also Robert Alexy, ‘The Existence of Human Rights’, in: *Law, Science, and Technology*, U. Neumann, K. Günther, and L. Schulz (eds) (Stuttgart: Steiner, 2013), pp. 9-18, at p. 11: ‘The existence

moral correctness, independent from institutionalization in national law, international law or any other form of law. During the last decades, human rights have come to the fore as a yardstick for the legitimacy of laws and whole legal systems. In the words of John Tasioulas 'the discourse of human rights' is the modern 'ethical lingua franca'.⁷

This meaning of the expression 'human right' is different from a popular parlance in international law, according to which it refers to legal instruments, such as in 'European Convention of Human Rights'. This convention is a treaty under international law according to Article 38 (1) lit a of the Statute of the International Court of Justice, a legal instrument that has legal validity owing to authoritative issuance and social efficacy.⁸ Such a treaty is a *legal instrument* for the protection of human rights, to be distinguished from the moral rights themselves that undergird this legal instrument. The rights that such legal instruments record shall be termed, in what follows, 'fundamental rights' or 'convention rights', or in the case of being recorded in a constitution, 'constitutional rights'.

of human rights consists in their justifiability, and in nothing else'; see, furthermore, Robert Alexy, 'Law, Morality, and the Existence of Human Rights', in: *Ratio Juris* 25 (2012), pp. 2-14, at p. 10.

7 John Tasioulas, 'The Moral Reality of Human Rights', in: *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?*, T. Pogge (ed) (Oxford University Press, 2007), pp. 75-101, at p. 75.

8 On authoritative issuance and social efficacy as criteria for the validity of positive law, see Robert Alexy, *The Argument from Injustice*, trans B. Litschewski Paulson and Stanley L. Paulson (Oxford: Clarendon, 2002), pp. 85-87.

1 The Moral Obligation to Record Human Rights in Legal Instruments

For human rights as moral rights *per se* lack any institutionalization and, thereby, effective enforceability, they require that they be transformed into law. Owing to the moral nature of human rights themselves, the obligation of transformation into law is a moral obligation.⁹ This idea is reflected by Article 28 of the Universal Declaration of Human Rights, which reads: 'Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.' It gives expression to the demand that the presuppositions of effective protection for the realization of human rights be established in the real world.¹⁰ This moral obligation is mirrored by the nature of legal instruments for the protection of human rights – they lay claim to transforming human rights into the law.¹¹

9 See Ernst Tugendhat, *Vorlesungen über Ethik* (Frankfurt on Main: Suhrkamp, 1993), p. 349; Robert Alexy, 'Die Institutionalisierung der Menschenrechte im demokratischen Verfassungsstaat', in: *Philosophie der Menschenrechte*, S. Gosepath and G. Lohmann (eds) (Frankfurt on Main: Suhrkamp, 1998), p. 255; Martin Borowski, 'Discourse Theory in International Law – Human Rights through Discourse', in: *Ratio Juris* 44 (2001), pp. 38-71, at p. 44; Borowski, 'Classifying and Qualifying Properties' (fn. 5), p. 38; Martin Borowski, *Grundrechte als Prinzipien*, 3rd edn (Baden-Baden: Nomos, 2018), p. 50.

10 See, for example, Thomas Pogge, 'Menschenrechte als moralische Ansprüche an globale Institutionen', in: *Philosophie der Menschenrechte*, S. Gosepath and G. Lohmann (eds) (Frankfurt on Main: Suhrkamp, 1998), pp. 378-400.

11 This implies a *weak objective connection* between human rights as moral rights and legal instruments for their effective protection. A *strong objective connection* – that legal instruments actually are results of the transformation of human rights into law proves too strong, a *merely subjective connection* – that the legal instruments were created with the subjective intent of transforming human rights into law – is too weak, see Borowski, *Grundrechte als Prinzipien* (fn. 8), pp. 46-49; Borowski, 'Classifying

2 Three Key Arguments for the Transformation of Human Rights into Law

There are three key arguments for the transformation of human rights into legal rights: (1) the argument from effective enforcement, (2) the argument from authoritative cognition, and (3) the argument from organization. Human rights *per se* are characterized by their moral nature and are not institutionalized. Institutionalization is necessary for effective enforcement, ultimately by means of force by public authority. Such institutionalization can only be provided by means of law.¹² What is more, there is a great deal of uncertainty as to what human rights precisely require in a case at hand. Thus, a framework of organs and processes is called for, which allocates the legal power for authoritative decisions whether human rights are violated in a given case. Such a framework is provided, for example, by a constitution with a bill of rights, which records human rights in legal form with binding force for all branches of government and a constitutional court that has final authority in interpreting the constitution. These legal powers can only be provided for by a legal system.¹³ Finally, an organization such as the state is indispensable for the realization of positive rights such as social rights. Social rights redistribute wealth. Tax needs to be collected from wealthy citizens and less wealthy citizens shall receive social subsidies. This redistribution – taking and giving – is a considerably complex undertaking that cannot be imagined without an organisation such as the state.¹⁴

and Qualifying Properties' (fn. 5), pp. 39-41.

12 Alexy, 'Die Institutionalisierung der Menschenrechte' (fn. 8), pp. 254-255; Borowski, *Grundrechte als Prinzipien* (fn. 8), pp. 50-51.

13 Alexy, 'Die Institutionalisierung der Menschenrechte' (fn. 8), p. 256; Borowski, *Grundrechte als Prinzipien* (fn. 8), p. 51.

14 Alexy, 'Die Institutionalisierung der Menschenrechte' (fn. 8), pp. 256-

3 Necessary Levels of Legal Instruments for the Protection of Human Rights

On first glance, a single level of legal instruments for the protection of human rights seems perfectly sufficient. Individuals are subjected to public authority of the state, in which they live or currently happen to be. A bill of rights in the national constitution and legal power of courts to take authoritative decisions on the interpretation of these constitutional rights may well provide effective protection and legal certainty. What is more, if the constitution records social rights, the redistribution of wealth is organized by that state. It is not without reason that legal instruments for the protection of human rights began to emerge at the national level.

a) The National Level of Legal Instruments for the Protection of Human Rights

States are still considered as the ultimate source of legal power, which rests on popular sovereignty. Sovereignty in the sense of unlimited power, stemming from the idea of public international law as a means of coordination between and among equally sovereign states according the Peace of Westphalia from 1648, has more and more been placed in perspective by cooperation by means of international organizations, such as the United Nations. This has not, however, changed the idea of sovereignty in the sense of original power.¹⁵ This is to say that the *national level* of fundamental rights – constitutional rights – *is a necessary level* for legal

258; Borowski, *Grundrechte als Prinzipien* (fn. 8), p. 51.

15 On sovereignty in the sense of original power, see, for example, Neil D. McCormick, 'Questioning Post-Sovereignty', *European Law Review* 29 (2004), pp. 852-863, at pp. 852-853.

instruments for the protection of human rights. By contrast, fundamental rights at the state level in federal states are, strictly speaking, not necessary, if and when all branches of government of the state are subject to the constitutional rights in the federal constitution.¹⁶

b) The International Level of Legal Instruments for the Protection of Human Rights

Legal instruments for the protection of human rights in international law emerged later. They are an expression of the concern for fellow human beings, who live in states that generally do not respect human rights in any reasonable interpretation or where there are occasional but gross violations of human rights without sufficient redress by national authorities. Human rights treaties are concluded in the form characteristic of *coordination* between and among states, but with an eye to their substantive matter these treaties establish *cooperation* – national states are promising each other to treat all human beings under their jurisdictions well, supervised by treaty organs such as international ‘human rights’ courts. A thin layer of *jus cogens* norms is provided by international customary law according to Article 38 (1) lit b of the Statute of the International Court of Justice.¹⁷ Such international legal instruments for the protection of human rights are usually equipped with less effective enforcement powers, compared

16 To be sure, this does not mean that constitutional rights in state constitutions in federal states are impossible or without any use. The federal constitution may leave room for some further concretization of the legal protection of human rights at state level, and the result of such concretization may be different among states under the same federal constitution.

17 On *jus cogens* with an eye to human rights, see, for example, James Crawford, *Brownlie's Principles of Public International Law*, 8th edn (Oxford University Press, 2012), pp. 594-597.

to national constitutional courts. While a constitutional court typically and ideally has the power to declare even parliamentary statutes null and void,¹⁸ international courts are typically limited to declare a violation of rights. As a matter of public international law, the member states are under an obligation to observe the judgment,¹⁹ this does typically not, however, render conflicting national laws or judgments null and void. The possibility of just satisfaction – in Europe’s regional systems Article 41 ECHR – has added another aspect of the enforcement of decisions, which may be important for individuals but is often rather symbolic for states.²⁰

At any rate, the international level of legal instruments for the protection of human rights adds a distinct layer of protection: the protection against one’s own state. A systematic and severe violation of human rights of a sovereign state’s own population may trigger a humanitarian intervention, which may be authorized and performed by an international organization or a group of states. The substantive and formal requirements for a humanitarian intervention are unclear and contested;²¹ there can be little doubt, however, that in

18 See, for example, section 78 clause 1 of the German Federal Constitutional Court Act.

19 See Article 46 ECHR.

20 On just satisfaction according to Article 41 ECHR, see Schabas, *The European Convention of Human Rights* (fn. 4), pp. 830-840. On the broader provision in Article 63 ACHR, see Thomas M. Antkowiak and Alejandra Gonza, *The American Convention of Human Rights* (Oxford University Press, 2017), pp. 285-316.

21 This is a topic in and of itself, which cannot be discussed further here. For an overview of the debate, see Richard B. Lillich, ‘Humanitarian Intervention through the United Nations: Towards the Development of Criteria’, *Heidelberg Journal of International Law* 53 (1993), pp. 557-575; John J. Merriam, ‘Kosovo and the Law of Humanitarian Intervention’, *Case Western Reserve Journal of International Law* 33 (2001), pp. 111-154; Thomas M. Frank, ‘Humanitarian Intervention’, in: *The Philosophy of International Law*, S. Besson and John Tasioulas (eds) (Oxford University Press, 2010),

modern international public law a humanitarian intervention can be justified under certain circumstances. This, in turn, awards protection to the individual – not to suffer human rights violations by the individual’s home state without the prospect of effective legal sanctions – that cannot be produced by merely national legal instruments for the protection of human rights. This is to say that the international level of legal instruments for the protection of human rights – international fundamental rights – is also a necessary level.

In the context of international fundamental rights two aspects are worth mentioning. To begin with, Charles Beitz and Joseph Raz have recently characterized human rights by focusing solely or strongly on the limit on state sovereignty to which they give rise.²² This, if taken literally, can hardly be convincing. Of course, the limit on state sovereignty in international law is an effect brought about by human rights, but it is by no means the only effect worth mentioning. The idea that bills of rights in national constitutions record human rights only as a means of preventing humanitarian interventions by international organizations or other states would be a distortion of history. The protection of fundamental interests in liberty and equality *per se* lies at the heart of human rights and their legal protection, not relations between and among states.

The second aspect is that, compared to constitutional rights at the national level, international fundamental rights

pp. 531-548; Ramesh Thakur, ‘The Use of International Force to Prevent or Halt Atrocities: From Humanitarian Intervention to the Responsibility to Protect’, in: *The Oxford Handbook of International Human Rights Law*, D. Shelton (ed) (Oxford University Press, 2013), pp. 815-840.

22 Charles Beitz, *The Idea of Human Rights* (Oxford University Press, 2009), p. 109 *et passim*; Joseph Raz, ‘Human Rights without Foundations’, in: *The Philosophy of International Law*, S. Besson and J. Tasioulas (eds) (Oxford University Press, 2010), pp. 321-338, at p. 328.

generally offer less protection. International fundamental rights cover the whole world (universal instruments) or a continent (regional instruments). For example, there are 47 member states of the ECHR with a population of roughly 820 million. It is obvious that the issue of cultural relativity of human rights plays a much more significant role within such a continent than within a single national state. This has found expression in the criterion of a 'European consensus', which is used in the case law of the European Court of Human Rights in Strasbourg in determining the extent of the margin of appreciation for the member states – the less consensus, the greater the margin of appreciation.²³ What is more, there is more democratic accountability in the national framework. If the general public disagrees with an authoritative interpretation of a certain constitutional right by the constitutional court, there are democratic processes available – a political debate on this issue can finally lead to an amendment of the constitution. Admittedly, an amendment of a constitution is usually dependent on qualified majorities in the bodies competent for legislation, a referendum or other qualified criteria. It is often politically difficult to meet these qualified criteria, it is not, however, impossible. By contrast, it is next to impossible to amend a substantive provision in a multilateral international human rights treaty. If a member state strongly disagrees with an authoritative interpretation of a certain international fundamental right by an international court, an amendment of this international fundamental right can hardly be contemplated. There are only two options realistically available for this state: to acquiesce in the decision of the international court or withdraw from the human rights

23 See, most recently, Shai Dothan, 'Judicial Deference Allows European Consensus to Emerge', *Chicago Journal of International Law* 18 (2018), pp. 393-419, at pp. 395-400, with further references.

treaty and the supervision of the relevant international court. Since the latter option is unfortunate for a number of reasons, one should avoid to put a member state in such predicament.

To sum up, there are good arguments to the effect that international instruments for the protection of human rights provide for some modest level of protection, while constitutional rights at the national level may concretize the protection of human rights further by providing an additional level of protection, subject to the democratic deliberation in this state.

c) The Supranational Level of Legal Instruments for the Protection of Human Rights

A supranational organization is a special kind of international organization.²⁴ According to the principle of attributed competences – in the case of the EU, Article 5 (2) Treaty on European Union (TEU) – the supranational organization has no original legal power.²⁵ Member states transfer some of their sovereign rights to this organization which then exercises these sovereign rights by means of the organization's own organs. Characteristic of supranationality is a legislative competence of the organization, according to which the legal acts of the organizations – in the case of the EU, *regulations* according to Article 288 (2) Treaty on the Functioning of the European Union (TFEU), *directives* according to Article 288 (3) TFEU, and *decisions* according to Article 288 (4) TFEU – have direct effect, they are immediately valid and effective within the legal systems of the member states.²⁶ What is more,

24 Matthias Ruffert and Christian Walter, *Institutionalized International Law* (Baden-Baden: Nomos, 2015), p. 8.

25 Paul Craig and Gráinne de Búrca, *EU Law*, 6th edn (Oxford University Press, 2015), p. 74.

26 Craig and de Búrca, *EU Law* (fn. 24), pp. 198-223; Ruffert and Walter,

the effective realization of the organization's ends may well require that even legal acts of the organization (secondary law) enjoy, at least as a rule, supremacy over national law – even over national constitutions.²⁷

The supremacy of supranational law over national law creates, however, a dilemma. Owing to this supremacy, supranational law can generally not be reviewed by the yardstick of national constitutional rights – ‘inferior law’ cannot provide protection against ‘higher law’. This is to say that a gap of protection emerges.

One might argue that the exercise of the competences attributed to the supranational organization might be subject to international fundamental rights. The problem is, however, that the EU is not – yet²⁸ – formally subject to the ECHR. All the members states of the EU are, but the EU itself – a legal person of its own according to Article 47 TEU – has not (yet)²⁹ acceded to this treaty. What is more, even if the EU had acceded to the ECHR, one might ask whether the modest level of protection under international law is adequate for an organization that, without formally being a state, interferes with liberty and equality of European citizens in certain areas just as states typically do. For

Institutionalized International Law (fn. 23), p. 8.

