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The impact of the EU Charter on Fundamental Rights in Norwegian law in the Age of Subsidiarity – in what situations does EU law give greater protection than traditional human rights instruments?

Abstract

The dissertation aims to examine whether EU law can offer efficiencies and/or improvements in the areas traditionally referred to as human rights law in Norwegian jurisprudence. The Charter and EU fundamental rights protection applies to Norway as general principles of EEA-law. However, knowledge of the Charter and its reach remains absent among those who apply the law in Norway. Thus, this dissertation is an attempt at bridging a perceived gap in the impact of fundamental rights protection derived of EU Law as a matter of law and the knowledge of said protection among those who apply the law in Norway. In particular, the dissertation aims to provide an overarching narrative for situations EU law may greater protection than traditional human rights instruments.

The dissertation starts out explaining the boundary problem, and the analytical tools that the ECtHR and the CJEU will use to approach it. By reference to a body of examples, it is then submitted that that EU fundamental rights may and is providing greater protection when the ECtHR only give procedural review or does not govern an issue at all. This represents an important finding following the procedural nature of the review derived of the ECHR following the ECtHR's increased use of the "non-substitution" principle over the last decade. The consequence is a growing divergence between the case-law of the ECtHR and the CJEU where EU law systematically gives greater protection of issues concerning contestable civil rights and socioeconomic rights, in particular rights relating to judicial protection, discrimination law, protection of privacy, and horizontal relationships.

The dissertation then goes on to explore the normative foundations underlying this development. It is submitted that differences in the context between the legal orders of the CoE and EU, including the institutional set up and the existance of a legislative branch, the internal market as a core subject matter, and the assent of the EU member states to the emergence of European federalism through consecutive treaty amendments, gives the CJEU a higher degree of authority in the legal order compared to the ECtHR. Further, it is argued that the difference in context, the existance of a legislative branch, and the link to the right to free movement, may influence the CJEU in its search for consensus.

Finally, this growing divergence requires a novel methodological approach to human rights adjudication in Norway.

1. Introduction

1.1 Human rights and EU law

Historically, Norwegian human rights acquis has been centred around the conventions of the Council of Europe ("CoE") and the United Nations ("UN").[1] These conventions are transposed into the domestic legal order of Norway through incorporation in either Chapter E of the Norwegian Constitution, the Human Rights Act 1999 or other statutory provisions.[2] A particular position is given to the European Convention on Human Rights ("ECHR"), and the Norwegian Supreme Court draws heavily on the case-law of the European Court of Human Rights (ECtHR) when interpreting Norwegian law.[3] Bodies of law which human rights acquis play a key factor now encompass i.a. freedom of expression, deprivation of liberty, criminal procedure, rights of the child and protection of indigenious people. Many term the influence of these international instruments the most important development Norwegian law over the course of the last 30 years. [4]

In concurrency with these developments in the CoE and the UN, the Court of Justice of the European Union ("CJEU") has developed its own doctrine of protecting human rights.[5] This development culminated with the proclamation of the Charter on Fundamental Rights of the European Union ("Charter" or "CFR") which became legally binding following the entry into force of the Lisbon Treaty.[6] While the Charter primarily "*reaffirms [...] the rights [...] from the constitutional traditions and international obligations common to the Member States, […] and the case-law of […] of the [ECtHR]*" [7], there is a clear tendency that the CJEU is now aiming its attention towards an autonomous understanding of human rights rather than simply referring to the case-law of the ECtHR and/or other traditional instruments.[8] There are now several situations in which issues which have traditionally been governed by traditional human rights instruments are being overtaken by novel EU legislation interpreted by the CJEU. The best example is probably protection of privacy in the digital domain where EU Law have provided extensive secondary legislation that seeks to regulate processing of personal data for various purposes.[9] Other example is discrimination law[10] and judicial protection. [11]

We can infer from this that EU protection of human rights have a *sui generis* nature. This increases the complexity when discussing human rights acquis. Generally speaking, all EU member states are bound by both traditional human rights instruments and EU law. In order

[1] These instruments predate both the Charter and the wider concept of fundamental rights protection in the EU. In the following, they will therefore be referred to as "traditional human rights instruments".
[2] See e.g. sc. 4 (1) Criminal Procedure Act 1981
[3] For example, *Rt. 2005 s. 833* para. 45.
[4] Jørgen Aal, *Rettsstat og menneskerettigheter*, vol 4th (Fagbokforlaget 2015) 26
[5] Eleanor Spaventa, 'Fundamental rights in the European Union' in Catherine Barnard; Steve Peers (ed), *European Union Law* (Oxford University Press 2020)
[6] Article 6 (1) TEU
[7] Charter preamble recital 5.
[8] Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 Human Rights Law Review
[9] Takis Tridimas, 'Fundamental Rights, General Principles of EU Law, and the Charter' in Kenneth A. Armstrong Albertina Albors-Llorens, Markus Gehring (ed), *Cambridge Yearbook of European Legal Studies*, vol 16 (Cambridge University Press 2017) 371-376
[10] Ibid 367-371
[11] Ibid 363-367

to comply with their obligations under public international law they will have to comply with traditional human rights instruments and EU fundamental rights at the same time. EU Law interacting with traditional instruments while still applying its own *sui generis* approach makes it a particularly demanding methodological task for scholars and practitioners to untangle the intricate and dynamic web of legal material that is being created. However, while increasing the cognitive complexity, this intricate relationship may also allow for improvements and efficiencies, as the above-mentioned examples are illustrative of.

1.2 Is EU Fundamental rights standards binding on Norway?

In the context of discussing Norwegian human rights acquis, the question that quickly arise is to which extent the greater protection afforded by EU law has effect in Norwegian law. Although the issue was earlier controversial, it is now becoming clearer and clearer that this is the case. Norway is not a party to the EU but affiliated with the Union through various instruments. While the Charter was a source of inspiration for the constitutional amendments in 2014[12], it is neither incorporated into domestic Norwegian law or binding on Norway under public international law. Thus, it cannot have any effect in Norwegian law as such.[13]

However, within the wide scope of the EEA-Agreement[14] the principle of homogeneity, formulated in Article 6 EEA and continuously promoted by the EFTA-Court, asserts that citizens and economic operators in the EFTA- and EU-pillar is to enjoy equal conditions of competition and equal rights to participate in the internal market. [15] According to established case-law from the EFTA-Court, secondary legislation is to be construed as conferring the same rights on individuals regardless of whether the CJEU is relying on the Charter as interpretative aid for reaching its conclusion.[16] Further, when interpreting primary law, the EFTA-Court has applied Charter provisions by analogy in the EFTA-pillar as general principles of EEA-law[17] in what has been described as a skillful "low key case-by-case approach" maintaining homogeneity between EU and EEA law, without drawing heavily – at least not expressly – on the Charter as such.[18]

In essence, because of the presumption of homogeneity in result the problem should not be framed as whether the Charter applies to Norway, but rather whether there is any reason for the Charter not to apply. Except for the political provisions in art. 39, 40, 43 and 44 CFR, the

[12] Dokument 16 (2011-2012)
[13] Christian N.K. Franklin; Halvard Haukeland Fredriksen, 'Of pragmatism and principles: The EEA Agreement 20 years on' (2015) 52 CMLR 629
[14] The EEA-Agreement is an associating public international agreement that allows the three outsider EFTA states to take part in the internal market, while at the same time not formally transferring any legislative and sovereign power. See e.g. Finn; Fredriksen Arnesen, Halvard Haukeland; Graver, Hans Petter; Ola, Mestad; Vedder, Christoph, *Agreement on the European Economic Area. A Commentary* (Universitetsforlaget 2018) 1-12
[15] Preamble Recital 5 of the EEA-Agreement. See also e.g. Arnesen (n 14) 210-248.
[16] See e.g. *Case E-23/13 para. 81* and *Case E-2/20* para. 50. See also Fredriksen (n 13); and Robert Spano, 'The EFTA Court and Fundamental Rights' (2017) European Constitutional Law Review 475
[17] *Case E-1/04* para 41, *Case E-14/11* para. 118 and *Case E-7/12* all concerning the right good administration; *Case E-2/10* para. 46 concerning the principle that civil and penal sanctions enforcing EU Law provisions are to be effective, but proportionate; and *Case E-10/14* para. 64 concerning the freedom to conduct a business in art. 16 CFR.
[18] Arnfinn Baardsen, *Fundamental Rights in EEA Law – The Perspective of a National Supreme Court Justice* (2015)

delineated material scope of the EEA which exempts agricultural- and fisheries-products[19], and possibly horizontal relationships, it is difficult to see arguments that would meet this argumentative threshold.[20] The effect is that, for all practical purposes, the Charter as construed by the CJEU applies to Norway within the scope of the EEA-Agreement as general principles of EEA-law.

In addition to the EEA-Agreement, Norway is affiliated with the EU trough the Schengen-Agreement and body of bilateral treaties allowing Norway to partake in cooperation with the EU in areas falling under the Union's competences in the AFSJ. The Norwegian Supreme Court has stated many times that it will pay due regard to the rulings of the CJEU when interpreting these provisions.[21] We can infer from this that – notwithstanding the need for individual analysis and a case-by-case approach – the Charter as construed by the CJEU will apply to Norway under this framework as well.

1.3 Problem

As outlined above, EU fundamental rights standards apply to Norway in the areas of law in which Norway are interacting with the EU. However, knowledge of the Charter and its reach remains absent among those who apply the law in Norway. Although the impact of EU law is widely recognized in Norwegian competition, state aid and public procurement law, in addition to how secondary legislation governs specific bodies of law more or less exhaustively, it would also be fair to say that Norwegian scholars and jurisprudence have been unaware of the impact of EU law towards ancillary issues of how violations are to be remedied in civil procedure and how violations can be sanctioned in criminal law. As the NAV Scandal have shown[22], EU law is increasingly affecting applicable Norwegian law in all sectors and bodies of law and the broader profession as a whole. A part of this influence is how EU fundamental rights protection impacts areas traditionally referred to as human rights law in Norwegian jurisprudence. This dissertation is an attempt at bridging a perceived gap in the impact of fundamental rights protection derived of EU Law as a matter of law and the knowledge of said protection among those who apply the law in Norway.

