21 Multilevel Protection of Fundamental Rights in the European Union and in Hungary

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21.1 Introduction

The system of fundamental rights, which is considered a significant element of the European legal order, has undergone remarkable changes in the past two decades.[1] The changes perceivable in the field of international law (including but not limited to the much discussed fragmentation of international law[2]) have, along with the ever increasing convergence of national law, international law and EU law raised *inter alia* a number of theoretical and practical questions related to the protection of fundamental rights. Courts are considered actors of increasing relevance at the international level, thus, inconsistent judicial practice and the correlation of various courts represent issues of great importance in the field of fundamental rights protection. The transformation of the role of the state, the trend where international factors increasingly affect the status of individuals and various transnational conflicts cause tremors in the foundations of the international legal order, all call into question the aptness of the state to assume the role of ultimate protector of fundamental rights and guarantor of international security.

According to the 'division of labour' construed decades ago on the European continent, the task of protecting fundamental rights lay partly with internal (national) law, and partly with the European Convention on Human Rights and the European Court of Human Rights established within the framework of the Council of Europe – which, however, was

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1 This article is a revised and extended continuation of the FIDE national report prepared by the authors in: J. Laffranque (Ed.), *The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions. Reports of the XXV FIDE Congress*, Tallinn, 2012, Vol. 1. For the Hungarian national report in this volume *see* Á. Mohay & E. Sándor-Szalay, *National Report – Hungary*, pp. 501-533.

2 For a detailed analysis *see e.g.,* A. Fischer-Lescano & G. Teubner, 'Fragmentierung des Weltrechts – Vernetzung globaler Regimes statt etatistischer Rechtseinheit', *in:* M. Albert & R. Stichweh (Eds.), *Weltstaat – Weltstaatlichkeit: Politische Strukturbildung nach der Globalisierung*. 2005 <www.velbrueck-wissenschaft.de/pdfs/2005_fischer-lescanoteubner.pdf> (last accessed 27 Septemeber 2012).

not a visible element in the institutional set-up of European economic integration.[3] As is the nature of things, the deepening of economic integration in the European Union has resulted in a trend, where the case law of the Court of Justice of the European Union focused more and more on the protection and interpretation of fundamental rights.[4] *Today the question is not whether certain fundamental rights may be relied upon before an international or a European court (provided that the necessary requirements have been fulfilled). The question is much rather which European court has jurisdiction to rule on the fundamental rights issue at hand* – obviously taking national court proceedings into account as well. Similarly, the basis of the relationship between European courts is also disputed: is it governed by a framework established via an international treaty, or much rather based on random, coincidental judicial interactions?

The two mammoth-organizations of Europe, the European Union and the Council of Europe have – following rather lengthy preparations – in the recent years attempted to connect the already existing protection of ECHR rights with the case law based judicial protection of fundamental rights of the EU system in a concrete, regulated fashion, at the same time establishing a channel of communication between the Strasbourg and Luxembourg courts. The accession of the Union to the European Convention on Human Rights is an admirable attempt – the success of which is threatened by the fact that both of these organizations are currently in crisis: the Union struggles to solve the financial crisis, the Council of Europe and the ECtHR strive for better budgetary conditions and rules enabling a more rational functioning. In a sense, the ECtHR is also a 'victim' of its unparalleled popularity.

In the meantime, European public opinion does not take note of the unprecedented opportunity that the Strasbourg review of EU law will mean for the citizens of the Union – besides national legislators and authorities. On top of all this the free (and less free) movement of persons throughout the European continent, the legal and illegal migration between European countries and from third countries to Europe in all their possible forms have become natural everyday phenomena.

This study endeavours to highlight the most obvious questions arising from the interaction of the fundamental rights system of the Union, the national (and more precisely the Hungarian) system of fundamental rights and the European Convention on Human Rights – without the intention of being fully comprehensive. Following 1 December 2009, the entry into force of the Lisbon Treaty and the Charter of Fundamental Rights of the European Union, and the future accession of the Union to the European Convention on Human Rights, the need to analyse these relationships seems as topical as ever.