27 There is general agreement that European Union law – both primary and secondary law – takes precedence over national law, because otherwise it would be impossible to implement the internal market, the Union's central collective economic good. There has been, however, a protracted and heated debate as to whether this supremacy is either (1) only very much the rule or (2) completely unconditional, see, for example, Craig and de Búrca, *EU Law* (fn. 24), pp. 266-314; see also Martin Borowski, ‘Legal Pluralism in the European Union’, in: *Law and Democracy in Neil MacCormick's Legal and Political Theory*, A. J. Menendez and J. E. Fossum (eds) (Dordrecht, Heidelberg, London, and New York: Springer, 2011), pp. 185-209.

28 On the European Union's accession to the ECHR, see, *infra*, section B. III.

29 See, *infra*, section B. III.

recourse to constitutional rights is impossible and recourse to international fundamental rights not enough, a distinct level of supranational protection of human rights is required.

d) Summing Up – The Standard Model

To sum up, both a national and an international level of legal instruments for the protection of human rights is required – the former does not render the latter superfluous nor does the latter the former. The result is a *standard model* of legal instruments for the protection of human rights with a comprehensive bill of rights that grant modest protection at the international level and a comprehensive bill of rights, providing for more protection at the national level.³⁰

30 The idea that the international level only provides for ‘modest protection’ in the standard model is based on the assumption that there is significantly more protection at the national level by means of constitutional rights and proper deliberative democracy in the respective country. In that sense, the standard model presupposes an ideal situation. The situation may be, however, non-ideal in two respects. To begin with, the legal protection of human rights at the national can be deficient. In such a situation the normal interplay between the international level and the national level does not properly work. The international level has to step in for the deficient national level and grant more protection than the standard model would require and permit under ideal circumstances. This is to say that the level of protection provided for by the international level depends to some extent on the protection provided for by the national level of constitutional rights – the less protection there is at the national level, the more protection at the international level is called for. What is more, the extent of discretion (or, in other words, the size of the ‘margin of appreciation’) that democratic decisions enjoy *vis-à-vis* review by means of legal instruments for the protection of human rights – be they national or international instruments – depends on the deliberative quality of democratic decisions. Deliberative democracy is based on the discourse rules for the rational practical discourse (on these rules, see Robert Alexy, *A Theory of Legal Argumentation* (Clarendon: Oxford, 1989), pp. 188-206; Jürgen Habermas, ‘Diskursethik – Notizen zu einem Begründungsprogramm’, in: J. Habermas, *Moralbewußtsein und kommunikatives Handeln* (Frankfurt on Main: Suhrkamp, 1983), pp. 53-125, at p. 99; Borowski, ‘Discourse Theory

Where a supranational organization such as the EU has been formed, the characteristics of such an organization call for a distinct additional level of supranational instruments for the legal protection of human rights, provided for in another comprehensive bill of rights. These levels of fundamental rights are the two or three necessary levels.

4 Non-Necessary Plurality of Legal Instruments for the Protection of Human Rights

There are, however, far more legal instruments for the protection of human rights than the necessary levels in this standard model would suggest.

a) Comprehensive and Thematic Instruments

For example, there are thematic instruments – such as Europe’s torture prevention convention (CPT) – in addition

in International Law – Human Rights through Discourse’ (fn. 8), pp. 53-56. For example, if there were proper democratic elections, with a transparent and fair system of financing political parties, a pluralistic media landscape and a long, comprehensive, thorough and fair public debate, in which the better argument had a good chance to prevail because it is the better argument, a good deal of protection of minorities will be realized through deliberative democracy. In such a situation greater discretion should be accorded to democratic decisions, compared to a situation in which the democratic debate was defective – because of an unfair system of financing political parties, because of unfair and undue political influence on the media, because decisions were taken by ‘experts’ behind closed doors ‘legitimated’ only formally by democratic elections (on this argument, see Martin Borowski, ‘Subjekte der Verfassungsinterpretation’, in: *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, J. Isensee and P. Kirchhof (eds), vol. XII: Normativität und Schutz der Verfassung, 3rd edn (Heidelberg: C. F. Müller, 2014), pp. 761-782, at p. 779). Where not only the legal protection of human rights is deficient at the national level, where also the processes of deliberative democracy are significantly deficient at the national level, there is even more protection required by means of the international level of legal protection of human rights.

to comprehensive instruments, such as the ECHR. This thematic instrument enhances and strengthens the protection against torture that is generally provided for by Art. 3 ECHR. This is to say that a comprehensive instrument may well prove non-exhaustive. This added protection does not pose any significant structural problems or issues with legal certainty.

b) Two Comprehensive Instruments at the Same Level

Things are different, however, if and when one finds two comprehensive instruments at the same level of necessary instruments. This situation emerges, in particular, where an international comprehensive instrument is incorporated into a domestic legal system, which records human rights, usually at the constitutional level. Both comprehensive instruments lay claim to transforming the protection required by human rights into law – at the same level of the legal system. What happens in case of conflicting results? To be sure, the fact that constitutional rights and international human rights are usually open to interpretation means that one often arrives – or at least: can arrive – at a convergent interpretation. This is not, however, necessarily the case – there may be cases in which one cannot avoid to arrive at divergent interpretations.

aa) The Criterion of the Formal Rank

On first glance, the formal rank of the two different but comprehensive instruments seems decisive. Where the national level of constitutional rights is formally superior to a comprehensive international instrument incorporated at the level of ordinary legislation, the former takes precedence – *lex superior derogat legi inferiori*. Things are more complicated, however, if and when constitutional rights must be interpre-

ted 'in conformity' with the international instrument and if and when this principle of interpretation 'in conformity' with international law boasts of constitutional rank itself. This is the case with the ECHR in the German legal system, in which it is incorporated with the rank of ordinary legislation.³¹ The German Federal Constitutional Court interprets the Basic Law, Germany's post-War constitution, as providing for the principle of interpreting the constitution 'in conformity' with international law in general and the ECHR in particular.³² Owing to the constitutional rank of the interpretive principle, the different domestic rank of the instruments themselves – constitutional rank of the constitutional rights and sub-constitutional rank of the ECHR – is placed in perspective.

What is more, different formal rank cannot be decisive anyway in cases in which the comprehensive instruments boast of equal rank. This is the rule in public international law, where there is – apart from *jus cogens*³³ – no hierarchy between and among legal instruments.³⁴ There are also states in which international instruments for the legal protection of human rights are incorporated into the domestic legal system with constitutional rank, in addition to original constitutional rights. As a result, there are two comprehensive legal instruments for the protection of human rights at the constitutional level – original constitutional rights and incorporated international fundamental rights.

bb) The Criterion of Maximum Protection

31 See, for example, Mark W. Janis, Richard S. Kay, and Anthony W. Bradley, *European Human Rights Law*, 3rd edn (Oxford University Press, 2008), p. 852.

32 BVerfGE 111, 307 (315-330).

33 See *supra*, section A. II. 3. b).

34 See, for example, Crawford, *Brownlie's Principles of Public International Law* (fn. 16), pp. 22-23.

One might think that the criterion of ‘maximum protection’ solves the problem. This cannot, however, provide a solution in cases where there are fundamental rights at stake on two sides of a case. For example, there may be a competition between free speech on one hand (constitutional right 1) and privacy (constitutional right 2) on the other. Let’s assume that, in the framework of original constitutional rights, free speech takes precedence over privacy. In the layer of incorporated international fundamental rights there is also a competition between free speech (incorporated international fundamental right 1) and privacy (incorporated international fundamental right 2). Let’s assume further that in this framework privacy takes precedence over free speech. In such cases there is a genuine conflict between the two layers – both layers provide a different outcome in the very same case. One cannot say that one layer provides more protection or ‘maximum protection’, compared to the other – both provide different forms of protection.³⁵

There can be little doubt that the general problem of two comprehensive instruments at the same level of necessary instruments needs further analysis. In the following, an enquiry into the relation between the two layers of fundamental rights in the European Union will shed some light on virtues and vices of two layers of fundamental rights at the same level in a legal system.

35 This is a well-known issue of multi-pole relations with an eye to fundamental rights – relations between and among the state and two or more holders of fundamental rights, see, for example, Tobias Thienel, ‘Article 53 EMRK’, in: *Konvention zum Schutze der Menschenrechte und Grundfreiheiten – EMRK*, Ulrich Karpenstein and Franz C. Mayer (eds), 2nd edn (Munich: C.H. Beck, 2015), pp. 702-706; Jörg Philipp Terhechte, ‘Artikel 53 GRC’, marginal number 11, in: *Europäisches Unionsrecht*, vol. 1, H. von der Groeben, J. Schwarze, and A. Hatje (eds), 7th edn (Baden-Baden: Nomos, 2015), pp. 835-839; both with further references.

B. Two Layers of Fundamental Rights in the European Union

The primary law of the European Union provides for two layers of fundamental rights – unwritten general legal principles of Union law and a written bill of rights, the Charter of Fundamental Rights of the European Union (ChFR).

I No Bill of Rights in the Initial Treaties

When the founding treaties of the three European Communities (European Coal and Steel Community of 1951, Euratom of 1957, and European Economic Community of 1957)³⁶ were drafted, a European bill of rights in written primary Community law was not, however, regarded necessary or desirable. Three reasons for the lack of provisions recording fundamental rights in the founding treaties are often mentioned. The first reason is the rather limited competence of the Communities at the beginnings of European integration.³⁷ Interferences with individuals' rights by the use of Community competence were rather unlikely. Yet the competences of the Communities extended significantly over time, rendering conflicts between Community law and fundamental interests of the individual more and more likely.

36 The 'European Economic Community' (EEC) was renamed 'European Community' (EC) in 1992 with the Treaty of Maastricht (ToM), which also founded the 'European Union', for the time being as a structure without legal personality, embracing three pillars, the supranational EC and the intergovernmental 'Common Foreign and Security Policy' (CFSP) and 'Cooperation in the Fields of Justice and Home Affairs' (JHA), the latter renamed 'Police and Judicial Cooperation in Criminal Matters' (PJCC) in 2003. The two intergovernmental pillars of the EU (ToM) were absorbed into the EU (ToL) in 2009, when the EU itself gained legal personality.

37 See, for example, Damian Chalmers, Gareth Davies, and Giorgio Monti, *European Union Law*, 3rd edn (Cambridge University Press, 2014), p. 251.

The second reason for the lack of provisions recording fundamental rights in the Founding Treaties is that constitutional rights of the Member States were initially regarded as sufficient for the protection of individuals' fundamental interests.³⁸ National constitutional law was, however, rendered inferior to European law, when the European Court of Justice (ECJ) in Luxemburg claimed 'supremacy' of European law in seminal decisions in the 1960's and early 1970's – *van Gend en Loos*,³⁹ *Costa v ENEL*,⁴⁰ *Internationale Handelsgesellschaft*,⁴¹ and *Simmenthal*⁴² – and when this claim was, at least on principle, accepted by the Member States' courts. This is to say that it became apparent around four decades ago that constitutional rights in national constitutions do not have power to set limits to Community law. Another reason was to avoid a state-like appearance of the Communities. Bills of rights are usually found in state constitutions, so that a bill of rights might have given the impression that the creation of some form of federal state was intended.

At that time the ECJ began to develop fundamental rights as general principles of Community law, based on a self-created mandate.⁴³ The Court introduced in *Internationale Handelsgesellschaft* the first 'source of inspiration' for fundamental rights at the Community level, the 'constitutional

38 Chalmers, Davies, and Monti, *European Union Law* (fn. 35), p. 251.

39 Case 26/62, *Van Gend en Loos* [1963] ECR 1.

40 Case 6/64, *Costa v ENEL* [1964] 12 CMLR 425.

41 Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125.

42 Case 106/77, *Simmenthal* [1978] ECR 629.

43 On the beginnings of the Court's case law on fundamental rights, see, for example, Craig and de Búrca, *EU Law* (fn. 24), pp. 383-390; Chalmers, Davies, and Monti, *European Union Law* (fn. 35), pp. 251-254; Alan Dashwood et al., *Wyatt and Dashwood's European Union Law*, 6th edn (Oxford and Portland, Oregon: Hart, 2011), pp. 337-339.

traditions common to the Member States'.⁴⁴ In 1974, the Court added, in *Nold*, the second 'source of inspiration', namely 'international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories'.⁴⁵ The ECHR soon proved to be the most important of such international treaties. These two sources of inspiration found their way into the initial version of the TEU as established by the Treaty of Maastricht (ToM), in 1993, Article F (2).⁴⁶ This provision amounted, however, to nothing more than an endorsement of the doctrinal foundation of the Court's case law. In the current form, Article 6 (3) TEU (ToL) reads as follows: '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.' *Nota bene*: This provision does *not incorporate* the ECHR into primary Union law; it only mentions the ECHR as a 'source of inspiration' for general principles of Union law.⁴⁷

II The Charter of Fundamental Rights of the European Union

Considering the import of human rights and the progress of the project of European integration, the call for a bill of rights in written primary Union law became ever more pressing at the end of the last century. Based on a mandate of the Cologne European Council in 1999, the 'Charter of

44 Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125, para 4.

45 Case 4/73, *Nold* [1974] ECR 491, para 13.

46 Later renumbered Article 6 (2) TEU in the Treaty of Amsterdam (ToA), in 1998.

47 See Craig and de Búrca, *EU Law* (fn. 24), p. 385 with further references.

Fundamental Rights of the European Union' was solemnly proclaimed in 2000, even if in a legally non-binding form in the interim.⁴⁸ With some amendments the Charter became part of the Constitutional Treaty (CT) in Articles II-61 to II-114,⁴⁹ which ultimately failed in 2005 following negative outcomes in referenda in France and in the Netherlands. After a 'phase of reflection' the Member States agreed the Treaty of Lisbon (ToL) in December 2007, which went into effect on 1 December 2009.⁵⁰

The reform treaty did not incorporate the text of the ChFR into the European Treaties. Rather, a cross-reference in Article 6 (1) TEU (ToL) lends legally binding force to the Charter in its revised form from 2007.⁵¹ This provision reads:

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- 48 Charter of Fundamental Rights of the European Union, OJ 2000/C 364/01. On the mandate of the European Council in Cologne, the convention method, and the genesis of the Charter generally, see, for example, Gráinne de Búrca, 'The Drafting of the European Union Charter of Fundamental Rights', *European Law Review* 26 (2001), pp. 126-138; David Anderson and Cian C. Murphy, 'The Charter of Fundamental Rights', in: *EU Law after Lisbon*, A. Biondi, P. Eeckhout, and S. Ripley (eds) (Oxford University Press, 2012), pp. 155-179, at pp. 155-159.
- 49 Treaty Establishing a Constitution for Europe, OJ 2004/C 310/01.
- 50 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ 2007/C 306/01.
- 51 Charter of Fundamental Rights of the European Union, OJ 2007/C 303/01. It was technically necessary to proclaim the revised version of the Charter as an independent document. The initial version from 2000 did not contain the amendments that were made when the Charter was included into the Constitutional Treaty and the amended version of the Charter from 2004 was an integral part of a larger document rather than a freestanding document (which was reflected in the numbering of the articles). The version of the ChFR from 2007 was re-proclaimed together with the consolidated version of the European Treaties in 2010, OJ 2010/C 83/02. The most recent consolidated document was published in October 2012, OJ 2012/362/02. On the three versions of the ChFR, see Martin Borowski, 'The Charter of Fundamental Rights in the Treaty on European Union', in: *The Treaty of Lisbon and the Future of European Law*, L. Rubini and M. Trybus (eds) (Cheltenham: Elgar, 2012), pp. 200-219, at pp. 207-208.