Thus, the aim of this dissertation is to examine whether EU law can offer efficiencies and/or improvements in Norwegian human rights acquis. There are clearly situations in which issues which have traditionally been governed by traditional human rights instruments are now overtaken by novel EU legislation. The question that quickly comes to mind is whether

[19] Article 8 (3) EEA-Agreement. See also Hallvard Haukeland Fredriksen; Gjermund Mathisen, *EØS-Rett*, vol 3rd (2017) 95

[20] See more elaborate in Spano (n 16); Fredriksen (n 13); and Finn Arnesen; Simen Hammersvik; Erling Hjelmeng; Olav Kolstad; Ole-Andreas Rognstad, *Oversikt over EØS-retten* (Universitetsforlaget 2022) 78-85.

[21] See i.a. *HR-2020-1328-A* para. 44 concerning Regulation (EU) 1215/2012 and *HR-2022-863-A* para. 20 concerning CFA 2002/584/JHA

[22] In the fall of 2019, the so-called "NAV scandal" hit the Norwegian newspapers. It was revealed that the Norwegian Labor and Welfare Administration ("NAV") had misinterpreted EEA law, leading to at least 80 people erroneously being accused, convicted and imprisoned for welfare fraud. Since then, the dominant explanation for what has been labelled the largest scandal in modern Norwegian jurisprudential history has been that NAV lacked knowledge of their EEA commitments. This incident later spiked a broader debate on how Norwegian jurisprudence have failed to consider the extent of which EU and EEA Law influence domestic Norwegian Law. See *Norwegian Social Security scandal (https://en.wikipedia.org/wiki/Norwegian_Social_Security_scandal* 11.08.23).

it is possible to induce some general criteria for in which situations EU Law will typically have such an effect. The aim of this dissertation is therefore to provide an overarching narrative for in which situations EU law may have a self-contained effect vis-à-vis traditional human rights instruments. The problem can aptly be described as in which situations does EU law give greater protection than traditional human rights instruments. In this context, "greater protection" is meant in a wide sense encompassing whenever a rule has a wider scope of application, a higher level of protection flowing from the rule and/or greater procedural rules to enhance enforcement of the substantial rules. Importantly, this also encompass whenever the CJEU applies a higher level of judicial review of whether a measure is proportionate.

It should be noted that the term "greater protection" also contains an inherent amiguity. Greater protection of one individual's fundamental right may often constitute an adverse development in the protection of another, conflicting right of another individual or a legitimate collective interest. As we shall see, the conflict between the right to privacy, on the one hand, and freedom of speech, on the other, serves as an illustrative example. In this situation, greater protection of the journalistic freedom of the reporter is by necessary implication detrimental to privacy of the person being named, and vice-versa. These two interests are negative corollaries, and the member states have to make a choice within a spectrum of possibilities of how to strike a fair balance between them. In governing this issue, however, there are discrepancies between the approach of the ECtHR and the CJEU.[23] In such a situation, the problem may more descriptively be framed as whether EU law gives the member states a narrower room of action in this balancing exercise than traditional human rights instruments. In essence, the spectrum of available lawful choices is narrower and this translates to what is meant by "greater protection of fundamental rights".

In particular, this dissertation will argue that EU law offer greater protection of i.a. contestable civil rights, administrative procedural rights, socioeconomic rights, and horizontal relationships. In such situations, in order to infer Norway's obligations under public international law, the emphasis in the jurisprudence should be shifted from the ECHR or other traditional instruments to that of EU-law. Conversely, when outside these situations, EU Law may not offer much more than what already follows from traditional instruments, and in such situations, emphasis may remain at the ECHR and other traditional instruments.

This dissertation is not meant to cover the scope of human rights protection as a matter of applicable EU and/or Norwegian law. An exhaustive outline of how EU primary and secondary law pursue interests that are commonly enshrined in traditional human rights instruments would easily make up a whole ph.d. For the purposes of this dissertation, it is not necessary, nor appropriate, to embark on such an endeavour. Instead, by making references to discrepancies in applicable law between traditional human rights instruments and EU Law in relation to specific problems, the dissertation will try to induce general criteria's for when such discrepancies will exist. These criteria's may then be used to guide scholars and practitioners aiming to articulate legal arguments. The focus of the dissertation is primarily this general framework for analysis, and, for this reason, the case-studies will

[23] Item 2.3.3 below.

take a rudimentary form. For the purposes of developing such a general framework it is sufficient to prove that there exists a discrepancy in the applicable law, and thus the dissertation will do no more in relation to the specific examples. One should have this rudimentary nature of the case-study in mind when reading.

The dissertation also delineates towards any normative discussion on whether this development is appropriate or not. Descriptively, it is clearly the case that EU Law goes further in fundamental rights protection in some situations. Some would argue that this development is another attribute of an increasing federalisation of Europe, in breach of, firstly, the intentions of the parties when the Charter was concluded[24] and, secondly, the normative premise giving the EU its legitimacy. [25] However, although the normative underpinnings for fundamental rights protection in the EU is a premise for the rights-creation done by the CJEU, such considerations concerning the appropriateness of judicialization by from a normative perspective is not considered in depth in this dissertation.

A few key terms and premises need to be set out early on. In particular, one must have a good grip on the boundary problem, and how the ECtHR and CJEU approach this when applying the ECHR and the Charter respectively.

1.4 The boundary problem

Protection of fundamental rights is a contested area of law. Whenever an international court asserts jurisdiction, the national courts must by necessary implication relinquish it. [26] If an international adjudicator decides that it is for itself to assess whether, for example, a national immigration rule is compatible with fundamental rights, it will then be only for the Court to balance the competing interests (i.e. the collective interest of society to curtail immigration to an appropriate level vis-à-vis the rights of the migrant).[27] Incursions in the sovereignty and jurisdiction of the national state might lead to problems, especially when national goverments disagree with the level of protection afforded by the international Court. Although many regard enthusiastic protection of individuals rights as moral imperatives, an important objection is how important elements of social and economic policy are being determined outside of national democratic processes. [28] Human rights adjucation do not involve public opinion in any way, and such judicialization, often termed "judge made law", is thus lacking in democratic legitimacy.[29] From the perspective of the elected politician, their democratic mandates are being threatened by what they perceive as international judges imposing their will on the peoples of Europe. Also, in problems involving local diversity, complex factual assessments and prioritization of resources one may rightly

[24] C. McCrudden, 'The Future of the EU Charter of Fundamental Rights' (2001) 10 Jean Monnet Working Paper 8

[25] P. Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39 CMLR 945. See also Catherine Barnard; Steve Peers, *European Union Law* (3rd edn, Oxford University Press 2020) 5-8.

[26] Barnard (n 25) 244

[27] Ibid

[28] For example, Robert Spano, 'The Future of the European Court of Human Rights - Subsidiarity, Process-Based Review and the Rule of Law' (2018) 18 Human Rights Law Review 2018

[29] Ibid

argue that national states – being closer to those that the decisions affect – are simply better placed to do the assessment of whether restriction of fundamental rights is appropriate.[30]

Unlike national legal orders, public international law does not contain any coercive mechanism to enforce rulings from international courts on national states. Political pressure give member states a strong incentive to comply with rulings given from an international adjudicator, but ultimately it is for the national state to decide. Realizing the non-mandatory nature of human rights acquis, one quickly also realize that making human rights an effective body of law requires staying deferential in order to maintain the legitimacy and support around the system from the national states. This balancing exercise can be termed the "boundary problem".[31] This problem, and in particular the degree of resistance from national states, will vary depending on the context and current geopolitical climate. Judges need to make wise, sustainable and principled choices of legal policy to achieve the appropriate balance, and for this reason human rights law is contemporary and dynamic.[32] It is mainly this problem, and in particular how traditional human rights instruments and EU law may approach this in distinctly different ways, that is the object of this dissertation.

1.5 ECHR

When discussing human rights acquis, the position of the ECHR simply cannot be understated. To this date, it is by far the most advanced and successful instrument for protection of individuals civil and political rights. [33]The workings of this convention have been subject to detailed scholarly analysis and will not be outlined in detail.[34] However, a few general points should be made on how the ECtHR have created several analytical and methodical tools to tackle the boundary problem outlined above.

Most important, the ECtHR will explore the existence of a consensus among the member states when deciding the scope and features of a specific right.[35] While one may argue that human rights are "inalienable" and/or "moral imperatives"[36], such normative foundations prove insufficient to establish the reach of these rights and the conditions under which they may be restricted. The latter problem is not possible to solve by way of rational construction, and thus the Court will look to empirical arguments in order to infer the level of protection that should be conferred by the Convention. In this regard, the Court will draw inspiration from the practices and traditions common to the national states.[37] This represents an important clarification, that the exact level of protection conferred by the Convention is heavily dependent on empirical findings from the practices of various member states and other international human rights treaties. Through a process of exploring the degree of

[30] Ibid
[31] Frederick G. Whelan, 'Prologue: Democratic Theory and the Boundary Problem' (1983) 25 Nomos 13
[32] Ibid
[33] Aal (n 4) 26
[34] For example, Aal, *Rettsstat og menneskerettigheter*; D. J. Harris; M. O'Boyle; E.P. Bates; C. M. Buckley, *Law of the European Convention on Human Rights*, vol 4th (Oxford University Press 2018); George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007); Bernadette Rainey; Pamela McCormick; Clare Ovey, *The European Convention on Human Rights* (Oxford University Press 2021)
[35] Buckley et al (n 34) 9-14
[36] For example, Rediar Maliks; Karlsson Schaffer, *Moral and Political Conceptions of Human Rights. Implications for Theory and Practice* (Cambridge University Press 2017)
[37] Buckley et al (n 34) 9-14

intersubjectivity among the national states one may induce a level of protection that may serve as a more or less objective standard for the appropriate level of protection. While the analytical constructs outlined in the following is an object of rational construction, their application onto the facts in the case will – expressly or more implicitly – be heavily guided by the degree of commonality among the national states, which is an empirical construct.