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3 For the sake of simplicity we will use the following abbreviations: European Court of Human Rights: ECtHR or Strasbourg Court; European Convention on Human Rights: ECHR or Convention.

4 Once again for the sake of simplicity, instead of the Court of Justice of the European Union we will use the expressions CJEU, Court of Justice or Luxembourg Court.

21.2 The Correlation of Hungarian Law, International Law and EU Law

In order to be able to analyse the current system of the protection of fundamental rights in Hungary and Europe, we first need to clarify the relationship between the three legal systems at hand.[5]

21.2.1 Hungarian Constitutional Law and Practice

According to Hungarian constitutional practice,[6] the relationship between public international law and Hungarian law can best be described as a form of *moderate dualism*.[7] Following the accession treaty that entered into force on 1 May 2004, the proper place and status of EU law within the Hungarian legal system also needed clarification.[8]
The Hungarian Constitution dating from 1949[9] was in force until 1 January 2012 and applied a differentiated treatment of traditional international obligations and obligations originating from EU membership: Article 7(1) contained the rules regarding international law, whereas Article 2/A (introduced in 2002) referred in a somewhat indirect way to EU law. The differentiation of obligations arising from international law and EU law, the ambiguous wording of Article 2/A and the fact that the Constitution did not clarify the position of EU law within the Hungarian legal system led to the result that the Hungarian

5 P. Kovács, 'Les constitutions nationales et les traités européens', *in:* M. Pogačnik *et al.* (Ed.), *Challenges of Contemporary International Law and International Relations – Liber Amicorum in Honour of Ernest Petrič*, Nova Gorica, Europska Pravna Fakulteta v Novi Gorici 2011, pp. 245-263.

6 Based essentially on Decison 4/1997 (I.22.) of the Constitutional Court (regarding the *ex post* constitutional review of acts promulgating international treaties), and on Act L of 2005 on Procedures relating to International Agreements.

7 P. Sonnevend, 'Application of EU Law and the Law of the European Convention of Human Rights in Hungary', *in:* G. Kajtár & G. Kardos (Eds.), *Nemzetközi jog és európai jog: új metszéspontok. Ünnepi tanulmányok Valki László 70. Születésnapjára*, Bibliotheca Juridica ELTE, Libri Amicorum 40, Budapest, Saxum-ELTE ÁJK 2011, pp. 213-214; G. Sulyok, 'A nemzetközi jog és a belső jog viszonyának alaptörvényi szabályozása', 1 *Jog-Állam-Politika*, 2012, pp. 17-59; T. Molnár, G. Sulyok Gábor & A. Jakab, '7.§ [Nemzetközi jog és belső jog: jogalkotási törvény]', *in:* A. Jakab (Ed.), *Az alkotmány kommentárja*, Budapest, Századvég 2009.

8 For a detailed analysis of the position of EU law in the Hungarian legal system *see* L. Blutman & N. Chronowski, 'Hungarian Constitutional Court: Keeping Aloof from European Union Law',5 *Vienna Journal on International Constitutional Law* 3, 2011, pp. 329-348 (<http://ssrn.com/abstract=1961034>); M. Varjú & F. Fazekas, 'The reception of European Union Law in Hungary: The Constitutional Court and the Hungarian Judiciary', 48 *Common Market Law Review* 2011, pp. 1945-1984; L. Blutman & N. Chronowski, 'Az Alkotmánybíróság és a közösségi jog: alkotmányjogi paradoxon csapdájában', *in:* N. Chronowski, *Alkotmány és jogalkotás az EU tagállamaként. Válogatott tanulmányok*, Budapest HVG-Orac 2011; M. Dezső & A. Vincze, *Magyar alkotmányosság az európai integrációban,* 2nd edn, Budapest, HVG-Orac 2012, pp. 233-237.

9 Act XX of 1949 on the Constitution of the Republic of Hungary as revised in 1989-1990, in force until 31th of December 2011. Available at <www.mkab.hu/jog/egyeb/alkotmany-1989>.