‘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.’ It is worth emphasizing that the decision was taken that the ChFR would not replace the ‘old layer’ of fundamental rights as general legal principles of Community/ Union law. Rather, the ‘old layer’ was preserved – in Article 6 (3) TEU (ToL) – and the ChFR was added as a ‘new layer’ by means of Article 6 (1) TEU (ToL).

III The European Union and the ECHR

The ‘Council of Europe’ was founded in 1949, distinct from the three European Communities, as a classic international organization. The Council of Europe follows the intergovernmental method, by contrast to the supranational method that characterized a good part of the Communities and characterizes now the European Union. Notwithstanding the fact that all 28 member states of the European Union are among the 47 member states of the Council of Europe and the ECHR, the ECHR as an instrument in regional international law with the European Court of Human Rights (ECtHR) in Strasbourg has, in principle, nothing to do with with the EU, EU law and the ECJ in Luxembourg. In particular, neither the Communities nor the Union were or are members of the Council of Europe or the ECHR.⁵² This is to say that the ECtHR in Strasbourg has no jurisdiction over the EU or EU law.

It is unfortunate that the EU escapes the jurisdiction of the ECHR. All EU member states are member states of the ECHR. The have created the EU and transferred some

52 See, *supra*, section A. II. 3. c).

of their sovereign rights to the EU. This led the ECHR in *Matthews*,⁵³ clarified in *Bosphorus*,⁵⁴ to hold that the member states of the EU (who are themselves all formally bound by the ECHR) are responsible for how the EU (which itself is not formally bound by the ECHR) exercises the transferred sovereign rights. To be sure, these sovereign rights are exercised autonomously by the EU; the member states have little, if any, influence on how EU organs exercise the Union's competences. Thus, Europe's regional system of protection of human rights in international law – the ECHR – will be only complete if and when the EU itself is formally subjected to the ECHR and the jurisdiction of the ECtHR in Strasbourg.

There has been quite some debate on the accession of the EC/EU to the ECHR since it had become apparent that the Community exercised the sovereign rights transferred to it autonomously. In its famous and notorious opinion from 1994 the ECJ stated that the Community lacked competence to accede to the ECHR.⁵⁵ Roughly two decades later it was finally agreed in the ToL that the Union would accede to the ECHR. Article 6 (2) clause 1 TEU (ToL), reads: 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms'. There can be little doubt that this provision establishes a binding legal obligation.⁵⁶ To be sure, 'accession' does not become a reality simply by being provided for in primary Union law; it must be established according to the rules of the Council of Europe.

53 *Matthews v. United Kingdom*, Appl. no. 24833/94, Decision of 18 February 1999, CEDH 1999-I.

54 *Bosphorus Hava Yollari Turizm ve Tocaret Anonim Sirketi v. Ireland*, Appl. no. 45036/98, Judgment of 30 June 2005, CEDH 2005-VI.

55 Opinion Pursuant to Article 228 (6) Treaty on European Community (TEC) [now Article 218 (11) TFEU], 28 March 1996, Court of Justice of the European Union, Case C-2/94.

56 See Craig and de Búrca, *EU Law* (fn. 24), p. 420.

Generally the ECHR was and is open to the member states of the Council of Europe. According to Art. 4 clause 1, Statute of the Council of Europe of 1949, 'European states' can become members of the Council of Europe: 'Any European State which is deemed to be able and willing to fulfil the provisions of Article 3 may be invited to become a member of the Council of Europe by the Committee of Ministers.' This rules the EU out, since it is a particular kind of international organization rather than a 'state'. At any rate, Protocol No. 14 to the ECHR of 2004 (in force since 2010) amended the ECHR by adding Article 59 (2) ECHR: 'The European Union may accede to this Convention.'

This provision looks, however, more promising than it actually is. The most important problem is that the EU has refused to accede to the ECHR by means of a one-sided legal declaration. To preserve the unique characteristic of the Union and Union law, an accession agreement is called for, in which a number of amendments to the ECHR are made to accommodate the special nature of the EU. The formal process follows the general rules for concluding treaties in Article 218 TFEU. The substantive requirements are set out in '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'. In short: In a lengthy and difficult process a 'Draft Accession Agreement' was drawn up, but rejected by the ECJ in its Opinion 2/13.⁵⁷ This opinion has brought the process of accession to a grinding halt and it is currently unclear how and when the EU's accession to the ECHR will have been accomplished.⁵⁸

57 Opinion Pursuant to Article 218 (11) TFEU, 18 December 2014, Court of Justice of the European Union, Case C-2/13.

58 See, for example, Steve Peers, 'The EU's Accession to the ECHR - The

IV Summing Up

The EU has two layers of comprehensive legal instruments for the protection of human rights: First, the layer of general principles of Union law according to Article 6 (3) TEU (ToL), which alone had to bear the load of protecting fundamental rights at the Community/Union level prior to the Treaty of Lisbon and, second, the ChFR according to Art. 6 (1) TEU (ToL).

C The Debate on the Protocol on the Charter of Fundamental Rights

Why was the decision taken to retain the ‘old layer’ in Article 6 (3) TEU? What is the relationship between these two layers? An analysis of the debate on the ‘Protocol (No 30) on the Charter of the Fundamental Rights of the European Union’ (PoC) will shed some light on this issue.

I The Genesis of the Protocol on the ChFR

The ChFR is binding, above all, for the Union and its institutions. It is also legally binding for the member states, albeit ‘only when they are implementing Union law’, Article 51 (1) ChFR.⁵⁹ When member states are acting in the

Dream Becomes a Nightmare’, *German Law Journal* 16 (2015), pp. 213-222; Craig and de Búrca, *EU Law* (fn. 24), pp. 421-422; Turkuler Isiksel, ‘European Exceptionalism and the EU’s Accession to the ECHR’, *European Journal of International Law* 27 (2016), pp. 565-589.

59 The interpretation of the term ‘implement’ in Article 51 (1) ChFR is the linchpin of the determination of the Charter’s field of application *vis-à-vis* Member States. Note that the phrase ‘when [the Member States] are implementing Union law’ might be narrower than the phrase ‘acting in the scope of Union law’. The ECJ held, for example, in *ERT* that ‘it has no power to examine the compatibility with the ECHR of national rules which do not fall within the scope of Community law. On the other hand, where

sphere of their original sovereignty, they are not committed to Union law in general and the ChFR in particular. The Charter's binding force at the national level gave, however, some Member States cause for serious concern. The driving force for the **'Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and**

such rules do fall within the scope of Community law, and reference is made to the Court for a preliminary ruling, it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures', Case C-260/89, *ERT*, [1991] ECR I-2925, para 42. The debate in the Convention on the Charter and the expression that was finally agreed - 'only when they are implementing Union law' - suggests that the Charter's field of application was intended to be narrower than the field of application of fundamental rights as general principles of Union law, Art. 6 (3) TEU (ToL), according to the *ERT* formula of the ECJ. This is to say that the field of application of the ChFR to member states would be narrower than the field of application of fundamental rights as general principles of Union law. The 'old layer' could then fill a gap that the ChFR, the 'new layer', leaves open. If this was a purpose of retaining the 'old layer', this arguably proved superfluous later. Note that the 'Explanations Relating to the Charter of Fundamental Rights' (Conv 354/02, WG II 16, OJ 2007/C 303/02) - which exhibit no binding force, see, *infra*, section C. V. 2. a) (aa) - ignore this difference. There the phrase 'only when they are implementing Union law' in Art. 51 (1) clause 1 ChFR is characterized in the tradition of the *ERT* formula. Referring to these explanations, the ECJ held in *Åkerberg Fransson*: 'Since the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.' (Case 617/10, *Åkerberg Fransson* [2013] 2 CMLR 46, para 21). While there may be good arguments on behalf of the idea that fundamental rights cover also cases in which the member states are acting 'within the scope of Union law' (see, for example, Bernhard Schima, *EU Fundamental Rights and Member State Action After Lisbon: Putting the ECJ's Case Law in its Context*, *Fordham International Law Journal* 38 (2015), pp. 1098-1133, at p. 1108; Craig and de Búrca, *EU Law* (fn. 24), pp. 415-418; both with further references), it is noteworthy that a gap resulting from a narrow interpretation of the field of application of the ChFR could have been filled by means of the 'old layer'.

to the United Kingdom' (Protocol No. 30) was the United Kingdom.⁶⁰ In the negotiations leading to the Lisbon Treaty in 2007 it expressed its wish to 'clarify' certain legal effects of the Charter. A protocol to the European treaties counts as a part of those treaties (Article 51 TEU), so that a protocol has the legal power to establish *leges speciales* at the level of primary EU law. Considering that the United Kingdom had signed the Constitutional Treaty, which included the ChFR as Part II, without any formal reservation two years earlier, the fact that its government insisted on a protocol strikes one as somewhat surprising.⁶¹ In September 2007, Poland declared its wish to join this protocol. As a result, the Protocol on the ChFR was annexed to the Reform Treaty of Lisbon as Protocol No. 30.

When The Czech Republic was the last member state to ratify the Lisbon Treaty in autumn 2009, it made ratification dependent on the guarantee that the notorious Beneš decrees from 1945-1946 would not be called into question.⁶² Against

60 Anthony Arnall, 'Protocol (No 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom', in: *The EU Charter of Fundamental Rights*, S. Peers, T. Hervey, J. Kenner, and A. Ward (eds) (Oxford and Portland, Oregon: Hart, 2014), pp. 1595-1612, at pp. 1599-1601.

61 See Paul Craig, 'The Treaty of Lisbon, Process, Architecture and Substance', *European Law Review* 33 (2008). pp. 137-166, at p. 163; Paul Craig, *The Lisbon Treaty* (Oxford University Press, 2010), p. 238; Arnall, 'Protocol (No 30) (fn. 58), p. 1600.

62 These decrees stripped the citizenship and appropriated the land of some two and a half million Germans, among other Europeans, after World War II. On the history and the circumstances on the expulsion of Germans, see Eagle Glassheim, 'National Mythologies and Ethnic Cleansing: The Expulsion of Czechoslovak Germans in 1945', *Central European History* 33 (2000), pp. 463-486. On the Beneš decrees in the context of the Czech Republic's ratification of the Treaty of Lisbon, see Steve Peers, 'The Beneš Decrees and the EU Charter of Fundamental Rights', available at: www.statewatch.org/news/2009/oct/lisbon-benes-decree.pdf, accessed on 14 October 2018. There are convincing reasons to assume that the ChFR

this backdrop, the Heads of State agreed at the European Council in Brussels from 29 to 30 October 2009 to comply with the request of the Czech Republic to join Protocol No. 30. According to the Presidency Conclusions, the 'Protocol on the Application of the Charter of Fundamental Rights of the European Union to the Czech Republic' was to 'be annexed' to the European Treaties.⁶³ Annexing a protocol to the European treaties counts as a treaty amendment, which needs ratification by all member states. It was envisaged to include the Czech Protocol into primary Union law with the next accession treaty. Owing to domestic political changes in the Czech Republic, the application to join the United Kingdom and Poland was eventually withdrawn in 2014.⁶⁴ It is also worth mentioning that Ireland had initially reserved the right to join the Protocol on the Charter, but finally desisted from joining.⁶⁵

would have had little effect on the legal evaluation of the Beneš decrees anyway. In that sense, it was more a symbolic political statement on the part of the Czech Government when it made ratification of the Lisbon Treaty dependent on its right to join the British and Polish Protocol on the ChFR.

- 63 Presidency Conclusions of the Brussels European Council on 29/30 October 2009, 15265/09 CONCL 3, Annex I. See Rudolf Streinz, 'Rechtliche Verankerung der Garantien für Irland und der "Fußnote" für Tschechien', in: *Rechtsfragen der Implementierung des Vertrages von Lissabon*, T. Eilmannsberger et al. (eds) (Vienna: Springer, 2011), pp. 23-45, at pp. 35-38.
- 64 On these developments between 2009 and 2014, see Jacques Ziller, 'Das Protokoll Nr. 30 über die Anwendung der Charta der Grundrechte der europäischen Union auf Polen und das Vereinigte Königreich', in: *Europäische Grundrechte-Charta*, K. Stern and M. Sachs (eds) (Munich: C.H. Beck, 2016), pp. 98-108, at pp. 100-102.
- 65 In discussions prior to the negative result in the first Irish referendum on the Treaty of Lisbon some issues related to fundamental rights played a prominent role. In particular, fear was spread by opponents of the Lisbon Treaty that the ChFR would force more 'liberal' laws on abortion in Ireland. The Treaty of Maastricht, however, saw the introduction of Protocol No 17 on the protection of unborn life in Ireland: 'Protocol on Article 40.3.3 of the Constitution of Ireland', see Cathryn Costello, 'Ireland's Nice Referenda',

The motives of the three Member States for negotiating and joining the Protocol were different. The government of the United Kingdom expressed concerns about social and economic rights in the Charter, especially the right to strike.⁶⁶ These concerns had earlier, in 2004, led to amendments to the initial version of the Charter with the intent of limiting the 'justiciability' of social and economic rights in the ChFR, in particular, in Title IV. It is far from clear, however, whether the relevant provisions – Article II-112 (5) and (7) CT, which became later Article 52 (5) and (7) ChFR – in fact secure that social and economic rights are 'non-justiciable'.⁶⁷ The insight that even the amended form of the Charter does not rule out that social and economic rights are regarded as 'justiciable' may well have played a role in the United Kingdom's decision to request another safeguard, the Protocol on the ChFR. What is more, the Protocol played a crucial role in internal affairs of the United Kingdom, namely, for the decision on whether a referendum on the Lisbon Treaty was to be held.⁶⁸

European Constitutional Law Review 1 (2005), pp. 357-382, at p. 362. This protocol became Protocol No 35 to the Lisbon Treaty. A complex package of guarantees assuaging Irish concerns was negotiated and agreed at various meetings of the European Council in 2008 and 2009, see Jean-Claude Piris, *The Lisbon Treaty* (Cambridge University Press, 2010), pp. 51-60. In the end, Ireland refrained from joining the Protocol on the ChFR.

66 Arnall, 'Protocol (No 30) (fn. 58)', p. 1600; Ziller, 'Das Protokoll Nr. 30' (fn. 62), p. 99.

67 See, *infra*, section C. V. 2. a).

68 On this dimension of the Protocol, see Michael Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts', *Common Market Law Review* 45 (2008), pp. 617-703, at pp. 665-666; Craig, *The Lisbon Treaty* (fn. 59), p. 238; Stephen Weatherill, *Cases and Materials on EU Law*, 9th edn (Oxford University Press: Oxford, 2010), p. 70; Arnall, 'Protocol (No 30) (fn. 58)', p. 1600. On the political background in the United Kingdom at that time, see Brendan Donnelly, 'A British Referendum on the Treaty?', in: *Der Vertrag von Lissabon: Reform der EU ohne Verfassung? – Kolloquium zum 10. Geburtstag des Walter Hallstein-Instituts für Europäisches Verfassungsrecht*, I. Pernice (ed) (Baden-Baden: Nomos, 2008), pp. 207-212.