It is this ever-changing empirical basis that gives the Convention its nature as a dynamic and living instrument.[38] The ECtHR will typically raise the standard of rights protection, in a given area, when a sufficient number of states no longer limit rights in that area for reasons of public interest. The margin of action enjoyed by states shrinks as consensus on higher standards of rights protection emerges among states, which then shifts the balance in favor of the right claimant. The Court can thus claim that there is some external, "objective" means of determining the weights to be given to the values in conflict, and it can usually claim that its bias is majoritarian and transnational.[39] At the same time, while in theory empirical, such judicial pronouncements tend to have the character of an assumption rather than a conclusion that results from comparative law analysis. As such, the abovementioed is not a binding rule, but rather a guiding principle for a court looking for a solution.[40]

Notwithstanding the effect of these empirical considerations, the ECtHR will pay due regard to the following normative factors or “analytical tools” when deciding the specific level of protection to be derived of the Convention.

First, notwithstanding the fact that the Convention generally have a broad scope of application, all of the rights have within their scope a requirement that a positive or negative action must have the necessary degree of severity it to constitute an interference. Some articles – e.g. art. 2 and 3 – apply a high threshold, while others - e.g. art. 8 which have been construed by the ECtHR to govern the autonomy of an individual more generally[41] or art. 1 TP1 ECHR on protection of property[42] – apply a lower threshold. The Court’s fourth instance doctrine states that errors of facts and or law from domestic authorities will be deemed *inadmissible ratione materiae* unless and insofar the state by this have interfered with a right under the Convention.[43] The implication is that the scope of the articles serve as a *de-minimis* exception, where less severe actions do not trigger the Convention at all.

Second, notwithstanding the fact that the distinction between positive and negative action may in many cases be difficult to define[44], the Court have consistently held that positive action in general, and in particular positive action that entail placing monetary obligations on the national states, the Court will grant the states a degree of deference.[45] Positive action may be fulfilled in an array of different manners. In addition, such positive actions to secure

[38] Buckley et al (n 34) 8-9
[39] Ibid 9-14
[40] Ibid
[41] The concept of private life now also covers moral integrity, see CoE Registry, *Case-Law Guide on Article 8* (28.02.23) para. 181
[42] All public regulations controlling the use of posessory rights are in principle covered by the scope of art. 1 P1, see CoE Registry, *Case-Law Guide on Article 1 of Protocol No. 1.* (28.02.23) para. 104
[43] Buckley et al (n 34) 18
[44] Ibid 24-29
[45] Ibid

one right will easily, and assuming a limited governmental budget by necessary implication, entail a lower level of protection of another right. Within the outer boundaries set by the Convention, it is generally not for the Court to do this prioritization. Allocation of resources should be the subject of democratic debate and is better served by the legislature.[46]

Third, the Convention draws a clear distinction between interferences in rights attributable to the state sensu lato and private individuals.[47] Pursuant to art. 1 the state may be under an obligation to act if private parties undermine rights of other private individuals. However, importantly, the conclusion that a national state is liable for an infringement of a right where the infringing action is attributable to a private party requires a subjective element of negligence from the authorities for failing to take the appropriate steps to prevent the violation.[48] This approach qualifies the scope of the Convention, exempting interferences that from private parties that couldn't have been foreseen or prevented by the authorities. Also, in this test of negligence, the Court have consistently held that national authorities will generally be better placed to assess the appropriateness of various actions and that the Court must grant a degree of deference when assessing whether the measures were appropriate.[49]

Fourth, the Convention recognizes the need for proportionality analysis. The term describes a particular legal technique of resolving conflicts between conflicting rights and/or public interests through a process of balancing.[50] When faced with conflicting collective interests and/or rights of different individuals the national state has to strike a "fair balance". This test of proportionality sensu lato consists of three steps; whether the interference pursues a legitimate objective, is indispensable and proportionate strictu sensu.[51] The principle is operationalized expressly in the derogation clauses in i.a. art. 2, 8-11, 14 and 15[52] and when deciding whether a positive obligation has been satisfied[53] and more implicitly in the Court's application of i.a. 3, 5, 6 and art. 1 P1[54]. While proportionality analysis plays a role in all of these situations, the impact that such assessments have will naturally vary according to the right in question.[55] Generally, the rights in art. 2, 3, 4, 5, and 6 have a narrower scope of application compared to articles 8-11, and thus the room for individual proportionality analysis is not that present. However, proportionality considerations still underlies the scope and features provided by that right, although the wording of the provision does not allow for express, individual proportionality analysis.[56]

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[46] For example, Gearty, 'Against judicial enforcement "' in Gearty; Mantouvalou (ed), *Debating Social Rights* (Hart 2011) 53
[47] Buckley et al (n 34) 26-27
[48] Ibid
[49] For example, *Valiuliene v. Lithuania (Application no. 33234/07)* para. 76 and 85.
[50] Alec Stone Sweet; Jud Matthews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Columbia Journal of Transnational Law
[51] Ibid
[52] Buckley et al (n 34) p. 12-14
[53] Ibid
[54] Aal (n 4) p. 154-157. See also Jon Petter Rui, 'The Interlaken, Izmir and Brighton Declarations: Towards a Paradigm Shift in the Strasbourg Court's Interpretation of the European Convention of Human Rights?' (2013) Nordic Journal of Human Rights 28
[55] For example, Takis Tridimas, 'Wreaking the Wrongs: Balancing Rights and the Public Interest the EU Way' (2023) 29 The Columbia Journal of European Law 185 192-193.
[56] Ibid

Fifth, a creature closely connected to proportionality considerations while at the same time distinct, is the margin of appreciation. The term refers to the fact that a member state is allowed a certain discretion when it takes legislative, administrative or judicial action bearing on a Convention right. The margin is mainly applied when considering whether an interference is proportionate in relation to the express derogation clauses, but seeing as a factual complex usually involve a balancing exercise between the respective right in art. 8-11 and other conflicting rights and/or collective interests, the effective scope of the doctrine is arguably wider.[57] The margin of appreciation is essentially the vehicle relied upon to give national states a certain degree of deference when balancing the conflicting interests.[58] When deciding the size of the margin, the Court will consider (i) the nature of the Convention right in issue; (ii) its importance for the individual; (iii) the nature of the interference, and (iv) the object pursued by the interference.[59] This margin will tend to be narrower "where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights" and where "a particularly important facet of an individual's existence or identity is at stake."[60] In contrast, whenever there is "no consensus within the Member States […], either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider."[61]

Finally, the non-substitution principle[62] provides that the ECtHR will be deferential whenever the national states have considered diligently – either through the legislative, administrative or judicial branch of government – the conflicting interests in good faith with the factors embedded in the case-law of the ECtHR. If that is the case, the ECtHR will not substitute its own judgement with that of the domestic authorities unless "good reasons" suggests so.[63] Conversely, when the government have not engaged in such considerations the ECtHR may regard the measure a violation without further consideration.[64]

This deferential approach has a wider scope of application compared to the margin of appreciation where it may apply to all rights under the Convention.[65] Also, formally, the effect of this deferential approach is not the equivalent to a wide margin of appreciation. While the margin of appreciation gives the state substantive discretion to decide within the convention boundaries, the non-substitution principle is about the intensity of judicial review, in particular the extent to which the national state's diligent perception of the proportionality of an interreference is to be given weight in the ECtHR's assessment. In practice, however, the non-substitution principle is closely linked to the substantive

[57] Letsas (n 34) 80-98
[58] Buckley et al (n 34) 14-17
[59] For example, *S. and Marper v. The United Kingdom (Applications nos. 30562/04 and 30566/04)* para. 102
[60] Ibid.
[61] Ibid.
[62] In his extrajudicial works, Robert Spano have termed the non-substitution principle "process-based", "subsidiarity based deference" and "convention-based assessment at the domestic level – the Von Hannover non-substitution principle", see Spano (n 28). This is distinct from the principle of subsidiarity, which is the wider notion underlying the non-substitution principle, the rule on exhaustion of domestic remedies in art. 41 and the fourth instance doctrine. See Buckley et al (n 34) 17-18.
[63] Buckley et al (n 34) 17-18
[64] For example, *Annen v Germany (Application no. 3690/10)* and *Terentyev v Russia (Application no. 25147/09)*
[65] See item 2.3.3 below.

protection that flows from the convention. When a case comes before the ECtHR, the situation will always be that the domestic legislature, administrative branch or judiciary have found the intervention proportionate. If so, even if the ECtHR considers the measure unreasonable assessed under ideal criteria, this unreasonableness remains unsanctioned whenever it does not meet the threshold of "good reasons".In practice, therefore, the non-substitution principle is decisive for whether a claim based on the convention is upheld or not. For this reason, many term this concept as an implied margin of appreciation.[66] The non-substitution principle and the increased weight given to it in the years following the Interlaken-, Izmir and Brighton conference[67], thus comes with an inherent controversy.[68]

To summarize, the ECHR has created a body of various doctrines to govern the boundary problem. In sum, these principles serve to establish what can be described as a room or margin of action under the Convention that the member states inherit.[69] Between the extremities the Convention deems unlawful, there is a spectrum of different actions and solutions that are all equally lawful. The choice between these solutions is essentially exempted from the realm of human rights acquis and left to the member states. Human rights law only provide that the result must be within the realm of reasonable outcomes.

When exercising this discretion to identify these outer boundaries, a range of factors, perceptions and argumentative techniques influence the ECtHR. It would be misleading to suggest that they are applied in a strict systematic way. The factors outlined above are subjective in nature and applying them in conjunction entail a great degree of judicial discretion. They are difficult to measure, and different people will reasonably disagree over their meaning.[70] Thus, as many have held, the room for action afforded by the ECtHR remains "slippery as an eel".[71] The exact level of protection depends on a holistic assessment, and for this reason it is primarily the case-law of the Court that is *the* most important source for deciding the level of protection.

1.6 EU Law and the Charter on Fundamental Rights

The Charter therefore, like the ECHR, has incorporated several mechanisms in order to achieve a well-struck balance between effective rights protection and state sovereignty.[72]

First of all, the Charter has two constituencies. It is addressed to the institutions, bodies, offices and agencies of the Union, and the Member States "*when they are implementing*

[66] Letsas (n 34) 80-98, Rainey et al (n 34) 80-82. See also Jan Kratochvíl, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights' (2017) 29 Netherlands Quarterly of Human Rights ; Rui (n 54) 51-52.
[67] Spano (n 28)
[68] For a discussion, see Rui (n 54)
[69] Some term this an implied margin of appreciation, see e.g. Kratochvil (n 66) and S.C. Greer, *The Margin of Appreciation: Interpretation and Discretion Under the European Convention on Human Rights* (2000). However, for analytical clarity, the wider "margin of action" will be used.
[70] Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press 2015)135–136.
[71] Dean Spielman, *Whither the Margin of Appreciation?'* (2014)
[72] For general literature, see Spaventa (n 5); Paul Craig; Gráinne de Búrca, *EU Law: Text, Cases, and Materials*, vol 7th (Oxford University Press 2020); Jonas Christoffersen, *EU's Charter om Grunlæggende Rettigheter med kommentarer* (2014) and Steve Peers; Tamara Hervey; Jeff Kenner; Angela Ward, *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014).