Constitutional Court assumed a sort of self-restricting role[10] regarding the analysis and interpretation of EU law in its case law.[11] The Constitutional Court attempted to summarize its point of view regarding EU law (especially the position of the founding Treaties in Hungarian law) in the greatest detail to date in its judgment on the constitutionality of Act CLXVIII of 2007 promulgating the Lisbon Treaty.[12]

The new Fundamental Law[13] entering into force on 1 January 2012 declares its commitment to international law and the international community in Article Q, while Article E refers to European integration as one of the basic principles of Hungarian constitutionality. At first glance, Article E employs much the same wording as the previously applicable Article 2/A. Subsection (3) of Article E however goes a bit further, and aims to establish a clearer situation, having regard to the preceding case law of the Hungarian Constitutional Court. Essentially it aims to lay down the foundations of the correlation of EU law and Hungarian constitutionality, however, without expressly mentioning the principle of supremacy (primacy of application) of EU law *vis-à-vis* Hungarian law.[14] The prevalent nature of the principles contained in its earlier case law, and the identical nature of Article 2/A of the Constitution and Article E of the Fundamental Law was confirmed by the Constitutional Court itself in May 2012.[15]

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10 L. Blutman, 'A magyar Lisszabon-határozat: befejezetlen szimfónia luxemburgi hangnemben', *Alkotmánybírósági Szemle* 2, 2010, p. 90.

11 Imre Vörös disputes the widely acknowledged view that the legal order of the European Union forms part of the Hungarian legal order, although he accepts that the relationship between the two legal orders is not on of concurrence, but rather a complementary coexistence, which, in his view however lacks the appropriate constitutional benchmarks that would be necessary to guarantee its adequate functioning within the state. *See* I. Vörös, 'Európai jog – magyar jog: konkurencia vagy koegzisztencia', 66 *Jogtudományi Közlöny* No.7-8, 2011, pp. 369-401; *and* I. Vörös, *Csoportkép Laokoónnal, A magyar jog és az alkotmánybíráskodás vívódása az európai joggal,* Budapest, MTA Társadalomtudományi Kutatóközpont Jogtudományi Intézete 2012, p. 127.

12 AB 143/2010 (VII.14.) Á. Mohay, 'Decision 143/2010 of the Constitutional Court of the Republic of Hungary regarding the constitutionality of Act CLXVIII of 2007 promulgating the Lisbon Treaty', *Vienna Journal on International Constitutional Law, No. 6,* 2012, pp. 301-306. <www.internationalconstitutionallaw.net/download/6c3312b920bbe937de3c3f50c0469846/Mohay.pdf> (2012.09.27.).

13 The Fundamental Law of Hungary was adopted on 25 April 2011 and has come into force on 1 January 2012. English text available under <www.mkogy.hu/angol/alk_angol.htm>. The *Revue Est Europa* has devoted its first special issue of 2012 to the Hungarian Fundamental Law via contributions by Hungarian and non-Hungarian authors: <www.est-europa.univ-pau.fr/est-europa-la-revue/dernier-numero-special-la-loi-fondamentale-hongroise-du-1er-janvier-2012.html (last accessed 27 September 2012).

14 For a comparative analysis of the previous Constitution and the new Fundamental Law with special focus on fundamental rights *see* N. Chronowski, 'The new Hungarian Fundamental Law in the light of the European Union's normative values', *Revue Est Europa,* Numéro Spécial 1, 2012 (<www.est-europa.univ-pau.fr/images/archives/2012-Hongrie/nora-chronowski.pdf>) (last accessed 27 September 2012). *See also*, A. Jakab, 'A bírói jogértelmezés az Alaptörvény tükrében', *Jogesetek Magyarázata*, 2011, pp. 92-93.