The misgivings of the Polish government were different in nature. It took no issue with social and economic rights.⁶⁹ Rather, potential repercussions of some Charter rights on family law, first and foremost on abortion and on the issue of 'same-sex-marriages' were advanced, and concerns over claims for compensation for expropriations of Germans after World War II.⁷⁰ In addition to joining the Protocol, Poland made a unilateral declaration on certain aspects of legal effects of the ChFR.⁷¹

II An Overview of the Protocol on the ChFR

Apart from a full page of recitals, the Protocol boasts of two Articles. Article 1 (1) states that the Charter 'does not extend the ability' of the ECJ or any Polish or British court to find that 'the laws, regulations or administrative

69 On the contrary, Poland expressed explicitly in the 'Declaration by the Republic of Poland Concerning the Protocol on the Application of the Charter of Fundamental Rights of the European Union in Relation to Poland and the United Kingdom (Declaration No 62)' to respect the rights in Title IV of the Charter 'fully'. Considering the role of the trade unions in Poland's modern history, it does not come as a surprise that Poland endorses social and labour rights. Thus, one might say that negotiating an own protocol rather than joining the United Kingdom's protocol would have been more consequent for Poland. This was, however, hardly a realistic political option.

70 See Arnall, 'Protocol (No 30)' (fn. 58), p. 1601; Ziller, 'Das Protokoll Nr. 30' (fn. 62), p. 100. The former concern is well expressed in Poland's unilateral declaration mentioned in footnote 69.

71 See Declarations Annexed to the Final Act of the Intergovernmental Conference which Adopted the Treaty of Lisbon, 'Declaration by the Republic of Poland on the Charter of Fundamental Rights of the European Union (Declaration No 61)', OJ 2007/C 115, p. 358: 'The Charter does not affect in any way the right of Member States to legislate in the sphere of public morality, family law as well as the protection of human dignity and respect for human physical and moral integrity.' Unlike a protocol to the treaties, such unilateral declarations do have the force of primary Union law.

provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.’ Article 1 (2) of the Protocol ‘clarifies’ that ‘nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.’ Finally, to the extent that a provision of the Charter refers to national law or national practices, ‘it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom’, Article 2.

These two articles, which have been – understandably – characterized as ‘extremely clumsily worded’,⁷² raise a great many questions. Before a more detailed analysis of the provisions of the Protocol will be front and centre, a more general issue deserves attention: the nature of the Protocol on the Charter. Is it an ‘opt-out’ or a mere ‘clarification’?

72 Damian Chalmers, Gareth Davies, and Giorgio Monti, *European Union Law*, 2nd edn (Cambridge University Press, 2010), p. 258 (text changed in the 3rd edn). See also Dashwood et al., *Wyatt and Dashwood’s European Union Law* (fn. 41), p. 386: ‘[T]he wording is so carefully drafted as to be nebulous’; Arnull, ‘Protocol (No 30)’ (fn. 58), p. 1610: ‘Considering its brevity, Protocol 30 is unusually difficult to understand’; Vojtech Belling, ‘Supranational Fundamental Rights or Primacy of Sovereignty? Legal Effects of the So-Called Opt-Out from the EU Charter of Fundamental Rights’, *European Law Journal* 18 (2012), pp. 251-268, at p. 251: ‘one of the most difficult-to-interpret changes to primary law’; Ulrich Haltern, *Europarecht – Dogmatik im Kontext*, vol. 2: Rule of Law, Verbunddogmatik, Grundrechte (Tübingen: Mohr Siebeck, 2017), p. 656: ‘Das Protokoll dürfte zu den seltsamsten Blüten gehören, die das Unionsrecht je hervorgebracht hat, und es hat die Juristen weitgehend ratlos zurückgelassen.’ In English: ‘The Protocol is one of the strangest flowers that Union law has ever produced and jurists have been, by and large, at a loss’ (trans by M.B.).

III The Nature of the Protocol – ‘Opt-Out’ versus ‘Clarification’

While some commentators refer to the Protocol on the ChFR as an ‘opt-out’,⁷³ others insist emphatically that it is a ‘clarification’ or an ‘interpretative Protocol’.⁷⁴ In fact, the expressions ‘clarify’ and ‘clarifying’ can be found in the eighth recital and the ninth recital of the PoC. One commentator expressed the confusion on the nature of the Protocol by calling it a ‘non-opt-out opt-out.’⁷⁵ The reason for the confusion in the debate on the nature of the Protocol is that the expressions ‘opt-out’, ‘clarification’, and comparable terms are used with different meanings.

It is characteristic of an ‘opt-out’ from a legal instrument that legal effects to which that instrument gives rise are changed. An opt-out that changes no legal effects whatsoever is conceptually impossible; it is conceptually not an opt-out. Opt-outs need not, however, render the legal instrument in question wholly inapplicable; they can be complete or partial. Partial opt-outs affect only some legal effects of the relevant legal instrument. This can range from a nearly complete opt-out to a very modest partial opt-out,

73 See, for example, Niamh Nic Shuibhne, ‘The Reality of Rights: From Rhetoric to Opt-Out’, *European Law Review* 34 (2009), pp. 815-816, at p. 816; René Barents, ‘The Court of Justice after the Treaty of Lisbon’, *Common Market Law Review* 47 (2010), pp. 709-728, at p. 721.

74 See, for example, House of Lords – European Union Committee (HoL – EUC), 10th Report of Session 2007-08, ‘The Treaty of Lisbon: an Impact Assessment’, vol. 1, paras 5.87 and 5.103 (d); Daniel Denman, ‘The Charter of Fundamental Rights’, (2010) *European Human Rights Law Review* (2010), pp. 349-359, at p. 355. See also Ingolf Pernice, ‘The Treaty of Lisbon and Fundamental Rights’, in: *The Lisbon Treaty – EU Constitutionalism without a Constitutional Treaty?*, S. Griller and J. Ziller (eds) (Vienna and New York: Springer, 2008), pp. 235-256, at p. 245 *et passim*.

75 Catherine Barnard, ‘The EU Charter of Fundamental Rights: Happy 10th Birthday’, *European Union Studies Association Review* (2011), pp. 5-10, at p. 7.

which changes relatively little of the effects of the legal instrument in question. Thus, the expression 'opt-out' covers a broad spectrum, ranging from a complete opt-out to a very modest partial opt-out.

A 'clarification' authoritatively interprets a legal instrument. Among all plausible interpretations of this legal instrument one certain interpretation is declared to be authoritative and, therefore, legally binding. On a superficial reading, it seems that this does not change the legal situation at all. This impression is, however, deceptive. All competing interpretations of the relevant legal instrument are ruled out, even if there are good or even compelling arguments on behalf of them. For example, if there are convincing arguments for an interpretation of this or that provision in Title IV of the ChFR, according to which this provision grants a justiciable right, one might say that Article 1 (2) of the Protocol 'clarifies' the interpretation of the relevant provisions in Title IV of the Charter to the effect that this provision does actually not grant a justiciable right, in so far as the commitment of Poland and the United Kingdom is concerned. It is hard to miss, however, that calling such a protocol a 'clarification' or an 'interpretive protocol' is a euphemism for a partial opt-out. Thus, it is crucial to understand that one cannot simply put 'opt-out' opposite to 'clarification' - a 'clarification' can indeed be a partial opt-out.

There is, however, a different terminology, according to which 'opt-out' and 'clarification' are actually put opposite. Some use the term 'opt-out' in a very narrow sense, according to which only a complete opt-out counts conceptually as an 'opt-out'. Paradigmatic is a quotation from the Report of the European Union Committee of the House of Lords on the Lisbon Treaty: 'The Protocol is not an opt-out from the Charter. The Charter will apply in the UK, even if its inter-

pretation may be affected by the terms of the Protocol.⁷⁶ Even a superficial reading of the text of the Protocol on the ChFR makes clear, however, that this protocol not simply renders the Charter inapplicable to the United Kingdom and Poland. In this sense the statement that the Protocol is not an opt-out in the sense of a complete opt-out is trivial.⁷⁷ Consequently, Advocate General Verica Trstenjak stated in her opinion on a preliminary reference from a British court that ‘the question whether Protocol No 30 is to be regarded as a general opt-out from the Charter of Fundamental Rights for the United Kingdom and the Republic of Poland can be easily answered in the negative.’⁷⁸ To be sure, the true problem is whether and to what extent the Protocol changes the legal commitment of the United Kingdom and Poland to the ChFR, compared to the legal effects of the ChFR to other Member States of the EU. In other words, the true question is of whether and to

76 HoL – EUC (fn. 72), at para 5.87. See also the preceding two paragraphs, in which expert opinions are quoted. See also Piris, *The Lisbon Treaty* (fn. 63), p. 161: ‘A lot of commentators have considered that Protocol No. 30 constitutes an opt-out from the Charter. One can express that this opinion is not legally the case. There is no provision in the Protocol stating clearly that the Charter will not be legally binding for the United Kingdom and Poland’.

77 Thus, the statement of the United Kingdom Secretary of State for the Home Department – ‘The purpose of the Charter Protocol is not to prevent the Charter from applying to the United Kingdom’ – in *Saaedi* (Court of Appeal (Civil Division), *The Queen on the Application of NS v. Secretary Of State For The Home Department*, [2010] EWCA Civ 990, para 7) was hardly surprising. See also Patrick Layden and Tobias Lock, ‘Protection of Fundamental Rights post-Lisbon: The Interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and National Constitutions’, United Kingdom National Report for the FIDE XXV Congress, pp. 1-49, at p. 29, available at SSRN: <http://ssrn.com/abstract=1940381> (accessed 14 October 2018): To claim ‘that the Protocol in any way exempts the UK from its obligations under the Charter’ would be ‘an odd proposition’.

78 Opinion of Advocate General Verica Trstenjak from 22 September 2011, Case C-411/10, *NS v. Secretary of State for the Home Department*, para 167.

which extent the Protocol on the Charter is a partial opt-out. And, to repeat, there are no convincing reasons to limit the use of the term 'opt-out' to complete opt-outs.

Even if a 'clarification' can be a partial opt-out, it is not necessarily such an opt-out. It depends on whether one had to choose the interpretation, which the 'clarification' declares to be authoritative, in any case. If there is no seriously competing alternative interpretation of the legal instrument in question, a 'clarification' actually changes nothing whatsoever. This was the position of the United Kingdom Government when the Protocol was negotiated. A leading member of this government stated: The Protocol 'puts beyond doubt what should have been obvious from other provisions'.⁷⁹ In the same vein: 'The negotiations at the June European Council and the subsequent Intergovernmental Conference provided [UK] Government with the opportunity to bolster existing safeguards and set in stone how the Charter will operate in the UK, as in all Member States.'⁸⁰ From this standpoint the Protocol only spells out how the provisions of the ChFr are to be interpreted in *all* Member States rather than only in the United Kingdom and Poland.⁸¹ The following line in the report of the European Union Committee of the House of Lords on the Lisbon Treaty does not come as a surprise, then: '[I]t is perhaps a matter of regret, and even a source

79 Jack Straw, quoted in HoL - EUC (fn. 72), at para 5.96.

80 Lord Goldsmith, quoted in HoL - EUC (fn. 72), at para 5.102.

81 Catherine Barnard points to the eighth recital of the Protocol on the ChFR as evidence that this was actually the 'original intention behind Protocol 30', but that then 'only Poland and the United Kingdom agreed to it', Barnard, 'The EU Charter of Fundamental Rights: Happy 10th Birthday' (fn. 73), p. 7. The eighth recital notes, however, the 'wish' only 'of Poland and the United Kingdom to clarify certain aspects of the application of the Charter'. The wording of the following recital, the ninth recital, makes clear that legal effects of the Charter *vis-à-vis* other Member States are not affected.

of potential confusion, that it was not expressed to apply to all Member States.⁸²

If one is convinced that a different interpretation of the ChFR is seriously competing or even more convincing than the interpretation favoured by the Government of the United Kingdom, things change. From this standpoint the Protocol on the ChFR is a partial opt-out (see above). To state the obvious: The very fact that a protocol with the ‘clarification’ was regarded necessary by the United Kingdom suggests that the other Member States did not share the United Kingdom Government’s view on how to interpret the ChFR.

To conclude, the Protocol on the ChFR is a ‘clarification’ or an ‘interpretative protocol’ in the sense that the Government of the United Kingdom tried to establish its own particular interpretation of the ChFR as authoritative. In so far as there are good or even compelling arguments for a different interpretation – the following sections will demonstrate that this is the case for two of the three provisions of the Protocol on the Charter – the Protocol proves to be a partial opt-out.

IV The General Fear of ‘Competence Creep’

The Protocol on the ChFR has been characterized as an expression of the fear of ‘competence creep’.⁸³ As already

82 HoL – EUC (fn. 72), at para 5.103 (d). See also Layden and Lock, ‘Protection of Fundamental Rights post-Lisbon’ (fn. 75), pp. 29-30. Surprisingly, a German commentator supported the view that Article 1 (2) PoC counts as an authoritative interpretation of the provisions in Title IV of the ChFR, which is binding for all Member States (he does not, however, mention the EU itself): Franz Josef Lindner, ‘Zur grundsätzlichen Bedeutung des Protokolls über die Anwendung der Grundrechtecharta auf Polen und das Vereinigte Königreich’, *Europarecht* 43 (2008), pp. 786-799, at p. 798. This view cannot, however, be reconciled with the clear wording of Article 1 (2) PoC, in which only ‘justiciable rights applicable to Poland or the United Kingdom’ are ruled out.

83 See, for example, Dashwood et al., *Wyatt and Dashwood’s European Union*

mentioned,⁸⁴ the EU has attributed competences rather than the original power in the sense of sovereignty, Article 5 (2) TEU. Competence creep is the phenomenon, according to which the competences attributed to the Union are interpreted excessively wide at the cost of the original sovereign competence of the Member States. This issue was particularly discussed with an eye to rather general attributed competences of the Community, in particular Article 95 and 308 TEC. The Treaty of Lisbon has brought about some substantive and procedural changes in the general distribution of competences between the Union and the Member States, some of which address the concern of competence creep.⁸⁵

With an eye to the general fear of competence creep by means of provisions of the ChFR it deserves to be emphasized that the Treaty of Lisbon contains a provision that explicitly rules out such competence creep. Immediately after the cross-reference in Article 6 (1) TEU (ToL) that incorporates the ChFR into primary EU law, one reads in clause 2: 'The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.' In the same vein, Article 51 (2) ChFR states: 'The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for

Law (fn. 41), p. 386.