Union law".[73] While the latter phrase brough on some controversy when it was introduced, it is now settled case-law that the Charter applies to member states when they act within their discretion afforded by EU law.[74] Thus, the Charter does not apply unless a situation is governed by Union law by virtue of a connecting factor other than the Charter. Also, the Charter may not in itself serve as the basis for the introduction of secondary legislation.[75]

Second, in order to ensure consistency, art. 52 (2), (3) and (4) in conjunction with (7) clarifies that Charter rights are to be interpreted and exercised according to the conditions and limits defined by the provisions that they are inspired of.[76] Similarly, art. 53 expressly states that the Charter does not intent to restrict or adversely affect fundamental rights as general principles of EU law. While these provisions limit the CJEU from going below the protection afforded by the ECtHR, it also makes the margin of action as set out by the ECtHR the natural analytical starting point when the CJEU applies the Charter.

In its case-law, the CJEU have developed its own *sui generis* margin of discretion to decide the level of judicial review. This discretion is exercised when the CJEU either decides on the validity of novel secondary legislation in validity challenges or gives a ruling on the compatibility of national law with EU law through the preliminary ruling procedure or infringement proceedings.[77] In relation to preliminary rulings, a dichotomy of "outcome"-, "guidance"- and "deference"-cases is often used.[78]

Traditionally, the Court rarely addresses the level of scrutiny that it applies. In Digital Rights Ireland[79], however, the CJEU stated that it will consider "*a number of factors, including, in particular, the area concerned, the nature of the right at issue guaranteed by the Charter, the nature and seriousness of the interreference and the object pursued by the interference*".[80] While articulated in slightly more abstract and nebulous terms, this approach essentially mirrors the factors set out by the ECtHR when deciding the margin of appreciation under the ECHR. The CJEU, recognizing this fact, stating that it would apply the factors developed by the ECtHR by analogy.[81] In addition, scholars have held that the CJEU seems to factor the extent to which the right has been the subject of legislative elaboration and whether the restriction emanates from EU or national law.[82] While the CJEU is soft in reviewing the competence of the EU *ratione materiae*, it is harder in reviewing compatibility with human rights.[83]

It should be noted that the Charter is structured in a distinct and different way compared to the ECHR. The role of proportionality analysis is emphasized in art. 52 (1), where all rights

[73] Article 51 (1) CFR
[74] For example, Barnard (n 25) 262-268.
[75] Article 51 (2) CFR. See also Búrca (n 72) 446-447 and 463.
[76] Barnard (n 25) 268-269.
[77] Christoffersen (n 72) 45-51.
[78] For example, Takis Tridimas, 'Constitutional review of member state action: The virtues and vices of an incomplete jurisdiction' (2011) 9 International Journal of Constitutional Law 737.
[79] *Joined Cases C-293/12 and C-594/12* para. 47.
[80] See also *Case C-601/15* ; *Case C-18/16* ; *Case C-362/14*
[81] (n 79) para. 47.
[82] For example, Tridimas (n 55) 198-199, 203-205
[83] Ibid

contained in the Charter may in principle be restricted subject to the principle of proportionality. Thus, it might seem that the margin of discretion has a wider scope of application than the margin of appreciation under the ECHR (which, at least formally, only applies to art. 8-11 ECHR). While this is a fact as a matter of terminology, one may debate whether the difference constitutes any discrepancy in applicable law. Pursuant to art. 52 (1) a right may only be restricted by reference to proportionality analysis in so far as one "respect[s] their essence". This condition limits the reach of the principle of proportionality[84], and thus, while the dichotomy varies, the approach therefore seems to be more or less the same as under the ECHR.

In relation to the the social rights in Titles II, III, IV and V, art. 52 (5) CFR introduces a conceptual distinction between rights and principles. Traditionally, such rights are seen as political objectives subject to budgetary constraints and discretionary political decision-making, rather than constitutionally protected legal claims or interests of individuals.[85] This resemblance of this argument in relation to positive obligations on national states under the ECHR is eminent.

The essence of this distinction is the following: While rights are judicially cognizable, provisions in the Charter that only give rise to principles can only be invoked before courts when they have been concretized and implemented in the form of EU secondary legislation. In essence, principles are judicially cognizable only in the interpretation of legislative and executive acts and in the assessment of their validity. While this distinction serves as a powerful signal to the judiciary, it should be noted that Union acquis now encompass a vast body of secondary law that cover so to say all areas of society. Whether this distinction has any operable effect is therefore a matter of scholarly debate.[86]

Altogether, these normative constructs serve to decide the margin of action that will be conferred to member states *under EU law*. It should be noted that, while the relevant factors deciding the margin of action under the ECHR and EU law respectively are similar, as mentioned before, the application of these factors entail a great degree of judicial discretion. Therefore, in the respective case, although the factors applied are the same, the CJEU may still choose to diverge from the approach developed in the case-law of the ECtHR. This issue will be examined further in item 2.

2. Enhanced protection in the EU so far – a case study

2.1 Introduction

Having set out the methodologic tools that the courts use to guide the level of judicial protection flowing from the respective instruments, the question to be examined in the following is in which situations EU law will typically give greater protection than traditional human rights instruments.

[84] For example, Takis; Gentile Tridimas, Giulia, 'The Essence of Rights: An Unreliable Boundary?' (2019) 20 German Law Journal 794.
[85] Peers et al (n 72) 2015-2024; Tobias Lock, 'Rights and principles in the EU Charter of Fundamental Rights' (2019) 56 CMLR 1201
[86] Ibid

It is submitted that a prerequisite for EU law having any such self-contained effect, is a lack of governance or simply procedural governance from the traditional instruments. Put plainly, in order for there to be room for any additional protection from EU fundamental rights, the traditional instruments must give the EU and its member states a margin of maneuvre to act within. When the room for action following by the traditional instruments is narrow or non-existent the implication is naturally that there is no room left for the EU to introduce legislation governing the same issues.

Several examples are illustrative of this dynamic. The following section distinguishes between three different situations, namely situations where the ECtHR apply substantive review, procedural review or no review at all. The final sub-section serves to illustrate the width of this dynamic, and, on this basis, it is submitted that a growing divergence is emerging where EU fundamental rights systematically provide greater protection of contestable civil rights and socioeconomic rights, in particular rights relating to judicial protection, discrimination law, protection of privacy, and horizontal relationships.

2.2 Core rights with substantive review from the ECtHR

Pursuant to art. 3 ECHR, an individual derives protection from being expelled from the territory of a national state if there is a real and demonstrable risk that he or she may be subject to degrading or inhuman treatment in the receiving state (the principle of non-refoulment).[87] The risk assessment must focus on the foreseeable consequences of the applicant's removal to the country of destination, in the light of the general situation there *and* of his or her personal circumstances.[88] In the case of removal of asylum-seekers to third intermediary countries, without an assessment of the merits of the asylum claim by the authorities of the removing State, the removing state has to examine thoroughly whether or not there is a real risk of the asylum-seeker being denied access, in the receiving third country, to an adequate asylum procedure, protecting him or her against unlawful refoulement.[89] In this regard, the application onto the facts is also subject to the scrutiny of the ECtHR.[90]

At the same time, the EU – faced with the migration crisis of the 21th century[91] – have enacted a body of legislation under its competences in the AFSJ to make immigration matters and policy able to deal with mass migration from Africa and the Middle East.[92]

Pursuant to the Dublin system[93] [94], which governs the allocation of responsibility to handle applications for asylum between the member states, an application will be processed by the

[87] For example, CoE Registry, *Case-Law Guide on Immigration* (31.08.2022) paras. 40-54
[88] Ibid
[89] Ibid paras. 55-63
[90] Ibid
[91] Barnard (n 25) 33-34
[92] Steve Peers, *Immigration and asylum* (European Union Law, Oxford University Press 2020); Takis Tridimas, 'Competence, Human Rights, and Asylum: What Price for Mutual Recognition? – A Post-Lisbon Assessment' in I.; Garben Goevare, S. (ed), *The Division of Competences in the EU Legal Order* (Bloomsbury 2017)
[93] Tridimas (n 92) 154-155
[94] Regulation (EU) No 604/2013 is incorporated into domestic Norwegian law by sc. 32 (4) Immigration Act 2008.

EU member state in which the asylum seeker first arrived in.[95] If the asylum seeker applies for protection in another Dublin country, he or she will be sent back to the country that has already considered his/her application or that is responsible for considering the application.[96] This system shifted the burden of assessing asylum applications to the southern and eastern member states, which also make out the poorer member states.[97] Faced with excessive number of asylum applications and a lack of solidarity among the other member states to receive and integrate asylum seekers, the diligence of the review with the authorities in Greece and Italy quickly declined.[98] At the same time, the Dublin system was founded on the principle of mutual recognition where member states where to presume that the member state responsible for handling the asylum application paid regard to their international obligations. There is a clear tension between this principle of mutual recognition and the obligation of proper evaluation prescribed by the ECtHR. Thus, Belgium was held liable for infringing art. 3 ECHR.[99]

Similar problems arise in relation to judicial protection. In civil matters, the Brussels Regulations[100] impose a principle of mutual recognition where foreign rulings is to be presumed compliant with the right to a fair hearing. This is contrary to the prohibition against recognizing and enforcing a foreign judgement without first conducting some measure of review of compliance with art. 6 ECHR.[101] Similarly, in criminal matters, EU member states are obliged to comply with arrest warrants from other member states without reviewing the complaint suspicion on the merits.[102] This is contrary to the prohitbition against extraditing an individual whenever the individual would risk suffering a flagrant denial of justice in the requesting country pursuant to an individual assessment.[103]