15 *See* Decision 22/2012. (V.11.). For a summary and short assessment *see* Á. Mohay, 'Decision 22/2012. (V. 11.) of the Constitutional Court of Hungary on the interpretation of Sections (2) and (4) of Art. E of the Fundamental Law' (Manuscript, forthcoming in *Vienna Journal on International Constitutional Law* in early 2013).

21.2.2 The ECHR in Hungarian Law

A defining characteristic of international norms protecting fundamental rights is that as a general rule they pertain to internal situations which do not contain any cross-border element. This attribute leads to peculiar results in an era where functions that were previously typically exclusive competences of states are now exercised by the states within the framework of international organizations. It is a well-known fact that international law leaves the adoption of measures necessary to ensure the application of international norms to the individual states – however, the situation underwent changes to a certain extent as the volume of international legal norms increased. Albeit international law previously did not prescribe the methods for fulfilling international obligations, it did pay close attention to it – however, the present state of affairs is different. Legally binding documents related to the protection of human rights/fundamental rights at the international, European and national level nowadays often define the conditions, methods and procedures that national law needs to comply with in order to avoid a breach of obligations by the state.[16]

The Committee of Ministers of the Council of Europe has also adopted a recommendation in this regard.[17]

In Hungary the Constitutional Court has referred to the European Convention on Human Rights (ECHR) and other international human rights treaties mostly on a comparative basis to support its own reasoning.[18] As the first state to make the political transition in the region, Hungary signed the European Convention on Human Rights on 6 November 1990, which entered into force on 5 November 1992.[19]

Following the change in the political system in 1989, comparative references were abundant: the Constitutional Court proclaimed for example that its stance on the protection of property is in conformity with the ECHR and the relevant case law of the European Court of Human Rights (ECtHR).[20] Similarly, when it pronounced the unconstitutionality of the death penalty, it referred to Protocol 6 of the ECHR as an accomplishment of European legal development.[21] We

16 *See e.g.,* Art. 5 of the ECHR on the right to freedom and security and Art. 6 on the right to a fair trial. Arts. 52(5) and (7) of the Charter serve the same purpose, though without reference to a concrete right.

17 Rec(2004)5E – Recommendation of the Committee of Ministers to member states on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights. Adopted by the Committee of Ministers on 12 May 2004 at its 114th Session.

18 For a detailed analysis of the relevant practice of the Hungarian Constitutional Court. *See* Z. Szente, 'A nemzetközi és külföldi bíróságok ítéleteinek felhasználása a magyar Alkotmánybíróság gyakorlatában', *Jog Állam Politika*,, 2010, pp. 47-72.

19 The Convention and its eight additional protocols were ratified by Act LXXI of 1991, and subsequently promulgated by Act XXXI of 1993. Currently, the consolidated text of the ECHR is made public by Decision 58/1998. (X.2.) of the Hungarian Parliament.

20 AB 64/1993(XII.22.).

21 AB 23/1990 (X.31.).

can also discern more substantial references from this historical period: when delivering its judgment on the constitutionality of the Act on the settlement of properties formerly belonging to Churches,[22] the Constitutional Court relied primarily on Article 2 of Protocol No.1 of the ECHR and the relevant case law of the Strasbourg court in determining the extent of state obligations.[23] Another question in relation to which the Constitutional Court delivered a more thorough analysis of the ECHR concerned the limits of the right to make public one's opinion regarding public figures. The Constitutional Court cited Strasbourg case law and came to a conclusion in line with ECtHR case law when it stated that the limits in question are to be interpreted broader for public figures than private persons.[24]

The Hungarian Constitutional Court has taken inspiration from ECtHR case law on other occasions as well, again in connection with the freedom of expression – although not always in a positive context.[25] For example, the Constitutional Court, when deciding on the constitutionality of the definition of the criminal offence of the use of symbols of despotism, did not apply the system of the ECHR in its entirety, but resorted to some arbitrarily selected elements, which was later held against the Hungarian Constitutional Court by the ECtHR in the *Vajnai* case.[26]

All in all however, it can be said that in areas such as the freedom of expression,[27] the right of assembly and association, Hungarian legal practice and interpretation was to a great extent influenced by the judgments of the ECtHR. Of course, negative experiences also affected legal development in Hungary: Hungary was found to have breached Article 10 and 11 of the Convention on multiple occasions. Apart from the already mentioned *Vajnai* case, some more recent examples can also be pointed out. In the *Bukta* case,[28] it was declared that the dispersing of a peaceful gathering by the police for the sole reason that it was held without prior notification constituted a disproportionate restriction of the right to assembly; and that

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22 Act XXXII of 1991.