84 See, *supra*, section A. II. 3. c).

85 On the discussion on 'competence creep', see Stephen Weatherill, 'Competence Creep and Competence Control', *Yearbook of European Law* 23 (2004), pp. 1-55; Paul Craig, 'Competence: Clarity, Conferral, Containment and Consideration', *European Law Review* 29 (2004), pp. 323-44; Dashwood et al., *Wyatt and Dashwood's European Union Law* (fn. 41), p. 105-111. Specifically on the changes brought about by the Treaty of Lisbon, see Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts' (fn. 66), at pp. 652-661; Craig, 'The Treaty of Lisbon, Process, Architecture and Substance' (fn. 59), pp. 144-151; Craig and de Búrca, *EU Law* (fn. 24), pp. 75-103.

the Union, or modify powers and tasks as defined in the Treaties.’

It is far from clear, however, whether these blanket provisions ruling out a competence creep effectively bar the interpretation of the provisions of the ChFR the United Kingdom and Poland were worried about.⁸⁶ In that sense it is perfectly understandable that the governments of these Member States felt that they could not simply rely on Article 6 (1) clause 2 TEU (ToL) and Article 51(2) ChFR. Rather, these issues are a matter of the interpretation of the relevant provisions of the ChFR.

V The Three Provisions of the Protocol on the ChFR

The analysis of whether and to what extent the Protocol limits the legal effects of the ChFR has to be carried out for each of the three provisions of the Protocol respectively. There is, however, one aspect common to all three provisions: they concern only legal effects of the ChFR *vis-à-vis* the United Kingdom and Poland. Pursuant to the three provisions of the Protocol, the commitment of the institutions of the Union and of other Member States to the Charter are left untouched. In this sense, the question is not whether the ChFR applies *in* the United Kingdom and Poland. Everyone *in* these member states may file an action for annulment according to Article 269 (4) TFEU against a legal act of the Union, based on a supposed violation of a right in the ChFR. The question is only to what extent the ChFR applies *to* the United Kingdom and *to* Poland.

86 As already mentioned, the specific concerns of the United Kingdom and Poland were quite different, see, *supra*, section C. I.

1 No 'Extension' of the Power of Courts through the ChFR, Article 1(1) PoC

The Protocol does not generally rule out any legal effects of the Charter *vis-à-vis* the United Kingdom and Poland. Rather, it states that the ChFR does not 'extend' the power of the ECJ, British, and Polish courts to find a violation of rights of the ChFR by these Member States.

a) The Point of Comparison: Article 6 (3) TEU (ToL) – the 'Old Layer'

'Extend' compared to what? As explained in section B., the architectonic of the protection of fundamental rights in the Lisbon Treaty comprises two layers, the ChFR according to Article 6 (1) TEU (ToL) – the 'new layer' – and fundamental rights as general principles of Union law according to Article 6 (3) TEU (ToL) – the 'old layer'. Against this backdrop, the point of comparison for whether the ChFR extends the power of courts is the other main instrument, the 'old layer'. Thus, in so far as fundamental rights as general principles of Union law correspond to rights of the ChFR, the ChFR does not extend any judicial power. Where the 'new layer' does not go beyond the 'old layer', nothing is extended. To the extent in which the legal protection of fundamental rights as general principles of Union law and as rights in the ChFR are congruent, even Poland and the United Kingdom are fully committed to the ChFR. To be sure, whether they are actually completely congruent or whether and to which extent they are not congruent, is precisely the contentious issue.

b) The ChFR as a Mere Reaffirmation of Rights Already Granted?

The ChFR 'extends' the protection of fundamental rights compared to general principles of Union law, if and when the ChFR grants additional protection. The greater the additional protection, the greater the extension. Commentators often emphasize, however, that the ChFR is a mere 'reaffirmation' of rights. If this is literally true, the ChFR does not 'extend' the protection of fundamental rights.⁸⁷ Indeed, the fifth recital of the Preamble to the ChFR explicitly states that the ChFR 'reaffirms' the rights as they result from constitutional traditions of the member states and their international obligations, and from the case law of the ECJ and the ECtHR. What is more, the sixth recital of the Protocol also emphasizes that the Charter 'reaffirms' rights, and that it 'does not create new rights or principles.' Finally, Article 1 (1) PoC also underscores that the Charter 'reaffirms' rights.

(aa) Plausible Cases of Innovations and Extensions

It is certainly true that the ChFR is not first and foremost a collection of innovations. Commentators have, however, noted that the Charter contains 'several innovative provisions', for example, the prohibition of reproductive cloning of human beings according to Article 3 (2) lit d ChFR. This suggests that there is a *new right* not to be cloned. Or is this only a *reaffirmation* of the right to the singularity of the human being that was/is already contained in human dignity as a

87 See, for example, HoL - EUC (fn. 72), at para 5.103 (a); Denman, 'The Charter of Fundamental Rights' (fn. 72), p. 355; Craig, 'The Treaty of Lisbon, Process, Architecture and Substance' (fn. 59), p. 163; Pernice, 'The Treaty of Lisbon and Fundamental Rights' (fn. 72), p. 245.

general principle of Community/Union law?⁸⁸ The same could be asked for Article 13 ChFR, freedom of the arts – is this a new right, or was/is this right already covered by fundamental rights as general principles of Community/Union law?⁸⁹ To give only a third example,⁹⁰ the wording of the right to marry and to found a family, Article 9 ChFR, has changed compared to Article 12 ECHR, and this may well have strengthened the protection.⁹¹ To be sure, what counts as a ‘new right’ or as a ‘reaffirmation of an old right’ depends on the interpretation of the *acquis communautaire* of fundamental rights as general principles of Community/Union law, which is in many respects unclear and controversial. There are, however, at least plausible arguments on behalf of the thesis that the ChFR strengthens the protection here and there to some extent.

(bb) More Weight in the Balancing

What is more, a ‘reaffirmation’ of rights can strengthen the protection of rights that were, in principle, already granted. According to the fourth recital of the Preamble to the Charter, ‘it is necessary to strengthen the protection of fundamental rights [...] by making those rights more visible in a Charter.’ If the Charter is supposed to *strengthen* the protection of mainly pre-existing rights, the protection of rights

88 On human dignity as a general principle of Community law, see Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH* [2004] ECR I-9641, para 34.

89 See Barnard, ‘The EU Charter of Fundamental Rights: Happy 10th Birthday’ (fn. 73), p. 8.

90 There may well be more examples. See, for example, on Articles 47 and 50 ChFR, Layden and Lock, ‘Protection of Fundamental Rights post-Lisbon’ (fn. 75), pp. 27-28.

91 See footnote 154.

already granted – as general principles of Community law – needs to be strengthened. What, then, changes by ‘making [...] rights more visible in a Charter’? The difference brought about by the Treaty of Lisbon is that the ECJ now has a clear, explicit, and detailed mandate to protect fundamental rights in a bill of rights in written primary Union law.

This mandate has more authoritative force, compared to the self-created mandate of the ECJ to determine fundamental rights as general legal principles in its own case law.⁹² Even though this mandate was confirmed by Article F (2) TEU (ToM) and later Article 6 (2) TEU (ToA), this confirmation was purely formulaic and did not place fundamental rights fully on equal par with rights expressly provided for in the European Treaties, particularly with the Community’s and later the Union’s market freedoms. A much clearer and stronger mandate in written primary Union law strengthens the protection of the rights by giving them, not least of all, more weight in the balancing with competing rights and interests.⁹³ This view is increasingly shared among commentators. In their standard work on constitutional law by Colin Turpin and Adam Tomkins, they write: ‘[T]here can be no doubt that [...] the Charter has significantly raised the profile of rights in the EU legal order. [...] Even if the Charter of itself does not alter the *content* of EU law (by adding to its rights), surely it is likely to alter the *weight* to be accorded in EU law to such rights as are contained in the Charter.’⁹⁴ Or, to quote Catherine Barnard: ‘[T]he incorporation of the Charter

92 On this self-created mandate, see, *supra*, section B. I.

93 See Borowski, ‘The Charter of Fundamental Rights in the Treaty on European Union’ (fn. 49), p. 231. See also Craig, ‘The Treaty of Lisbon, Process, Architecture and Substance’ (fn. 59), p. 164.

94 Colin Turpin and Adam Tomkins, *British Government and the Constitution*, 7th edn (Cambridge University Press, 2011), pp. 329-330 (emphasis in the original).

might require a re-evaluation of the competing rights. No longer can it be assumed that the economic freedoms should take priority. Rather there should be more genuine balancing between the competing interests.⁹⁵ Finally, a standard work on European Union law states that ‘the Charter will have positive effects not least in making the European judiciary more confident in developing its own fundamental rights jurisprudence and holding the EU institutions to proper account.’⁹⁶ The changes in the balancing will not necessarily be drastic; they ought to be, however, noticeable.

cc) More Epistemic Certainty

It was outlined that according to the argument from authoritative cognition, there is a great deal of uncertainty as to what human rights require in a case at hand.⁹⁷ This counts as an argument on behalf of a legal framework that establishes legal certainty by establishing substantive content and attributing competences. Legal certainty begins with the question of what counts as a human right. Which interest of the individual is so important that it deserves particular protection? A written bill or rights that records several liberty rights, equality rights and positive rights in quite a few provisions gives rise to more epistemic certainty – in other words: more clarity – than a reference to general principles of Union law. A good illustration of this fact is human dignity. Advocate General Christine Stix-Hackl needed about five pages (para 74 to 92) in her opinion in *Omega* to justify that human dignity as a fundamental right counts as a ge-

95 Barnard, ‘The EU Charter of Fundamental Rights: Happy 10th Birthday’ (fn. 73), p. 9.

96 Dashwood et al., *Wyatt and Dashwood’s European Union Law* (fn. 41), p. 387.

97 See, *supra*, section A. II. 2.

neral principle of Union law.⁹⁸ Compare that to the short and clear statement in Article 1 ChFR: ‘Human dignity is inviolable. It must be respected and protected.’ Since both empirical and normative epistemic uncertainty may well decrease the weight of rights in balancing according to the principle of proportionality,⁹⁹ more epistemic certainty leads to greater weight. This is another aspect for greater weight of fundamental rights according to the ChFR, compared to fundamental rights of the ‘old layer’.

(dd) Summary

To sum up, the ChFR is for the biggest part a reaffirmation of rights that were already granted in the EU before the Treaty of Lisbon. The ChFR in its legally binding form as a part of written primary Union law, however, generally strengthens the protection of the interests of the individual by giving the ECJ a clearer and stronger mandate for the protection of fundamental rights and by reducing epistemic uncertainty as to what counts as a fundamental right. Thus, there is reason to assume that the ChFR strengthens the protection of fundamental rights in the EU to some extent. In that sense and to this extent, the ChFR actually extends the power of the courts to find violations of fundamental rights. Article 1 (1) PoC, which rules out such an extension for Poland and the United Kingdom, proves to be an, albeit modest, partial opt-out.

Interestingly, this goes contrary to the finding of the ECJ in *N.S.* In this preliminary reference the Court was asked whether the Protocol on the ChFR can be regarded as an

98 Opinion of General Advocate Stix-Hackl from 18 March 2004, Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH* [2004] ECR I-9611.

99 This is a topic in and of itself. See, for example, Borowski, *Grundrechte als Prinzipien* (fn. 8), pp. 177-190 with further references.

opt-out. Advocate General Verica Trstenjak stated that the Protocol on the Charter cannot be regarded as a general opt-out from the ChFR.¹⁰⁰ This is correct, but follows trivially from the wording. The only other remark with an eye to Article 1 (1) PoC was to point out that this provision ‘merely reaffirms the normative content of Article 51’ ChFR.¹⁰¹ The ECJ referred to these passages in the Advocate General’s opinion and held: ‘Protocol No 30 does not call into question the applicability of the Charter in the United Kingdom or Poland’, with particular reference to the fact that according to the sixth recital to the preamble of the ChFR, ‘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.’¹⁰² This led the ECJ to the following conclusion: ‘Article 1 (1) of Protocol (No 30) explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions.’¹⁰³ It is quite obvious that the reasoning of the Court remains – in kind words – undercomplex. It might also be important to point out that the eleventh recital of the Preamble of the Protocol, which states that ‘this Protocol is without prejudice to the application of the Charter to other Member States’, would be meaningless if it changed nothing.¹⁰⁴

100 Opinion of Advocate General Verica Trstenjak from 22 September 2011, Case C-411/10, *NS v. Secretary of State for the Home Department*, para 167.

101 *Ibid.*, para 169.

102 Joined Cases C-411/10 and C-493/10, Judgment of the Court (Grand Chamber) of 21 December 2011, *N.S. and M.E.* [2011] ECR I-13905, para 119.

103 *Ibid.*, para 120.

104 See Anderson and Murphy, ‘The Charter of Fundamental Rights’

A German commentator has characterized the approach of the ECJ in *N.S.* and *M.E.* with the expression that the Court ‘interpreted away’ (*weginterpretiert*) the legal effects of Article 1 (1) PoC.¹⁰⁵ This may be read as hinting at the allegation that the Court arrived at its conclusion for political rather than legal reasons. At any rate, there are good reasons to assume that the ChFR strengthens the protection of fundamental rights and that to that extent Article 1 (1) PoC may have legal effect – be it modest and, owing to the dynamic character of the points of comparison,¹⁰⁶ even in its modest extent possibly only temporary.

c) A Limitation of the Power of the Courts Only

It deserves to be emphasized that the wording of Article 1 (1) PoC only limits the power of the ECJ and of the national courts to review British and Polish national law by the yardstick of the ChFR. This is only one aspect of the commitment of the member states to the ChFR.¹⁰⁷ According to the clear wording of Article 1 (1) PoC, the commitment to the ChFR of the branches of government other than the judiciary remains unaffected by this provision. This is to say that the British and the Polish executive as well as the British and the Polish legislature remain fully committed to the ChFR, independent of whether the ChFR ‘extends’ the power of courts. In so far as these branches of government other than the judiciary should fail to respect an aspect that represents

(fn. 46), pp. 166-167; Arnulf, ‘Protocol (No 30)’ (fn. 58), p. 1604; Ziller, ‘Das Protokoll Nr. 30’ (fn. 62), p. 104.

105 Wolfgang Weiß, ‘Grundrechtsschutz in der EU: Quo Vadis?’, *Europäische Zeitschrift für Wirtschaftsrecht* 2012, pp. 201-202, at p. 202.

106 See, *infra*, section C. V. 1. d).

107 See also Ziller, ‘Das Protokoll Nr. 30’ (fn. 62), p. 105 with an eye to the legislature.

an 'extension' to which the ChFR gives rise, owing to Article 1 (1) PoC neither a British or Polish court nor the ECJ can, however, establish a violation of the ChFR. Admittedly, it is difficult to determine whether an 'extension' of the power of courts brought about by the ChFR is at stake in a given case and the commitment of branches of government other than the judiciary is rather theoretical in so far as 'non-justiciable' aspects are concerned. At any rate, the emphasis on limiting the power of courts is telling, because it reveals that the Protocol on the ChFR is a particular expression of distrust *vis-à-vis* courts – of distrust, not least of all, *vis-à-vis* the ECJ.

d) The Dynamic Nature of the Point of Comparison

Finally, the question arises as to whether the point of comparison for determining whether and to what extent the Charter counts as an 'extension', Article 6 (3) TEU (ToL), is *static* or *dynamic* in nature. The point of comparison is static in nature if a point in time is decisive – in the case of Article 6 (3) TEU (ToL) the point in time would be 1 December 2009, when the Treaty of Lisbon became effective. The level of protection granted by Article 6 (3) on 1 December 2009 would count as the point of comparison.