In order to balance the right under art. 3 with the functioning of the Dublin-system, the CJEU in NS[104] articulated a set of criteria that member states may rely on in order to rebut the presumption that the responsible member state comply with fundamental rights. In essence, the principle of mutual recognition ceases to apply whenever a member state suffers from "systemic flaws" in the asylum procedure and in the reception conditions of asylum-seekers[105] which is to be assessed on the basis of the sources that the ECtHR regard relevant.[106] This approach was applied *mutatis mutandis* in consequent case-law relating to arrest warrants.[107] For some scholars, the ruling in NS begs the question whether, in the absence of systemic deficiencies, individual circumstances indicating that there is a risk of violation of the fundamental rights of the individual may provide sufficient grounds to deny

[95] Peers (n 92) 847-849
[96] Ibid
[97] Ibid
[98] Barnard (n 25) 33-34
[99] *MSS v Belgium and Greece (Application no. 30696/09)* .
[100] Regulation (EU) No 1215/2012 and Regulation (EU) 2201/2003. The parallel Lugano Convention is incorporated into domestic Norwegian law by sc. 4-8 Civil Procedure Act.
[101] CoE Registry, *Case-law Guide on Article 6 – Civil Limb* (31.08.22) paras. 240-242
[102] Regulation (EU) 1215/2012. See also John R Spencer; András Csúri, 'EU Criminal Law', in Barnard (n 25) 809-816
[103] CoE Registry, *Case-law Guide on Article 6 - Criminal Limb* (28.02.23) paras. 577-583
[104] *Joined cases C-411/10 and C-493/10*
[105] Ibid paras. 106-108, 115
[106] Ibid para. 91
[107] *Joined Cases C-404/15 and C-659/15* ; *Case C-216/18*

transfer. Lack of emphasis on the personal circumstances of the individual represents a discrepancy that raises the question of whether EU law is compliant with the ECHR. [108]

To this date, the approach of the CJEU have been deemed lawful by the ECtHR applying the Bosporus-doctrine[109]. For example, in Avotiņš v Latvia[110] concerning Latvian recognition and enforcement of a ruling delivered *in absentia* in Cyprus the ECtHR did not find the Brussel-Regulation manifestly deficient to rebut the presumption of equivalent protection. It remains to be seen whether the ECtHR will apply a more stringent review when the EU assents to the ECHR. As noted above, there is arguably deficiencies in the approach envisioned by the CJEU.

The examples have in common that EU law impose a principle of mutual recognition, which run conter the condition of individual assessment criteria under several articles in the ECHR. Thus, the examples illustrate how EU law does not have any particular room of action to introduce EU specific legislation to govern human rights issues when traditional human rights instruments apply a narrow margin of action. The examples all concern core-rights, which which attract extensive obligations and substantive, high-intensity review from the ECtHR. The implication is that EU regulatory instruments with a distinct approach give rise to problematic issues of compliance with the Convention at once. We can infer from this that EU law does not provide greater protection than traditional instruments in such situations. To the contrary, the problem is rather that EU law gives adverse protection of fundamental rights and this raises issues of compliance with the ECHR.

2.3 Contestable rights with procedural review from the ECtHR

2.3.1 Introduction

In other situations, the ECtHR allows the national states a wider margin of action. In relation to so-called contestable rights[111] the protection flowing from the Convention is essentially of a procedural nature. This allows the EU the necessary room of action to offer greater protection. Several examples are illustrative.

2.3.2 Proceduralisation of Convention rights

One example is the "proceduralisation of Convention rights". [112] It is a common approach for the ECtHR to abstain from reviewing the proportionality strictu sensu of interferences in Convention rights whenever the issue is contested. Instead, the Court will impose strict procedural guarantees in order to regard the measure as proportionate.[113] In such situations, the CJEU may take the step to also review the substantive proportionality strictu sensu with the implication that the margin of action afforded to member states is narrower under EU law.

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[108] For a discussion, Tridimas (n 92)
[109] For example, *Avotiņš v Latvia (Application no. 17502/07)* paras. 115-17. See also Spaventa (n 5) 571-576.
[110] (n 109)
[111] Item 2.3.3 below.
[112] For example, Eva Brems, 'Procedural Protection: An Examination of the Procedural Safeguards Read into Substantive Convention Rights'' in Eva; Gerards Brems, Janneke (ed), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press 2013).
[113] Ibid

A contentious issue is the lawfulness of mass and pervasive state surveillance in the interest national security. This is allowed en-bloc under art. 8 ECHR provided that extensive procedural safeguards are in place.[114] This minimalistic approach have been criticised by many for being too deferential to intelligence agencies and opening the door for mass surveillance regimes.[115] Thus, EU law applies a slightly stricter approach where the Court also assesses the substantive necessity and proportionality strictu sensu.[116] In SpaceNet and Telekom Deutschland[117] the CJEU admits that this entails a more diligent review than the approach under the ECHR.[118] While the member states have pressured the CJEU into accepting that bulk data retention is permissible under strict judicial oversight in some situations[119], EU law still provide greater protection of privacy when compared to the protection derived of art. 8 ECHR.

2.3.3 The non-subsititution principle

Another example illustrative example is the ECtHR's use of the "non-substitution-principle". It is a common approach for the ECtHR to require "good reasons" to substitute its judgement with that of the domestic courts.[120] In essence, the ECtHR abstains from assessing the proportionality strictu sensu on the merits if the Convention principles have been adequately embedded into and applied in the domestic legal order.[121] As mentioned in item 1.5, this represents a minimalistic approach where the protection flowing from the Convention is of a procedural nature. The ECtHR will not review the proportionality strictu sensu unless this assessment is manifestly deficient. EU law, on the other hand, may impose stricter judicial review in such situations also reviewing the merits of the proportionality strictu sensu. This translates to a narrower room of action and greater protection of rights under EU law than under traditional human rights instruments.

One example of this is in defamation cases. In its case-law, the ECtHR have established six criteria to be considered when striking a fair balance between freedom of expression in art. 10 and the right to privacy in art. 8. That is, the contribution to a debate of public interest; the degree of notoriety of the person affected; the subject of the news report; the prior conduct of the person concerned; the content, form and consequences of the publication; and, where appropriate, the context and circumstances.[122] Whenever the national

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[114] *Big Brother Watch and Others v. United Kingdom (Application nos. 58170/13, 62322/14 and 24960/15)* paras. 334-339 and 348-350; *Centrum för rättvisa v. Sweden (Application no. 35252/08)* See also Registry, *Case-Law Guide on Article 8* paras. 225-229; CoE Registry, *Case-law Guide on Data Protection* (31.08.22).

[115] For example, Monika Zalnieriute, 'Big Brother Watch and Others v. The United Kingdom' (2022) 116 American Journal of International Law 585; Juraj Sajfert, *The Big Brother Watch and Centrum för Rättvisa judgments of the Grand Chamber of the European Court of Human Rights – the Altamont of privacy?* (2021).

[116] *Joined Cases C-293/12 and C-594/12*; *Joined Cases C-203/15 and C-698/15* ; *Case C-623/17* ; *Joined cases C-511/18, C-512/18 and C-520/18* ; *Case C-140/20* ; *Joined cases C-793/19 and C-794/19* . For a commentary, see Valsamis Mitsilegas; Elspeth Guild; Elif Kuskonmaz, 'Data Retention and the Future of Large-Scale Surveillance: The Evolution and Contestation of Judicial Benchmarks' (2022) 36 European Law Journal .

[117] *Joined cases C-793/19 and C-794/19*

[118] Ibid para. 125

[119] Mitsilegas, Guild, Kuskonmaz (n 116)

[120] Spano (n 28), Rui (n 54).

[121] Ibid

[122] For example, *Von Hannover v. Germany (Applications nos. 40660/08 and 60641/08)* 104-113 See also CoE Registry, *Case-law Guide on Article 10* (31.08.22) paras. 108-112

authorities have done assessments in good faith with these criteria, the ECtHR will require "strong reasons" to substitute its view for that of the domestic courts.[123]

In EU law, handling of personal data by private individuals is governed by the GDPR[124] [125]. Article 6 (c) and (e) governs the lawful handling of personal data in the public interest, and article 23 allows making exceptions to the rights of the data subject to notice of the processing, rectification and erasure for the purposes of public interests subject to an assessment of proportionality sensu lato. Article 85 GDPR imposes the equivalent mandatory obligation to establish and enforce such derogations for the purposes of journalistic purposes or the purpose of academic artistic or literary expression.[126]

In interpreting these provisions, the CJEU will apply an expansive view of whether the processing does in fact follow a journalistic purpose. Under EU law, the exception for journalistic purposes applies not only to media undertakings but rather to 'every person' pursuing the relevant purposes including, in principle, individuals using online platforms, such as for example YouTube, to send, watch and share videos.[127] This represents a wider notion of journalistic purpose compared to that under art. 10 ECHR.[128] In addition, although the relevant criteria in the assessment of proportionality strictu sensu between the right to privacy and freedom of speech are more or less the same as the test under the ECHR[129], the CJEU will not allow the member states the exact same margin of discretion in the application of this test. One example is how art. 17 GDPR give the data subjects a default right of erasure towards search engines[130], in addition to a right of erasure towards original publishers subject to individual review.[131] EU Law also govern disclosure of information relating to use of public funds available to the general public strict.[132] In such situations, EU law provide greater protection of the privacy of the individual when compared with the protection flowing from the ECtHR.

The ability of EU law to provide greater protection of rights when the ECtHR applies the non-substitution principle represents an important finding. The reason is the perceived increase in the use of this approach from the ECtHR over the last decade. Following a hostile view taken on by some member states, notably i.a. the UK and Russia, that the ECtHR imposes too intrusive governance of issues best left to the national states, Protocol 15 emphasized the margin of appreciation and principle of subsidiarity by inserting these constructs into Recital 3 of the Preamble to the Convention following the Interlaken-, Izmir and Brighton

[123] Ibid
[124] Regulation (EU) 2016/679
[125] GDPR is incorporated into domestic Norwegian law through sc. 1 General Data Protection Act.
[126] *Case 73/07* para. 54.
[127] Ibid paras. 58-62; *Case C–345/17* paras. 52-62
[128] *Case 73/07 compare with Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland (Application no. 931/13)* paras. 175-178.
[129] *Case C–345/17* para. 66
[130] *Case C-131/12* paras. 81-88, 97-99; *Case C- 136/17* ; *Case C-507/17*
[131] A right of erasure towards newspapers and other original publishers requires a case-by-case approach, by reference to how this inflicts freedom of speech. In this regard, the ECtHR seems to offer the member states a wider margin of action than the CJEU, see *Case C-398/15* paras. 52, 56 and 60 and the rulings in (n 130) *compared with Mediengruppe Österreich Gmbh v. Austria (Application no. 37713/18) Biancardi v. Italy (Application no. 77419/16)* .
[132] *Joined cases C-92/09 og C-93/09 compare with L.B. v. Hungary (Application no. 36345/16)*

conference between 2010 and 2012.[133] In the case-law following the amendments, scholars now argue that there has been a "paradigm-shift" where an increased deference can be traced.[134] As a part of this deference, the ECtHR have increased the use of the non-subsitution principle. As outlined in item 1.5, this approach makes the protection flowing from the Convention of a procedural nature effectively expanding the substantive margin of action that is available to the national states.