Article 6 (3) TEU (ToL), and the same applied to all precursor provisions – Article F (2) TEU (ToM) and Article 6 (2) TEU (ToA) – is, however, dynamic in nature. Also the case law of the ECJ that these provisions confirm has ever had dynamic character. What is more, the sources of inspiration, to which Article 6 (3) TEU (ToL) refers, are dynamic in nature. The constitutional traditions common to the Member States evolve over time, and the same applies to the protection of human rights granted by the ECHR. In particular, new protocols to the ECHR may extend the scope of the protec-

tion of fundamental rights and also the interpretation of the Convention rights by the ECtHR in Strasbourg evolves. This dynamic nature of fundamental rights as general principles of Community law and later Union law has always been part of the *acquis communautaire*. Nothing in the Protocol on the ChFR indicates that this Protocol would affect the *acquis communautaire* with an eye to fundamental rights as general principles of Community or Union law.¹⁰⁸

Thus, Article 6 (3) TEU (ToL), the point of comparison for the determining whether and to which extent the ChFR extends the power of courts according to Article 1 (1) PoC, is dynamic in nature. To be sure, also the interpretation of the provisions of the ChFR will evolve over time. This is to say that both points of comparison are dynamic in nature. It is difficult to predict precisely with which speed both layers of protection will evolve. In general, there will be a tendency towards a convergence of both layers to a 'single standard' of the protection of fundamental rights.¹⁰⁹ To the extent that such convergence of both layers will have been achieved, the ChFR will not grant more protection than Article 6 (3) TEU (ToL). If and when this will have been fully achieved, the ChFR will not 'extend' the power of the courts any more; Article 1 (1) PoC will have lost any legal effect.

e) Summary

The Charter 'extends' the protection of the rights it reaffirms by providing a clear and detailed mandate for the protection of fundamental rights in written primary Union

108 See, for example, Craig, 'The Treaty of Lisbon, Process, Architecture and Substance' (fn. 59), p. 163.

109 On the trend towards convergence, see Borowski, 'The Charter of Fundamental Rights in the Treaty on European Union' (fn. 49), p. 219 *et passim*.

law, which will result in ascribing more weight to these rights in the balancing with competing rights and interests. By limiting this 'extension' in so far as Poland's and the United Kingdom's commitment to the ChFR is concerned, Article 1 (1) PoC is technically a partial opt-out from legal effects of the Charter.

This opt-out is, however, qualified in two respects. To begin with, because the ChFR is for the biggest part a reaffirmation of fundamental rights as general principles of Community/Union law, it extends the protection of fundamental rights by some margin, but may not be immediately noticable. The opt-out from such a margin is a rather modest opt-out. Second, the tendency towards convergence of rights of the ChFR and fundamental rights as general principles of Union law will quite likely diminish the relevance of this opt-out up to the point at which Article 1 (1) PoC may well have lost any legal effect whatsoever.

2 No Justiciable Rights in Title IV of the ChFR, Article 1 (2) PoC

Is Article 1 (2) PoC also an opt-out? This provision states that, 'for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law'. This provision reflects the concern of the government of the United Kingdom that social and economic rights in Title IV of the Charter could be interpreted as an expansion of Union competence in labour law, providing a basis for judicial activism of the ECJ or domestic courts. To be sure, if provisions in Title IV of the ChFR do not grant 'justiciable

rights' anyway, Article 1 (2) PoC changes nothing.¹¹⁰ Only if some of these rights are actually justiciable, Poland¹¹¹ and the United Kingdom had opted out from the 'justiciability'¹¹² of these rights by means of Article 1 (2) PoC.

a) Do Provisions in Title IV of the ChFR Grant 'Justiciable Rights'?

The expression 'for the avoidance of doubt' in Article 1 (2) PoC reflects that this provision of the Protocol is an attempt to secure an interpretation of all provisions in Title IV of the ChFR in conjunction with Article 52 (5) ChFR, according to which these provisions do not give rise to 'justiciable rights', legal positions that the holders of the rights are empowered to enforce before the courts. This raises the question as to whether the provisions in Title IV of the ChFR, Article 27 to 38, are 'principles' in the sense of Article 52 (5) ChFR and whether the nature of such 'principles' rules out that they give rise to 'justiciable rights'. To make things worse, a comprehensive answer to the first question depends on the answer to the second – you can only answer the question which provisions give rise to 'principles' if you have understood the characteristics of 'principles'.

The United Kingdom had preferred from the outset that the ChFR never attained the status of binding law. When this

110 See, for example, Juliane Kokott and Christoph Sobotta, 'Die Charta der Grundrechte der Europäischen Union nach dem Inkrafttreten des Vertrages von Lissabon', *Europäische Grundrechte-Zeitschrift* 2010, pp. 265-271, at p. 270.

111 Poland's Declaration No 62 does not count as an 'opt-out from the opt-out', for a Declaration has not the power to amend a Protocol. See footnote 151 and the accompanying text.

112 This opt-out would not render provisions in Title IV of the Charter inapplicable to Poland and the United Kingdom; it would render these provisions 'non-justiciable'.

proved impossible, the horizontal provisions, now Art. 52 (4) to (7) ChFR, were introduced when the ChFR was included in the Constitutional Treaty (as Articles II-112 [4] to [7]).¹¹³ The United Kingdom's idea was to avoid to empower the ECJ to enforce economic and social rights.¹¹⁴ This is why the distinction between 'rights' and 'principles' is particularly geared to provisions in Title IV of the ChFR, although Article 52 (5) ChFR does not explicitly say so.

aa) The 'Explanations' – Which Provisions of the ChFR Establish 'Principles'?

With an eye to the question which provisions give rise to 'principles' rather than 'rights', there is some limited guidance in the 'explanations' on the ChFR. The original version of these explanations was 'prepared at the instigation of the Praesidium' of the Convention of the Charter,¹¹⁵ the explanations were not, however, approved by the plenary of the Charter Convention.¹¹⁶ In the second sentence of the initial version of these 'explanations', they characterize themselves as having 'no legal value'. An amended version

113 On the three versions of the ChFR, see footnote 49.

114 See, for example, Arnall, 'Protocol (No 30) (fn. 58)', p. 1600. Lord Goldsmith played an important role in drafting the horizontal provisions, among them Article II-112 (5) CT and now Article 52 (5) ChFR. It was later Lord Goldsmith who drafted the Protocol on the ChFR, so that there was continuity with an eye to the people behind placing in perspective social and economic rights by means of (what was later) Article 52 (5) ChFR in the Constitutional Treaty and later, in the Treaty of Lisbon, by means of Article 1 (2) PoC.

115 Note from the Praesidium of the Convention: Explanations on the Charter of Fundamental Rights of the European Union (Brussels, 11 October 2000) CHARTE 4473/00 CONVENT 49.

116 See Anthony Arnall, 'From Charter to Constitution and Beyond – Fundamental Rights in the New European Union', Public Law 2003, pp. 774-793, at p. 784.

of the 'explanations' was produced in 2007 in Working Group II of the European Convention.¹¹⁷ The language of their self-characterization changed slightly. The second sentence of the amended version of the 'explanations' now reads: 'Although they do not have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter.' The language in the amended version is somewhat more positive, but the decisive issue is the same: The 'explanations' do not have the authoritative status of binding law. They may become relevant in legal interpretation as some form of 'soft law', but might well be outweighed by competing arguments in legal argumentation.¹¹⁸ Since this self-characterization forms an integral part of the explanations themselves, the parts of the 'explanations' beyond this self-characterization cannot become legally binding by external reference or incorporation by means of binding law.¹¹⁹ In substance, these 'explanations' attempt to classify some provisions of the ChFR as establishing merely non-justiciable 'principles'.¹²⁰ Things are complicated further by clause 7 of the 'explanations' on Article 52 (5) ChFR: 'In some cases, an Article of the Charter may contain both ele-

117 CONV 354/02, WG II 16, OJ 2007/C 303/02.

118 See Borowski, 'The Charter of Fundamental Rights in the Treaty on European Union' (fn. 49), pp. 208-210.

119 There are actually three provisions in primary EU law that refer to the 'explanations': the second sentence of the fifth recital of the Preamble of the ChFR, Article 52 (7) ChFR, and Article 6 (1) clause 3 TEU. Strangely, the third recital of the Protocol on the Charter claims that 'the aforementioned Article 6 (1) clause 3 TEU requires the Charter to be applied and interpreted by the courts of Poland and of the United Kingdom *strictly* in accordance with the explanations referred to in that Article'. (emphasis added). Article 6 (1) clause 3 TEU actually does not – it requires only 'due regard'. This nuance is, however, hardly decisive.

120 See, in particular, the 'explanations' on Article 34 (1), 35, 36, 37, and 38 ChFR.

ments of a right and of a principle.’ The key characteristic is expressed in clause 4: ‘They do not however give rise to direct claims for positive action by the Union’s institutions or Member States authorities.’

bb) The Characteristics of ‘Principles’ According to Article 52 (5) ChFR

There has been much debate on the characteristics of ‘principles’ according to Article 52 (5) ChFR. The ChFR, incorporated by means of Article 6 (1) TEU, has the nature of a multilateral international treaty. This is to say that the wording is the result of a compromise between and among parties with different intent, so that the wording carries particular weight in the interpretation (Article 31 [1] of the Viennese Convention of the Law of Treaties).¹²¹ The wording of Article 52 (5) ChFR states: ‘The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.’ The key word in clause 1 is ‘may’ – there is no legal obligation of the addressees of the ChFR to implement a ‘principle’. They may or they may not, this is legally indifferent. Clause 2 has two messages, a negative and a positive one. The negative message is that a ‘principle’ in and of itself is not ‘judicially cognisable’, if and when there is no legislative and executive act that implements the ‘principle’. The positive

121 In the case of the supranational European Treaties, this method in interpreting treaties in public international law is often supplemented with teleological interpretation.

message is that ‘principles’ are indeed ‘judicially cognisable’, if and when there is such a legal act that implements the ‘principle’, in this case courts are under an obligation (‘shall be judicially cognisable’) to use the ‘principle’ as a yardstick ‘in the interpretation of such acts and in the ruling on their legality’. It is not explicitly mentioned, but understood that ‘rights’ are judicially cognisable independent from whether there is an implementing legal act or not.

In the first place, it is important to understand that this distinction between ‘rights’ and ‘principles’ does not follow any existing model and is, in this sense, completely artificial.¹²²

cc) Three Key Characteristics of ‘Justiciable Rights’

To make sense of the completely artificial and unprecedented distinction in Article 52 (5) ChFR, it proves helpful to sketch the three key characteristics of what one might call ‘justiciable rights’. They are recorded in legal norms that are binding, these norms grant subjective rights rather than establish merely objective norms, and they typically grant *prima facie*-rights that can and must be limited, subject to proportionality analysis.

(1) Legally Binding Norms

Legally binding norms are norms the violation of which can be established by courts.¹²³ If a violation is established,

122 A comprehensive and detailed enquiry into this issue goes well beyond the scope of this paper. See Borowski, ‘The Charter of Fundamental Rights in the Treaty on European Union’ (fn. 49), pp. 210-213; see also Christopher J. Hilson, ‘Rights and Principles in EU Law: A Distinction without Foundation?’, *Maastricht Journal of European and Comparative Law* 15 (2008), pp. 193-215.

123 Borowski, *Grundrechte als Prinzipien* (fn. 8), p. 373; Martin Borowski, *Die*

the court will impose a sanction to enforce the law. The argument from effective enforcement¹²⁴ requires that the transformation of human rights as moral rights into law result in legally binding norms. Instances of fundamental rights recorded in norms that are not legally binding – for example, the ChFR from 2000 until the incorporation into primary Union law with the Treaty of Lisbon, or *Programmsätze* under the Constitution of the German Reich of 1919 ('Weimar Constitution')¹²⁵ – fall short of a full transformation, if and when there is a corresponding human right. This is to say that a right can lack the character of being 'judicially cognisable' because the norm that provides for this right is not legally binding.

(2) Subjective Rights and Merely Objective Norms

Characteristic of subjective rights is that a binding norm establishes a legal position that is beneficial for the holder of this position and that the holder of this position has the legal power to initiate legal proceedings before the courts to enforce his or her subjective right. By contrast, a merely objective (binding) norm establishes a legal position, but does not grant legal power to the individual to commence court proceedings. The merely objective norm may well be enforced, however, by officials of the legal system, namely, courts or administrative agencies or bodies.¹²⁶ If 'judicially cognisable' in Art. 52 (5) ChFR is characterized by the phrase

Glaubens- und Gewissensfreiheit des Grundgesetzes (Tübingen: Mohr Siebeck, 2006), pp. 219-221 with further references.

124 See, *supra*, section A. II. 2.

125 See Borowski, *Die Glaubens- und Gewissensfreiheit des Grundgesetzes* (fn. 122), pp. 45-46 with further references.

126 Borowski, *Grundrechte als Prinzipien* (fn. 8), pp. 373-380; Borowski, *Die Glaubens- und Gewissensfreiheit des Grundgesetzes* (fn. 122), pp. 222-227.

‘They do not however give rise to direct claims for positive action by the Union’s institutions or Member States authorities’ in clause 4 of the ‘explanations’, a ‘principle’ is not ‘judicially cognisable’ if it counts as an objective norm rather than a subjective right.

(3) Prima Facie-Rights Rather than Definitive Rights

Finally, constitutional rights or fundamental legal rights record prima facie-rights rather than definitive rights.¹²⁷ This is to say that, in the case of a negative right or liberty right, an interference with the individual’s liberty can be justified subject to, not least of all, proportionality analysis.¹²⁸ In the case of a positive right, a concretization takes place by means of balancing. In the course of this balancing as part of proportionality analysis the positive right is balanced with competing rights and principles. The result is a concretization of all balanced prima facie-rights and goods: the definitive positive right.¹²⁹ In assessing claims stemming from positive rights, there is often a great deal of discretion accorded to the democratically directly legitimated parliament.¹³⁰ A claim of an individual that the legislature has failed to properly implement a positive right requires that such a definitive positive right be clearly established by a constitutional court by means of balancing, which will be possible only in exceptional cases. This means that there is a third potential meaning of ‘judicially cognisable’ – a positive right might be only ‘judicially cognisable’, if a court can, owing to ex-

127 See, on this distinction, Borowski, *Grundrechte als Prinzipien* (fn. 8), pp. 97-100 and 206-228; Borowski, *Die Glaubens- und Gewissensfreiheit des Grundgesetzes* (fn. 122), pp. 228-241.