To address the scope of this novel approach from the ECtHR, a distinction between "core rights" and "contestable rights" in the ECHR may be introduced.[135] Commentators argue that there is a clear distinction in the approach of the ECtHR in relation to the negative obligation to abstain from violating art. 2, 3, 4, 5, and 6, on the one hand, and articles 8-11, and 14 on the other, where the increased impact of the non-substitution principle is limited to the latter.[136] [137] The explanation is thought to be that whereas the former can be said to be true "moral imperatives", the latter rights will to a greater extent involve policy in their application.[138] It is thus the primordial role of the ECtHR to enforce the protection of core rights.[139]

From a normative perspective, one may of course debate whether such a restrained, minimalistic approach from the ECtHR is appropriate or not.[140] However, as a matter of law, this is clearly the norm going forward. Following a more restrained approach from the ECtHR, the floor is now open for the CJEU to provide greater protection of these contestable rights.

2.4 Areas without comparable protection in the ECHR.

2.4.1 Introduction

As mentioned, traditional instruments may allow the member states a wide margin of action. A similar situation is when the traditional instruments do not govern an issue at all. In the latter situation, EU law may provide for greater protection. Several examples are illustrative.

[133] Mikael Rask Madsen, 'The European Court of Human Rights: From the Cold War to the Brighton Declaration and Backlash' in Laurence R.; Alter Helfer, Karen J; Madsen, Mikael Rask (ed), *International Court Authority* (2018)

[134] Mikael Rask Madsen, 'Rebalancing European Human Rights: Has the Brighton Declaration Engendered a New Deal on Human Rights in Europe?' (2018) 9 Journal of International Dispute Settlement ; Spano (n 28); Rui (n 54).

[135] In his article, Spano uses a dichotomy of "core, absolute rights" and "qualified rights". However, to avoid confusion towards the distinction of whether a right is derogable or not pursuant to the wording of the provision, the terms "core" and "contestable" will be used.

[136] Spano (n 28)

[137] An important qualification in this regard is that positive action to prevent infringements of core rights attributable to private parties are still subject to a considerable margin of action for the member states. In these assessments, the non-substitution principle may still play a considerable role. See Spano (n 28).

[138] Spano (n 28). On this distinction in the abstract, see Letsas (n 34) 99-119; Fernando Suárez Müller, 'The Hierarchy of Human Rights and the Transcendental System of Right' (2019) 20 Human Rights Review .

[139] Spano (n 28).

[140] Item 1.5 above.

2.4.2 Administrative procedural requirements

In the abstract, process requirements include the obligation for the enacting authority to examine carefully and impartially all the relevant elements of the situation in question and to give an adequate statement of reasons, and within the secondary legislation this may include specific rules on gathering of evidence, standards of proof and assessment of evidence.[141]

While art. 6 ECHR offers a right to fair hearing, the Convention does not specify at which stage this hearing is to take place.[142] Accordingly, the ECHR offers the member states a choice between a so-called administrative or judiciary model to govern their administrative proceedings.[143] EU law, on the other hand, provides an extensive framework governing the administrative law of its institutions and member states.[144]

First, the enormous body of sector specific secondary legislation may impose extensive regulation of procedural matters within its respective scope of application. An illustrative example of the latter is A and others[145] where the CJEU ruled that the Status Directive[146], read in light of art. 7 CFR, prohibited the immigration authorities from conducting extensive interrogations of individuals concerning their sexual behaviour and/or requiring documentation of homosexual acts in order to accept homosexuality as a ground for protection when assessing applications for asylum.[147] In the assessment of evidence, the Directive also precludes weighing the fact that the individuals didn't immediately allege homosexuality.[148] The delicate nature of the matter require member states to allow the individual some time in order to reveal intimate aspects of his life. Another current example is how ESA has inquired into failure of the Norwegian government to conduct environmental impact assessments under the SEA-[149] and EIA-Directive[150] when deciding on i.a. petroleum activities.[151]

Second, in the absence of relevant EU secondary law provisions on the matter, pursuant to the principle of equivalence and effectiveness, art. 41 CFR lays down a right to good administration towards EU institutions. The same principle applies towards the member states as a general principle of EU law.[152] Important sub-principles are the right to have his or her affairs handled impartially, fairly and within a reasonable time, a fair hearing based on an adversarial procedure. The latter includes a reasoned and complete statement of

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[141] Tridimas (n 55) 209
[142] *Segame v. France (Application no. 4837/06)* para 55.
[143] On this in the abstract, Michael Asimow, 'Five Models of Administrative Adjudication' (2015) 63 The American Journal of Comparative Law 3.
[144] Herwig Hofmann, 'General principles of EU law and EU administrative law', in Barnard (n 25)
[145] *Joined Cases C-148/13 to C-150/13*
[146] Directive 2004/83/EC
[147] *Joined Cases C-148/13 to C-150/13* 64, 65,72.
[148] Ibid 68, 69, 72.
[149] Directive 2001/42/EC. Transposed into domestic Norwegian law by FOR 2005-04-01-276; FOR 2009-06-26-855
[150] Directive 2014/52/EU. Not yet transposed.
[151] ESA Document no: 1218672, Case No: 86939, 4 November 2021.
[152] For example, *Case C-166/13* paras 44-45

objections, access to documents and the case-file, and the opportunity to make one's views known on the merits, a reasoned decision, and ancillary language rights.[153]

2.4.3 Socioeconomic rights

Because of the positive monetary obligations on the national states that such protection entails, traditional human rights acquis does not offer any extensive protection of social- and economic rights. The positive obligation under art. 2 ECHR requires states to adopt appropriate measures for the protection of patients' lives but do not confer any right to a certain standard of living.[154] The UN-conventions have an individual complaints procedure that the national states may submit to, but their decisions are not binding on the member states and the compliance is varying. Further, the Revised European Social Charter only contain a collective complaints procedure. Thus, although the Conventions arguably have some substance, de facto, traditional instruments do not impose extensive obligations on member states to secure a certain standard of living for their citizens.

In EU Law, on the other hand, a body of social- and economic rights in Title I, II, and VI CFR may be invoked by individuals before the CJEU through the preliminary ruling procedure. Notwithstanding the distinction between rights and principles, the social provisions in the Charter – which, contrary to the rights in Title I, II, and VI derived of the ECHR, do not have any effective complaints procedure or adjudicator under the traditional instruments – may be given a judicially cognizable operable core-matter that bind EU institutions and EU member states through precedent and case-law.[155] One example is Sobczyszyn[156] and Bauer[157] where the CJEU established that art. 31 (2) CFR contain an operable right to enjoy paid a period of relaxation and leisure. Other examples from the ECJ's case-law are also illustrative.[158] As such, the inclusion of a body of rights in the Charter, is already, and may certainly in the future lead to a greater level of protection of individual's social- and economic rights.[159]

2.5 Conclusion

The problem examined in this section has been in which situations EU law will typically give greater protection than traditional human rights instruments. The above sub-section has illustrated, through use a body of examples, that a prerequisite for such a self-contained effect is that the traditional instruments allow the national states some margin of action. In essence, in order for EU law to provide greater protection, lack of governance or procedural governance from the traditional instruments is a prerequisite.

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[153] Hofmann (n 144) 228-233.
[154] CoE Registry, *Case-law Guide on Article 2* (28.02.22) paras. 45-55.
[155] For example, Alec Stone Sweet; Thomas L. Brunell, 'Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization' (2013) 1 61. In the context of the ECHR, Spano termed this the "substantive embedding phase". See Spano (n 28).
[156] *Case C-178/15* para 21
[157] *Joined Cases C-569/16 and C-570/16*
[158] Búrca (n 72) 436.
[159] M.H.S. Gijzen, 'The Charter: A Milestone for social protection in Europe?' (2001) Maastricht Journal of European and Comparative Law 33

In this regard, a distinction has to be made between core and contestable rights in the ECHR. Examples of the former is art. 2, 3, 4, 5 and 6 ECHR, while art. 8-11, and 14 ECHR is examples of the latter. In relation to core-rights, the ECtHR applies strict judicial oversight with national states. In these situations, EU law do not have the necessary margin of action under the traditional instruments to impose a *sui generis* approach to the issues. The example on the Dublin system and the European Arrest Warrant system are illustrative of this fact. These concern core-rights, which attract high-intensity review from the ECtHR. The implication is that EU regulatory instruments with a distinct approach give rise to problematic issues of compliance with the Convention at once.

Conversely, when discussing contestable rights in art. 8-11, and 14 ECHR the judicial oversight from the ECtHR takes a procedural form, either by reference to proceduralisation or the non-substitution principle. In such cases, EU Law may apply a distinct approach to these problems without there being any problems of compliance with the Convention. Also, in cases where traditional human rights instruments do not govern issues EU law have the necessary margin of action to take a more central role. The most important examples of the latter are considerations relating to administrative law, socioeconomic rights and the balancing exercise between economic efficiency and social objectives.

2.6 Systemic differences – a growing divergence?

Having established that EU fundamental rights *may* offer greater protection whenever the review derived of the traditional instruments is nonexistant or of a procedureal nature, the next question that comes to mind is whether there are systemic differences, i.e. discrepancies with a wider scope of application.

At the outset, it should be emphasized that the empirical basis for concluding that EU law systematically confer greater protection than traditional human rights instruments remains unsatisfactory. The reason is how the minimalistic approach from the ECtHR is still quite novel and in its early years. In addition, the comparative exercise of comparing rulings from the CJEU to that of the ECtHR is of little practical relevance to other than scholars exploring how various legal systems deal with the boundary problem. However, notwithstanding this, there are tendencies of a growing divergence.