128 See, for example, Borowski, *Grundrechte als Prinzipien* (fn. 8), pp. 305-313.

129 See, for example, Borowski, *Grundrechte als Prinzipien* (fn. 8), pp. 380-392.

130 Borowski, *Grundrechte als Prinzipien* (fn. 8), pp. 244-281.

ceptional circumstances, establish a definitive positive right by means of balancing the positive prima facie-right and competing rights and goods.

dd) Social and Economic Rights: The German Experience

Admittedly, positive rights in general and, in particular, social and economic rights are notoriously difficult with an eye to their structure. In Germany, the Weimar constitution boasted of provisions recording social and economic rights. That was so 'modern' at the time that these provisions proved to be a burden of constitutional rights in general – the idea that there were binding, subjective and definitive social and economic rights that courts could enforce *vis-à-vis* the legislature was so outrageous that, in turn, these provisions undermined the very idea of the binding nature of constitutional rights. When the Basic Law was drafted in 1948 and 1949, the constituent assembly – *der Parlamentarische Rat* – placed much emphasis on an effective guarantee of liberty and equality. Before the issue of social and economic rights, the structure of which was completely unknown, would – again – endanger the whole project of binding and subjective constitutional rights, the assembly rather refrained from providing for social and economic rights. This was not, however, a conscious decision that there should be never such rights. Against this backdrop, the German Federal Constitutional Court finally held in 2010 that there is a definitive social right to the subsistence level (*Existenzminimum*), justified by reference to human dignity according to Article 1 (1) Basic Law and the principle (in the natural sense of this expression) of the social state, according to Article 20 (1) Basic Law.¹³¹

131 BVerfGE 125, 175 (222-227).

This is a subjective right, provided for in a binding constitutional norm, the content of which is established by means of balancing competing rights and goods.¹³²

ee) 'Principles' According to Article 52 (5) ChFR and the Three Distinctions

Various commentators have suggested that 'principles' according to Article 52 (5) ChFR are not 'justiciable rights' because they establish merely objective norms rather than subjective rights.¹³³ Clause 4 of the 'explanations' on 'principles' according to Article 52 (5) ChFR may have played a role here, since 'claim right' and 'subjective right' are used as synonyms: 'They do not however give rise to direct claims for positive action by the Union's institutions or Member States authorities.' To be sure, from a structural point of view this idea is somewhat astonishing, since the very wording of Article 52 (5) clause 2 ChFR clearly expresses that the *binding nature* of the provision in question is limited. By contrast, merely objective norms are 'judicially cognisable' – courts can establish a violation of provisions that establish such an objective norm and enforce it.

132 Borowski, *Grundrechte als Prinzipien* (fn. 8), pp. 432-436 with further references.

133 See, for example, Thorsten Kingreen, 'Art. 52 GRCh', marginal number 13-15, in: *EUV/AEUV – Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta*, C. Calliess and M. Ruffert (eds), 5th edn (Munich: C. H. Beck, 2016), pp. 2964-2985; see also Ziller, 'Das Protokoll Nr. 30' (fn. 62), p. 105. See also Hans D. Jarass, *Charta der Grundrechte der Europäischen Union*, 2nd edn (Munich: C. H. Beck, 2013) Art. 52 GRCh, marginal number 70: 'Die Grundsätze dürften objektiv-rechtliche Vorgaben sein'. More careful, however, in the most recent edition: Hans D. Jarass, *Charta der Grundrechte der Europäischen Union*, 3rd edn (Munich: C. H. Beck, 2016) Art. 52 GRCh, marginal numbers 68-69.

Clause 1 of Article 52 (5) ChFR expresses, against the backdrop of clause 2, that provisions in the ChFR that establish 'principles' are not legally binding norms, if and when there is no legal act that implements this 'principle'. They cannot be enforced at all, neither at the initiative of an individual (subjective right) nor of officials of the legal system (merely objective norm).

Clause 2 states that 'principles' are actually 'judicially cognisable', if and when there is a legislative and executive act that implements Union law and the 'principle'. Two different cases are distinguished: the interpretation of implementing acts and the ruling on the legality of the implementing act. The second case raises a great many difficult issues that cannot be discussed here, so that the following enquiry will be confined to the first case. Let's assume that there is a legislative act in secondary Union law that implements a 'principle'. The wording permits two different interpretations I_1 and I_2 . Let's assume further that I_1 realizes the 'principle' to a greater extent than I_2 , and that other 'principles' or rights play no decisive role. Article 52 (5) clause 2 ChFR and the 'principle' require that I_1 be chosen over I_2 . This permits two conclusions with an eye to 'justiciable rights'. The first conclusion is that the legislative act in secondary Union law may well grant a subjective right itself. If the 'principle' is 'judicially cognisable' to the effect that I_1 is required, the 'principle' indirectly gives rise to 'justiciable rights' at the level of secondary Union law. The second conclusion: If the 'principle' that requires that I_1 be chosen is 'judicially cognisable', it may well count as a subjective right in primary Union law that a court actually gives precedence to I_1 . There is nothing in the wording of Article 52 (5) clause 2 ChFR that indicates that once a 'principle' has actually become 'judicially cognisable' owing to clause 2, it cannot grant a subjective, definitive right.

Even these short structural considerations suggest that even ‘principles’ may well give rise to ‘justiciable rights’. What is more, many of the provisions in Title IV of the ChFR contain the expression ‘right’ (Article 28, 29, 30, 31, 33 (2), 34 (3) ChFR), which is generally an indication that these provisions grant, at least on principle, a ‘right’ rather than a ‘principle’ according to Art. 52 (5) ChFR. That provisions in Title IV of the ChFR may well grant rights is also explicitly admitted by the European Union Committee of the House of Lords in its Report on the Treaty of Lisbon: ‘Article 52 (5) read in the light of the Explanations could have led to a conclusion that some Title IV “rights”, such as Article 33, represent enforceable rights which could be relied upon directly before British courts.’¹³⁴

This is to say that the interpretive claim that ‘nothing in Title IV of the Charter creates justiciable rights’ in Article 1 (2) ChFR certainly reflects what the United Kingdom had preferred, but the wording of Article 52 (5) clause 2 ChFR, the result of the agreement the United Kingdom could achieve in negotiations with the other member states of the EU, cannot be reconciled with this interpretation.¹³⁵

134 HoL – EUC (fn. 72), at para 5.103 (b). See also, for example, Piris, *The Lisbon Treaty* (fn. 63), p. 154, who argues that Articles 27 to 33 ChFR grant ‘rights’ and Articles 36 to 38 ChFR establish ‘principles’ in the sense of Article 52 (5) ChFR.

135 Against this backdrop it strikes one as astonishing that the United Kingdom still lays claim that the Protocol’s ‘purpose is to clarify how the Charter applies to the EU institutions and across all Member States’ (Her Majesty’s Government, ‘Review of the Balance of Competences between the United Kingdom and the European Union Fundamental Rights’, marginal number 3.5 clause 2 [2014]).

ff) Conclusion

To conclude, there are actually strong arguments on behalf of the thesis that provisions in Title IV of the Charter grant ‘justiciable rights’ – because some of these provisions grant ‘rights’ in the first place and if they only establish ‘principles’, even these provisions give rise to ‘justiciable rights’ by means of clause 2 of Article 52 (5) ChFR. To be sure, Article 1 (2) PoC categorically rules out ‘justiciable rights’ in Title IV of the Charter in so far as the United Kingdom and Poland are concerned. This is to say that Article 1 (2) PoC represents a partial opt-out.¹³⁶

This seems to be even acknowledged by the Opinion of General Advocate Verica Trstenjak in *N.S.* After having briefly explained the background of Art. 1 (2) PoC, she explains that the ChFR ‘does not create justiciable rights as between private individuals’.¹³⁷ That is true, but actually irrelevant – that is not the contentious issue. She continues: ‘However, Article 1 (2) of Protocol No 30 also appears to rule out new EU rights and entitlements being derived from Articles 27 to 38 of the Charter of Fundamental Rights, on which those entitled could rely against the United Kingdom or against Poland.’¹³⁸ In other words: It appears to be a partial opt-out. Since in *N.S.* none of the rights in Title IV of the ChFR was at stake, she found ‘no need to examine in any greater detail

136 See also Craig, ‘The Treaty of Lisbon, Process, Architecture and Substance’ (fn. 59), p. 163 on Art. 1 (2) PoC: ‘substantive limit’; see also Craig, *The Lisbon Treaty* (fn. 59), p. 239; Panos Koutrakos, ‘Does the United Kingdom Have a General Opt-Out from the EU Charter of Fundamental Rights’, *European Law Review* 39 (2014), pp. 1-2, at p. 2: ‘substantive limit’. See also Barnard, ‘The EU Charter of Fundamental Rights: Happy 10th Birthday’ (fn. 73), p. 8.

137 Opinion of Advocate General Verica Trstenjak from 22 September 2011, Case C-411/10, *NS v. Secretary of State for the Home Department*, para 173.

138 Ibid.

here the question of the precise validity and scope of Article 1 (2) of Protocol No 30'.¹³⁹ The Court did not even mention this provision in its judgement in *N.S. and M.E.*

b) Filling the Gap by Means of Article 6 (3) TEU (ToL)

It was already mentioned that the current architectonic of the protection of fundamental rights comprises two main instruments: the ChFR, according to Article 6 (1) TEU (ToL), as the 'new layer' of protection, and fundamental rights as general principles of Union law, according to Article 6 (3) TEU (ToL), as the 'old layer' of protection. The question arises: To the extent that the partial opt-out in Article 1 (2) PoC creates a gap in the effective protection of fundamental rights, can the 'old layer' of protection fill this gap?

Let us assume that a certain 'justiciable Charter right' in Title IV, along the lines explained in section a), is paralleled by a fundamental right as a general principle of Union law, which counts, according to the common traditions of the Member States and/or international obligations common to the Member States, also as a 'justiciable right'. According to the case law of the ECJ, all member states are committed to such 'justiciable rights' as general principles of Union law, if and when they act in the sphere of Union law.¹⁴⁰ This applies, according to the principle of uniform application of Union law, to every member state, even to Poland and the United Kingdom. While this right counts for other member states as both a 'justiciable Charter right' and a 'justiciable right' according to Article 6 (3) TEU (ToL), it would still be a 'justiciable right' according to Art. 6 (3) *vis-à-vis* the United Kingdom and Poland. This is to say that the limiting effect

139 *Ibid.*, para 174.

140 On this issue, see, *supra*, footnote 57.

of Article 1 (2) of the Protocol would be rendered, in some sense, pointless.¹⁴¹

The government of the United Kingdom claimed in 2014 that this is not the case: 'The Government's position is that the horizontal provisions on the interpretation and application of the Charter reflect how the ECJ has developed general principles of EU law. The rights of the Charter therefore have the same meaning and scope as the general principles they reaffirm; they are not two distinct groups of rights in EU law that are potentially subject to disparate interpretations.'¹⁴² Plainly, this is wrong. It may echo to some extent the insight that the two layers are different attempts to transform the very same human rights as moral rights into primary Union law.¹⁴³ Different attempts at transformation may well, however, be interpreted differently. What is more, it would have been consequent, based on the understanding of the United Kingdom's government, to have the ChFR as the only layer of protection of fundamental rights. There was a conscious decision, however, to retain the 'old layer' of protection as a distinct layer in primary Union law.¹⁴⁴ None of the provisions of the Protocol on the Charter men-

141 See also the quotation from Steve Peers in HoL – EUC (fn. 72), at para 5.94: 'meaningless'. The Committee agrees to this interpretation: 'Where a Charter right is declared by the Court to constitute a general principle which would exist under EU law irrespective of the Charter, any protection afforded by the Protocol will fall', HoL – EUC (fn. 72), at para 5.104.

142 Her Majesty's Government, 'Review of the Balance of Competences' (fn. 135), marginal number 3.39.

143 See, *supra*, section A. II. 1.

144 See Steve Peers, 'The Opt-Out that Fell to Earth: The British and the Polish Protocol Concerning the EU Charter of Fundamental Rights', *Human Rights Law Review* 12 (2012), pp. 375-389, at pp. 384-385: 'A wider scope or impact of the general principles as compared to the Charter must be possible in principle, otherwise there is no logical reason why a reference to the general principles was retained in Article 6 (3) TEU alongside the references to the Charter in Article 6 (1).'

tions either Article 6 (3) TEU (ToL) or fundamental rights as general principles of Union law. All three provisions of the Protocol refer explicitly to the ChFR, parts thereof, and to legal effects of Charter provisions. What is more, the seventh recital of the Protocol reads: 'RECALLING the obligations devolving upon Poland and the United Kingdom under the Treaty on European Union, the Treaty on the Functioning of the European Union, and Union law generally.' In the same vein, the twelfth recital: 'REAFFIRMING that this Protocol is without prejudice to other obligations devolving upon Poland and the United Kingdom under the Treaty on European Union, the Treaty on the Functioning of the European Union, and Union law generally'. This recalls and reaffirms, not least of all, the commitment to fundamental rights as general principles of Union law according to Article 6 (3) TEU (ToL). Thus, there is nothing in the wording of the Protocol that indicates that Article 1 (2) PoC should have the power to limit effects to which Article 6 (3) TEU (ToL) gives rise. By contrast, the recitals of the Protocol on the Charter underscore the selective nature of the Protocol: Only those obligations of Poland and the United Kingdom, which the three provisions of the Protocol, Article 1 (1), 1 (2), and 2, explicitly mention, shall be affected.

Filling the 'gap' by means of Article 6 (3) TEU (ToL) could count, however, as 'bypassing' Article 1 (2) PoC if not according to the wording, but according to the spirit of the Protocol. In Michael Dougan's words: It 'implies treating the Protocol in a relatively abrasive manner, and thus at the risk of inviting accusations that an important element of the political bargain underpinning the TL [Treaty of Lisbon] has been blatantly undone by the Court.'¹⁴⁵ If the purpose of the

145 Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts' (fn. 66), p. 668. See also Belling, 'Supranational Fundamental Rights or Primacy

Protocol pursued the United Kingdom and by Poland was to limit the protection of fundamental rights, and if filling the 'gap' through Article 6 (3) TEU (ToL) renders the limiting effect of the Protocol pointless, one could think of an 'extended limiting effect', according to which 'filling the gap' by fundamental rights as general principles of Union law would be barred.¹⁴⁶ This is to say that this provision of the Protocol would count as a partial opt-out not only from legal effects of the Charter, but also as a partial opt-out from legal effects of fundamental rights as general principles of Union law, Article 6 (3) TEU. This can be, however, hardly convincing.

To begin with, protocols 'form an integral part' of primary Union law, Article 51 TEU (ToL). A protocol is agreed among all member states; it is not a unilateral declaration. One cannot simply argue that the United Kingdom pursued this or that end and that a certain interpretation which might seem questionable against this backdrop is, therefore, ruled out from the outset. The seventh and the twelfth recital of the Protocol (see above) are expressions of the end pursued by the other member states, namely, to secure as much uniform application of Union law in all Member States as possible¹⁴⁷ and to preserve the *acquis communautaire* – fundamental rights as general principles of Union law – to the greatest extent possible. These two important ends pursued by the other

of Sovereignty?' (fn. 70), p. 261: '[T]he Charter and the Protocol could give rise to a restrictive effect in relation to the extensive application of general principles of law'.

146 See Barents, 'The Court of Justice after the Treaty of Lisbon' (fn. 71), p. 721.

147 The principle of uniform application of Community/Union law lies right in the heart of the project of European integration. The ECJ has attached great importance to this principle in various contexts. See, for example, Joined Cases C-143/88 and C-92/89, *Zuckerfabrik Süderdithmarschen AG v. Hauptzollamt Itzehoe* and *Zuckerfabrik Soest GmbH v. Hauptzollamt Paderborn*, [1991] ECR-I 00415, para 26: The uniform application of Community law 'is a fundamental requirement of the Community legal order'.

member states call for ‘filling the gap’ by means of Article 6 (3) TEU (ToL).