First of all, the case-law now contain a wide number of rulings in which there is a clear discrpeancy between the ECtHR and CJEU in relation to the same specific issue, where the latter to a greater extent partakes in prescriptive, substantial review.. The abovementioned examples in item 2.3 on bulk-interception and defamation are both illustrative of this. In immigration law, art. 27f. of the Citizenship Directive[160] have overtaken the right to residence based on family reunification and protection against expulsion derived of the right to family life in art. 8 ECHR in full. Whereas the ECtHR will apply the non-substitution rule[161], the Citizenship Directive applies a more casuistic approach, which narrows down the grounds that can justify expulsions and increases the threshold for when such measures are

[160] Directive 2004/38/EC

[161] *Ndidi v. The United Kingdom (Application no. 41215/14)* para. 76. See also Registry, *Case-Law Guide on Article 8* paras. 407-413.

proportionate strictu sensu.[162] Schmidberger[163] concerning freedom of assembly, Omega Spielhallen[164] concerning human dignity, Herbert Karner Industrie-Auktionen [165] concerning freedom of expression and Booker Aquaculture Ltd & Hydro Seafood GSP Ltd v Scottish Minister[166] are other examples of how the CJEU notoriously applies the "outcome-approach".[167]

While these rulings are freestanding examples of a more prescriptive, substantive review in relation to specific bodies of the more interesting question is whether it is possible to trace a more systematic divergence within bodies of law. There are some signs in the case-law.

First, the right to judicial protection and right of defence stands at the apex of EU fundamental rights. [168] In no other area has the Court been more active.[169] The reason is how effective judicial protection functions as a prerequisite for the primacy of Union law and how the right to good administration interplays with the civil limb and administrative criminal limb of the right to a fair trial. [170] The extensive economic sanctions case-law starting with Kadi I serves as an illustrative example.[171] In a Norwegian context, lack of administrative review ("forvaltningens frie skjønn") may prove problematic in the future.[172] The Commission has also been activist in pursuing a rule-of-law agenda concretising and raising the standards that member states are expected to fulfil.[173]

In discrimination law, EU law provides for extensive secondary regulation covering discrimination on grounds of sex, racial and/or ethnocentric origin, religion and/or belief, disability, age, or sexual orientation by governments and private parties.[174] The scope of this regulation is wide, applying to both private parties, undertakings and in vertical relations[175], and the CJEU is arguably leaving little discretion for the member states when assessing whether the situations are comparable and whether differential treatment of comparable situations can be justified.[176]

[162] *Case C-60/00* concerning self-employed; *Case C-457/12* concerning employees.
[163] *Case C-112/00*
[164] *Case C-36/02*
[165] *Case C-71/02*
[166] *Joined Cases C-20 and C-64/00*
[167] Tridimas (n 78)
[168] Tridimas (n 55) 196
[169] Ibid
[170] Tridimas (n 9) 366-367.
[171] *Joined Cases C-402/05 and C-415/05* ; *Joined Cases C-584/10, C-593/10 and C-595/10*
[172] Halvard Haukeland Fredriksen, ' Tvisteloven og EØS-avtalen' (2008) Tidsskrift for Rettsvitenskap 2008 289 on 295-296
[173] C.; Kochenov Closa, D., *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016)
[174] For example, Mia Rönnmar, 'Labour and equality law', in Barnard (n 25)
[175] Ibid
[176] Ibid. See also Tridimas (n 9); Tridimas (n 78).

Finally, protection of privacy seems to also enjoy an enhanced status with several seminal cases in the later years.[177] Three illustrative examples is Google Spain[178], Test Achat[179] and the Schrems-rulings.[180] It should also be emphasized how the Charter contains rights that expands the realm of human rights acquis compared to traditional instruments. The most important examples here is the freedom to conduct a business[181], the right to good administration[182], and importantly a wide body of socioeconomic rights[183]. Recognition of these as pre-existing fundamental rights serves to narrow down the margin of action conferred on member states within the scope of the respective right.

To conclude, within these areas, a divergence between the case-law of the CJEU and the ECtHR is clearly emerging, where the CJEU partakes in a more prescriptive, substantive review of whether member state action is compliant with fundamental rights. One may infer for this that EU law systematically confer greater protection in relation to judicial protection, discrimination law and privacy.

Second, another systemic feature that is distinct for EU law is its ability to affect horizontal relationships, i.e. legal relationships between private parties.[184] Traditional human rights instruments generally only assert state mediated-[185] or indirect-horizontality.[186] Thus, private individuals and undertakings are not direct constituents as such. EU law, on the other hand, bypass this dualist standard.

With its extensive secondary legislation the EU legislature imposes obligations on private undertakings in a vast number of different situations. The Charter may then be used as interpretative aid to determine the scope and features of these.[187] In cases of soft-conflict with domestic law, the principle of consistent interpretation serves to give EU law indirect horizontal effect.[188] In cases of hard-conflict, regulations are capable of producing direct effect[189] while directives are not.[190] Notably, however, the case-law of the CJEU also confirms

[177] Tridimas (n 55) 197
[178] *Case C-131/12*
[179] *Case C-236/09*
[180] *Case C-362/14*; *Case C-311/18*
[181] The freedom to conduct a business provide a basis for governing the balancing exercise between economic efficiency and civil and social rights, see e.g. *Case C-438/05 Case C-157/15 Case C-426/11*
[182] Item 2.4.2
[183] Item 2.4.3
[184] On vertical and horizontal effect in the abstract, see Al Young, 'Horizontality and the Human Rights Act 1998' in K Ziegler (ed), *Human Rights and Private Law: Privacy as Autonomy* (Hart 2007) 35-51.
[185] Ibid.
[186] Ibid
[187] For example, in *Case C-131/12* Directive 95/46/EC was interpreted in light of art. 7 CFR as conferring an effective right of erasure towards Google. See also *Case C-465/00* concerning privacy more broadly; *Case C-25/17* concerning religious freedom; *Case C-426/11* and freedom to conduct a business.
[188] Barnard (n 25) 168-174
[189] Now art. 288 TFEU
[190] For example, *Case C-425/12* para. 18. See Barnard (n 25) 158-168 on the rule and exceptions.

that the Charter can confer obligations on private individuals.[191] [192] For the purposes of this dissertation, it is sufficient to remark that EU law and the Charter goes further than traditional human rights instruments imposing obligations on undertakings and private individuals in horizontal relationships. In essence, EU Law can produce direct effect in horizontal relationships, whereas traditional human rights instruments only produce state-mediated and indirect horizontal effect.

All of these examples serve to illustrate the width of the dynamic outlined in item 2.2 - 2.4. On this basis, it is submitted that EU law systematically offer greater protection of contestable civil rights and socioeconomic rights, in particular rights relating to judicial protection, discrimination law, protection of privacy, and in horizontal relationships.

3. The normative underpinnings

3.1 Introduction.

As outlined above, EU fundamental rights generally provide greater protection than traditional instruments in a number of situations. This divergence can be expected to increase following the increased emphasis on the non-substitution principle under the ECHR. This is an interesting observation on its own. At the same time, such a divergence must be presumed to be an articulated choice done knowingly. In order to understand why the CJEU goes further in some situations one must explain the normative and contextual depth that these rulings are given in. The following section will delve deeper into the normative foundations for the CJEU pursuing such a policy.

3.2 Judicialization of international regimes: The EU and the ECtHR

While both the CJEU and the ECtHR are trustee-courts[193], as we have seen in item 2, the judicialization in the two legal orders now differ. General theories explaining the degree of judicialization have been the object of extensive scholarly analysis and will not be explored in detail here. [194] For the purposes of this dissertation, a brief outline of how the legal system in the EU to a greater extent is conducive of judicial empowerment is sufficient.

First, as many have held, separation of power facilitates judicial empowerment because of how it makes it difficult for the member states to override the rulings of a constitutional

[191] Examples from the case-law of the CJEU to this date concern discrimination on the basis of sex, nationality, age and religion or belief, see *Case C-43/75* ; *Case C-281/98* ; *Case C-555/07* ; *Case C-414/16* respectively. In *Case C-684/16* the CJEU held art. 31 (2) CFR as conferring a right to paid leave towards undertakings. The CJEU has also concluded that some provisions are not capable of applying horizontally. See e.g. *Case C-356/12* concerning art. 26 on respect for people with disabilities; *Case C-176/12* concerning art. 27 CFR on the right to information and consultation within the undertaking; *Case C-122/17* concerning art. 38 CFR on consumer protection.

[192] It should be mentioned that the horizontal effect of the Charter remains controversial. For a discussion, Elena Frantziou, 'The Horizontal Effect of the Charter: Towards an Understanding of Horizontality as a Structural Constitutional Principle?' (2020) 22 The Cambridge yearbook of European legal studies 208. Whether the Charter is capable of applying in horizontal relationships in domestic Norwegian law have not yet been decided by the Supreme Court.

[193] For example, Sweet and Brunell (n 155); R. Daniel Kelemen, 'The Court of Justice of the European Union: Changing Authority in the Twenty-First Century' in Laurence R. Helfer Karen J. Alter, Mikael Rask Madsen (ed), *International Court Authority* (2018)

[194] For example, Sweet and Brunell (n 155); Karen J.; Helfer Alter, Laurence R.; Madsen, Mikael Rask, 'How Context Shapes the Authority of International Courts' (2016) 36 Law & Contemporary Problems 24;

court.[195] In this regard, the institutional set up of both the EU and the CoE facilitates judicicalization. In the EU, power is fragmented horizontally among the European Commission, the Parliament, and governments in the Council, all of which play a key role in adopting secondary legislation. Power is also separated between member states by how they can only appoint 1 out of X judges and only hold 1 out of X votes when deciding on secondary legislation under the qualified majority or unanimous vote in the Council. Similarly, any amendment of the ECHR would require a unanimous vote among the 47 national states.