To all appearances it was the intent of the United Kingdom’s Government to see the country and the Union not be subjected to ‘justiciable rights’ in Title IV of the Charter. If it was also the United Kingdom’s government’s intent to limit fundamental rights as general principles of Union law to the same extent, this further intent was, considering the clear wording of the agreement among all member states – not realized. What is more, in so far as the Protocol on the Charter was supposed to demonstrate, with an eye to internal affairs of the United Kingdom, that the United Kingdom’s Government does not transfer sovereign rights to the Union by ratifying the Lisbon Treaty,¹⁴⁸ filling the gap by means of Article 6 (3) TEU (ToL) plays no role anyway. This provision expresses only the *acquis communautaire*, to which the United Kingdom was fully committed even before the Treaty of Lisbon.

Poland is, however, a different case. The Polish government was not concerned about ‘justiciable rights’ in Title IV of the Charter. This is clearly expressed in Poland’s unilateral declaration on the Protocol on the Charter (No. 62):¹⁴⁹ ‘Poland declares that, having regard to the tradition of social movement of “Solidarity” and its significant contribution to the struggle for social and labour rights, it fully respects social and labour rights, as established by European Union law, and in particular those reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union.’¹⁵⁰ If ‘fully

148 See, *supra*, C. I.

149 See *supra*, footnote 67.

150 A commentator described this declaration, with an eye to the fact that Poland joined the United Kingdom Protocol, which ‘was defensive against social rights’, rightly as ‘bizarre’, Andrew Duff, ‘Draft Report on a Proposed

respect' means that the Polish government had no misgivings *vis-à-vis* 'justiciable rights' in Title IV of the Charter, this declaration seems to be an 'opt-out from the opt-out'. If Article 1 (2) PoC counts as an opt-out from 'justiciable rights' in Title IV, Declaration No. 62 seems to establish an opt-out from Article 1 (2) PoC. At any rate, Declaration No 62 formally has no power to derogate from the Protocol on the Charter. Article 51 TEU states that 'Protocols and Annexes to the Treaties shall form an integral part thereof', but this does not apply to declarations, which are not legally binding. Thus, from the legal point of view, Protocol Article 1 (2) PoC still fully applies to Poland.¹⁵¹

To conclude, the Article 1 (2) PoC does not affect the protection of fundamental rights as general principles of Union law pursuant to Article 6 (3) TEU (ToL). In so far as fundamental rights as general principles of Union law correspond to 'principles' in Title IV of the Charter and are regarded 'justiciable rights', even Poland and the United Kingdom are fully committed to these rights as 'justiciable rights'.¹⁵²

Protocol on the Application of the Charter of Fundamental Rights of the European Union to the Czech Republic (Article 48 [3] of the Treaty on European Union)', Committee on Constitutional Affairs of the European Parliament, 19 October 2011, p. 8.

151 This raises again the question of whether it would have been advisable for Poland to negotiate an own protocol. See, *supra*, footnote 67.

152 See Dashwood et al., *Wyatt and Dashwood's European Union Law* (fn. 41), p. 387; Craig, 'The Treaty of Lisbon, Process, Architecture and Substance' (fn. 59), p. 163; Craig, *The Lisbon Treaty* (fn. 59), p. 240; Barnard, 'The EU Charter of Fundamental Rights: Happy 10th Birthday' (fn. 73), p. 8; Marija Zrno, 'Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom: A Polish Perspective', *Croatian Yearbook of European Law and Policy* 6 (2010), pp. 293-323, at pp. 318-321; Arnull, 'Protocol (No 30)' (fn. 58), p. 1609; Steve Peers, *EU Justice and Home Affairs Law*, 3rd edn (Oxford University Press, 2011), p. 106; Peers, 'The Opt-Out that Fell to Earth' (fn. 144), pp. 384-385; Jan Martin

c) Summary

There is much to be said on behalf of the thesis that provisions in Title IV of the ChFR grant justiciable rights. Article 1 (2) PoC categorically rules out that provisions in Title IV of the ChFR give rise to ‘justiciable rights’ *vis-à-vis* Poland and the United Kingdom. Article 1 (2) PoC proves to be a partial opt-out. This is, however, placed in perspective by the fact that even Poland and the United Kingdom are fully committed to corresponding ‘justiciable rights’ as general principles of Union law according to Article 6 (3) TEU (ToL).

3. National Law and National Practices, Article 2 PoC

Finally, the question arises of whether the third and last provision of the Protocol, Article 2, is also – at least to some extent – an opt-out. This provision states: ‘To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.’ This depends on whether an interpretation of the relevant provisions of the ChFR yields a different result.

a) The Reference to ‘National Laws and Practices’ as a Limiting Clause

Quite a few articles of the ChFR refer to national law and national practices, namely, Article 9, 10 (2), 14 (3), 16, 27, 28, 30, 34 (1), (2), and (3), 35 clause 1, and 36 ChFR. On first glance, one might think that rights provided for ‘in accor-

Hoffmann and Verena Rudolphi, ‘Die Durchführung des Unionsrechts durch die Mitgliedstaaten’, *Die Öffentliche Verwaltung* 2012, pp. 597-602, at p. 601; Haltern, *Europarecht* (fn. 70), p. 656.

dance with the national laws governing the exercise of these rights', such as the right to marry and the right to found a family in Article 9 ChFR, empower national authorities to establish a definition of the scope of the right. This is to say that if, for example, national law characterizes 'marriage' as a union of two persons of opposite sex, the union of two persons of the same sex falls not within the scope of the right. Denying two persons of the same sex a 'marriage' counts not, then, as an interference that needs justification. The statement on same sex marriage in the 'explanations' on Article 9 ChFR goes precisely in this direction. On Article 9 ChFR, one reads: 'This right is thus similar to that afforded by the ECHR, its *scope* may be wider when national legislation so provides.'¹⁵³ This reconstruction is not convincing – neither for Article 9 ChFR¹⁵⁴ nor for other rights subject to national laws and practices governing their exercise generally. It

153 Explanations Relating to the Charter of Fundamental Rights, Conv 354/02, WG II 16, OJ 2007/C 303/02 (emphasis added).

154 There is a crucial difference between Article 12 ECHR and Article 9 ChFR. The scope of Article 12 ECHR is limited from the outset to opposite sex marriages, which is indicated by the expression 'Men and women [...] have the right to marry' – at least this is the orthodox reading, see Pieter van Dijk, 'The Right to Marry and to Found a Family (Article 12)', in *Theory and Practice of the European Convention on Human Rights* P. van Dijk, F. van Hoof, A. van Rijn, and L. Zwaak (eds), 4th edn (Antwerp and Oxford: Intersentia, 2006), pp. 841-862; John Wadham et al., *Blackstone's Guide to the Human Rights Act 1998*, 5th edn (Oxford University Press, 2009), p. 265. By contrast, Article 9 ChFR simply speaks of the 'right to marry.' While same sex marriages do not fall within the scope of Article 12 ECHR in the first place, for Article 9 ChFR they become an issue of 'national laws governing the exercise' of this right. This clause is – this will be explained in the next paragraph in the text – a limiting clause. This is to say that, strictly speaking, depriving people of same sex marriages is subject to proportionality analysis. In that sense, Article 9 ChFR grants more protection than Article 12 ECHR. Article 52 (3) clause 2 ChFR makes clear that this is perfectly possible. One hastens to add, however, that the limiting clause 'subject to national laws governing the exercise of this right' generally calls for light touch review only, see footnote 158.

amounts to the legal power of national authorities – which are, according to Art. 51 (1) ChFR, committed to the ChFR – to decide whether and to what extent a Charter right grants protection. Metaphorically speaking, this is setting the fox to mind the geese.

It does not come as a surprise, then, that there is widespread agreement that the corresponding phrase in Article 12 ECHR – ‘men and women of marriageable age have the right to marry and to found a family, *according to the national laws governing the exercise of this right*’ (emphasis added) – does not grant national authorities legal power to define the scope of Article 12. Rather, ‘national laws governing the exercise’ of Article 12 ECHR must not be arbitrary or, in other words, disproportionate.¹⁵⁵ Proportionality analysis is, however, characteristic of limitation.¹⁵⁶ This means that a clause, according to which a right is provided for subject to ‘laws governing the exercise’ of this right, represents – from the structural point of view – a limiting clause.¹⁵⁷ This applies also to the rights in the ChFR with such a clause, namely, Article 9, 10 (2), 14 (3), 16, 27, 28, 30, 34 (1), (2), and (3), 35 clause 1, and 36 ChFR.¹⁵⁸ The scope of these rights is deter-

155 See, for example, B. Rainey, E. Wicks, and C. Ovey, *Jacobs, White & Ovey – The European Convention on Human Rights*, 6th edn (Oxford University Press, 2014), p. 357: Restrictions ‘by national law must be imposed for a legitimate purpose, [...] and must not go beyond a reasonable limit to attain that purpose.’ See also Wadham et al., (fn. 154), at 266-7.

156 Where proportionality analysis is applied to rights, these rights are be limited. On the necessary relation between proportionality and limitation, see Martin Borowski, ‘Limiting Clauses’, *Legisprudence* 1 (2007), pp. 197-240, at pp. 203-204; Borowski, *Grundrechte als Prinzipien* (fn. 8), pp. 206-217.

157 See Borowski, ‘Limiting Clauses’ (fn. 156), pp. 221 and 235.

158 See Borowski, ‘Limiting Clauses’ (fn. 156), pp. 234-236. This raises the question of the relation between this special limiting clause and the general limiting clause in Article 51 (1) ChFR. On behalf of parallel application of this special limiting clause and the general limiting clause in Article 51 (1) ChFR, see Steve Peers, ‘Taking Rights Away? Limitations and Derogations’,

mined by Union law alone, while national law and national practices may set limits to these rights.¹⁵⁹

b) Which ‘National Laws and Practices’ Count?

The crucial question in the interpretation of these limiting clauses is, then, which national laws and practices count, in so far as the commitment of a member state according to Article 51 (1) ChFR is concerned. In other words: With an eye to, for example, France’s commitment to Article 9 ChFR, do only French laws on marriage count? Or does France have to take national laws of other Member States into consideration?

The alternative would be some form of common denominator that results from a complex assessment of the whole of the laws on marriage in all member states. The question of a common denominator inevitably arises for the Union’s commitment to those Charter rights that are limited by national laws and practices – be it limited by national laws and practices alone, namely, Article 9, 10 (2), 14 (3), 35 (1), and 36 ChFR, or be it limited by *both* Union law and national law and practices, Article 16, 27, 28, 30, and 34 (1) to (3) ChFR.

Which of these two approaches – common denominator or national law and practices of the relevant Member

in: *The European Union Charter of Fundamental Rights*, S. Peers and A. Ward (eds) (Oxford and Portland, Oregon: Hart, 2004), pp. 141-179, at p. 177; Borowski, ‘Limiting Clauses’ (fn. 156), pp. 235-236. Critical of such parallel application Barnard, ‘The EU Charter of Fundamental Rights: Happy 10th Birthday’ (fn. 73), p. 9. The concern is that parallel application of Article 51 (1) ChFR would leave national authorities too little discretion. This concern can be, however, assuaged by ‘a relatively light review of national limitations’ in such cases, Peers, *ibid.*

159 Provisions in the ECHR, in the ChFR, and in some national constitutions use the phrase of limits of ‘the exercise of rights’ rather than limits of ‘rights’. There is, however, no reasonable margin for such a distinction, see Borowski, ‘Limiting Clauses’ (fn. 156), p. 214; Borowski, *Grundrechte als Prinzipien* (fn. 8), p. 67.

State – is convincing? To begin with, the issue of the Union’s commitment to the Charter must not be confused with the commitment of the member states. The very fact that a common denominator of national laws and practices may well be needed for Union’s commitment to some Charter rights is not to say that such a common denominator must also be relevant for the commitment of the Member States.

Among the horizontal provisions of the ChFR one finds Article 52 (6): ‘Full account shall be taken of national laws and practices as specified in this Charter.’ Strictly speaking, ‘full account’ does not decide which national laws and practices are decisive. The ‘explanations’ on Article 52 (6) ChFR are, however, more telling. They emphasize that this provision has to be seen against the backdrop of the ‘spirit of subsidiarity’. This is to say that every member state takes a sovereign decision (subject to proportionality) as to what extent such a Charter right is limited. This makes clear that only national law and practices of the relevant member state counts, not a common denominator.

This is precisely what Article 2 PoC requires for Poland and the United Kingdom. In other words: ‘Article 2 reflects a common-sense interpretation of those articles in the Charter which refer to national laws and practices.’¹⁶⁰ Article 2 PoC does not represent an opt-out, not even a partial opt-out.

VI Conclusion

Closer analysis has revealed that two of the three provisions of the Protocol on the Charter are actually partial opt-outs in the technical sense, Article 1 (1) and 1 (2). These

160 HoL – EUC (fn. 72), at para 5.103 lit c. See also Duff, ‘Draft Report on a Proposed Protocol’ (fn. 150), marginal number 9.10: ‘It could hardly be otherwise’; see furthermore Arnull, ‘Protocol (No 30)’ (fn. 58), p. 1610.

two partial opt-outs will, however, change relatively little in the assessment of claims *vis-à-vis* Poland or the United Kingdom, based on Charter rights. In particular the partial opt-out in Article 1 (1) PoC is rather insignificant from the outset and will pale into insignificance over time. The partial opt-out in Article 1 (2) PoC may have a more pronounced legal effect, but general principles of Union law can fill the resulting gap. What is more, Poland does not want this opt-out anyway and the United Kingdom will have left the European Union on 29 March 2019, the 'Brexit' date. Thus, from the legal point of view the conclusion is: Much ado about very little. The difficulties in the interpretation of the Protocol on the Charter are completely out of proportion *vis-à-vis* its minuscule legal effects. At the end of the day, the Protocol on the Charter will be recorded in the history books as an exercise in political symbolism that created a great deal of legal problems.

D. Result

The analysis of the Protocol on the Charter has shown that the layer of general principles of Union law proves useful to fill gaps that Article 1 (2) PoC might create. The price is, however, that the parallel structure of fundamental rights of the EU, the 'old layer' and the 'new layer', gives rise to a great deal of legal uncertainty. What is more, EU fundamental rights represent only one necessary level¹⁶¹ in the greater system of the protection of the legal protection of human rights. When these two layers at the third necessary level are seen together with the national level and the international level, the picture gets far more complicated. There might

161 On this necessary level of legal instruments for the protection of human rights, see, *supra*, section A. II. 3. c).

actually be an overlap in the field of application of national constitutional rights and supranational rights, leading to a conflict between national courts and the ECJ. What is more, once the Union will have acceded to the ECHR,¹⁶² the ECtHR may well interpret the ECHR differently, compared to the ECJ's interpretation of the ECHR as a 'source of inspiration' for general principles of Union law according to Article 6 (3) TEO (ToL), leading to a conflict between the ECtHR in Strasbourg and the ECJ in Luxemburg. This suggests that it is hardly a lack of legal instruments for the protection of human rights or of courts enforcing these legal instruments that represents a problem – it is the plurality of legal instruments and of courts which lay claim to authoritative decisions, creating a great deal of legal uncertainty. This is to say that simpler and clearer structures would improve the legal protection of human rights.

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162 See, *supra*, section B. III.