Second, the internal market worked in a cycle of "deregulation and re-regulation". [196] When the ECJ struck down existing regulations at the state level, the EU legislature often responded by introducing common standards to apply to all states by way of secondary legislation. Because the ECJ was also the authoritative interpreter of this secondary legislation, this cycle led to the slow, incremental expansion of its jurisdiction.[197] Similarly, the ECtHR have incrementally expanded the scope of the various articles through its dynamic rulings and "living instrument"-doctrine.[198] Such incremental expansion is difficult for member states to militate because the instrusive governance of the individual ruling or legislative act would always loose out when balanced against the risk of jeopardizing the system and the total, aggregate advantages that flows from it.

However, importantly, while governance from the ECtHR was met with discontent, the member states of the EU have generally been quite positive to the emergence of European federalism. There are several reasons. First, whereas the rulings from the ECtHR is imposed by way of unilateral action, the legislative procedures leading towards secondary legislation is enacted by way of deliberation among also the member states. This participation in the legislative procedure allows for, first, more optimal outcomes and, second, generally makes it easier to reconcile with a disagreeable outcome.[199]

Second, cooperation in the European Community have traditionally concerned areas which is less politically contentious than what human rights courts faced.[200] All of the core doctrines establishing the federal nature of the EU was given in the context of technocratic issues of market integration.[201] This were areas in which all of the member states were positive to further integration of. Conversely, it did not take long after the massive spike in precedent derived of the ECHR in the early 1980s and again in 2000 before a growing discontent among the national states arose.[202] It is illustrative how the rulings of the ECtHR went right into core political issues such as the conflict with Northern Ireland and the increasing rift between the British left and the Thatcher government regarding the

[195] Ibid
[196] Kelemen (n 193) 229-231
[197] Ibid
[198] Buckley et al (n 34) p. 8-9
[199] For example, Roger Fischer; William Ury; Bruce Patton, *Getting to YES: Negotiating an agreement without giving in* (Random House Business 2012) 29.
[200] Kelemen (n 193) 229-231
[201] For example, *Case C-26/62* concerning classification of chemicals and *Joined Cases C-6/90 & C-9/90* concerning employer insolvency
[202] Madsen (n 133) 255-257

protection of the rights to strike, assemble, or protest.[203] While the general geopolitical climate in the 1980s and 1990s had favoured neo-constitutionalism and allowed the ECtHR to develop into a de facto constitutional court for civil and political rights in Europe, the contentiousness of the issues in conjunction with another geopolitical climate in the 21th millenium led to the systemic critique which resulted in Protocol 15. While scholars debate the exact causality between this critique and the the "paradigm-shift" that followed in the years after[204], the effect of the shift is nonetheless an increased deference.[205]

The EU, on the other hand, dealing with less contentious issues and with the appropriate institutional bodies to include the interests of the member states, have had it's jurisdiction extended to new fields of law in every round of treaty revision. This implies assent to the federal structure that is emerging which again gives the CJEU a position and authority where it can go further than the ECtHR in imposing aggressive fundamental rights standards on member states.[206] It remains to be seen whether this position will persist as the competences of the CJEU expands further into the AFSJ and other new, more sensitive policy areas or whether the contentiousness of the issues will spark the same sort of political backlash they already have provoked for the ECtHR. While most member states perceive EU governance of the internal market as a virtue of significant value, which raises the bar for opting out, Brexit also serves to illustrate how further integration in economic, criminal and immigration matters may spike a similar repulse in an era of crisis-regulation and populism.[207]

3.3 Differences in context, legislative action and the link towards free movement

We can infer from the above that the CJEU hold a position and authority in the legal system where it can go further than the ECtHR in imposing aggressive fundamental rights standards on member states. While one may argue that the trustee-court will always be susceptible to pursue the interests of the beneficiaries to the extent that it can[208], there are also several other arguments that applies particularly to the European Union when compared with the ECtHR.

First, one reason for the CJEU applying more aggressive human rights protection might be the difference in the applicable consensus when the context is the EU compared to the CoE. As mentioned, the Courts will – expressly or implicitly – draw heavily on consensus when determining the specific level of protection to be derived from the various instruments. As outlined in item 1.5, human rights protection is essentially a creature of majoritarian activism. In this empirical exercise, what may be considered a lack of commonality under the CoE's 47 member states may not be the case when the context is the 27 member states of the EU. If national constitutional courts of the EU member states provide greater protection than what follows from the minimum floor as set out by of the ECHR, the CJEU – recalling the historical origin of EU fundamental acquis[209] – would be inclined to follow.

[203] Ibid
[204] Spano (n 28)
[205] Madsen (n 133)
[206] Ibid.
[207] Barnard (n 25) 31-35
[208] Sweet and Brunell (n 155)
[209] Spaventa (n 5) 244-252

Second, the arguments put forward against intrusive scrutiny from international courts do not apply to the same extent when the context is the European Union. In EU law, secondary law contain a derived democratic legitimacy and consent from the member states by way of the prerequisite of qualified majority or unanimous vote in the Council. The involvement of the member states and the European Parliament effectively makes the argument that human rights instrument lack democratic legitimacy insufficient. As such, the reference to fundamental rights in the Preamble of the regulation or directive represents an implied consent where the member states give the CJEU a mandate to sensor their actions when they act within their discretion under EU law.

As such, whenever the EU has legislated an area quite extensively the CJEU may feel more comfortable imposing aggressive judicial scrutiny because it does so with the implicit support of the member states and the EU legislative institutions.[210] This argument applies *a fortiori* when discussing positive obligations which entail prioritization of resources. Essentially, in the search for the necessary consensus to determine the existence of pre-existing constitutional rights the legitimacy created by legislative action give the Court an additional argument for either lowering or heightening human rights standards. As such, the fragmented institutional structure of the EU and the hierarchy of norms that the a legislative branch entails, allow the CJEU to play an active policy role with little fear of concerted political reprisals.[211] Illustrative examples are Mangold[212] and Bauer[213]. Although the rulings are methodologically unpersuasive[214], the Court's reasoning in both cases illustrates the legitimating effect of legislation. In the converse juxtaposition, a narrow concretization of rights by the legislature may cause the CJEU to reduce the level of protection. The rulings in Dano[215] and Alimanovich[216] are examples of the CJEU retreating from previous case-law by reference to amendments in secondary law.

At the same time, the reach of this argument may also be qualified. While the democratic deficit is less prevalent compared to the ECHR, it still exists as one of the main arguments that has haunted the Union throughout it's history.[217] Also, the other argument against judicialization, namely that the member states may be better placed to assess whether an outcome is optimal in matters involving factual assessments and local diversity, still applies.

However, third and most importantly, while the idea of local diversity[218] is appreciated and underlies a wide margin of appreciation under the ECHR, this interest does not carry the same weight in EU law. In EU law, although the national identity of the member states is recognized in art. 4 (2) TEU, the case-law show that this interest is prone to loose when

[210] Tridimas (n 54) 198-199
[211] Kelemen (n 193) 229-231
[212] *Case C-144/04*
[213] *Joined Cases C-569/16 and C-570/16*
[214] For a discussion, Tridimas (n 5)
[215] *Case C-333/13*
[216] *Case C-67/14*
[217] Paul Craig, *Development of the EU* in Barnard (n 25)
[218] That is, the notion that different practices among member states should be allowed to persist because of how this is a product of cultural heritage and pluralism

faced with the core objective of market integration.[219] The reason is the link between fundamental rights protection and the right to free movement. In essence, whenever a discrepancy in fundamental rights protection exists in a context which affects undertakings, economically active or non-economically active persons, this is also likely to constitute a restriction on the right to free movement.[220] In the internal market, the fundamental interest of market harmonization run counter to that of local diversity. These notions are negative corollaries and cannot exist together at the same time. In order to ensure an effective right to free movement, the degree that undertakings and individuals have to respect fundamental rights should be as similar as possible.[221] As such, the approach envisioned by the margin of appreciation and the non-substitution principle where national states are afforded a wide room of action is simply not compatible with the functioning of the internal market. Given the weight of this interest in the EU and the authority of the CJEU within this core substance matter, the CJEU will be more aggressive when establishing whether a consensus does exist.[222] Carpenter[223] concerning expulsion of foreigners (which constitutes discrimination) and Coman and Others[224] concerning lack of recognition of same-sex marriage (which constitutes a restriction on the free movement of workers, self-employed and persons) serves to illustrate this dynamic.

4. A novel methodological approach to human rights adjudication

The ultimate, main point with this dissertation is the realization that the intertwined relationship between traditional human rights instruments and EU Law, in particular the ECHR and EU law, requires a novel methodologic approach when discussing Norwegian human rights acquis. In light of the abovementioned analysis, it is submitted that it is no longer sufficient to scrutinize the traditional human rights instruments. These may provide a good starting point, but in order to infer the holistic, full and correct picture of Norway's obligations to comply with human rights instruments under public international law, EU law has to be examined as well.

In this regard, a distinction may be drawn between the "core" and the "contestable" civil rights flowing from the ECHR. Examples of the former is art. 2, 3, 4, 5 and 6 ECHR, while art. 8-11, and 14 ECHR is examples of the latter. When discussing the contestable rights in the ECHR, emphasis should be placed on how this is governed in EU Law. The ECHR does not impose strict judicial oversight, and it is then EU Law that gives the final decisive answer to how various assessments of proportionality strictu sensu are to be done. As outlined above, this applies in particular to rights relating to judicial protection, discrimination law, privacy and in horizontal relationships. The same applies whenever EU fundamental rights protection contain rights that have no equivalent under the ECHR. The most important examples of the latter are considerations relating to administrative law, socioeconomic rights and the balancing exercise between economic efficiency and social objectives.

[219] Tridimas (n 55) 196-198; Tridimas (n 5) 362-363
[220] On the notion of a restriction, see Catherine Barnard, *The Substantive Law of the EU: The Four Freedoms* (Oxford University Press 2022) 24-31.
[221] Ibid
[222] Ibid
[223] *Case C-60/00* For a commentary, see Spaventa (n 5) 250-252.
[224] *Case C-673/16*

Conversely, when discussing core-rights the approach is more complex. The starting point will still be the traditional instruments, in practice the ECHR, and the protection that is derived of the case-law of the ECtHR. You then have to approach the EU regulatory instruments within that area, and ask whether these apply an approach that is distinct from the case-law of the ECtHR. If that is the case, you must then ask whether this distinct approach is compliant with the ECHR. In these situations, notwithstanding the Bosporus doctrine, the judicial oversight from the ECtHR is more diligent and thus the final emphasis will be placed on the case-law of the ECtHR.

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