23 AB 4/1993. (II.12.).

24 AB 36/1994 (VI.24.) Following detailed analysis, the Constitutional Court declared the relevant paragraph of the Criminal Code unconstitutional. The Constitutional Court has delivered a number of judgments regarding the restriction of the freedom of expression via criminal law sanctions, for example AB 30/1992. (V.26.).

25 L. Sólyom, 'The interaction between the case law of the European Court of Human Rights and the protection of freedom of speech in Hungary', *in:* Mahoney *et al.* (Eds.), *Protecting Human Rights: the European Perspective. Studies in memory of Rolv Ryssdal*, Köln, Carl Heymans Verlag, 2000, p. 1316.

26 *Vajnai v. Hungary*, Appl. No. 33629/06, Judgment of 8 July 2008. In this case, the ECtHR found that Hungary has violated the Convention by imposing a criminal sanction on individuals publicly wearing the red star symbol. The latest ECtHR judgment regarding the red star continues the previous line of argumentation: *Fratanoló v. Hungary*, Judgment of 3 November 2011, Appl. No. 29459/10. *See* for a more detailed analyse in the *Vajnai* case: A. Koltay, 'A Vajnai-ügy', *JeMa* 1 2010, pp. 77-82. *See* for prior interpretation ("special historical circumstances") the case: *Rekvényi v. Hungary*, Appl. No. 25390/94, Judgment of 20 May 1999. *See* T. Bán, 'A Rekvényi-ügy és környéke', *Fundamentum* 3, 1999, pp. 94-100.

27 P. Kovács, 'La liberté d'expression dans la jurisprudence constitutionnelle hongroise', *Annuaire internationale de justice constitutionnelle*, XXIII–2007, Paris/Aix-Marseille, Economica/Presse Universitaires d'Aix-Marseille 2008, pp. 311-325.

28 *Bukta and others v. Hungary*, Appl. No. 25691/04, Judgment of 17 July 2007.

an internal law contrary to the ECtHR does not absolve the state from its responsibilities. As a result of this latter judgment, the Constitutional Court annulled the disputed regulation.[29] Similarly, Hungary was in breach of the Convention according to the *Uj* case,[30] where the ECtHR has found that commercial reputation was not to be equated with human dignity, and that freedom of expression regarding matters of public interest falls under the protection guaranteed by the Convention (together with the style and the form of the expression used), even if it may cause individual commercial damage.[31]

It is worth noting that the majority opinion of Hungarian legal literature[32] is that in Hungary today, judicial protection of fundamental rights is essentially in the hands of regular courts, which on the other hand in most cases do not feel empowered to refer directly to the Constitution or to engage in the direct interpretation of the fundamental rights contained in it. The most often used methodology is that judges achieve the protection of constitutional-level fundamental rights indirectly, via the conveyance of legal acts (*i.e.* not basing their judgments directly on the Constitution, but on the general provisions of legal acts – which nonetheless convey constitutional rights). The persons concerned were unable to initiate direct and concrete constitutional complaint proceedings, thus, in many cases they turned to the European Court of Human Rights, which also ruled on the incompatibility of certain provisions of the Constitution with the ECHR (most recently in the *Kiss* case[33]).

Consequently, we may say that the ECHR – as an international Treaty – is an accepted source of reference for the Hungarian Constitutional Court and Hungarian constitutionality in general.[34] Nevertheless, the Hungarian Constitutional Court is reluctant to

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29 AB 561/B/2008, available in English at <www.mkab.hu/admin/data/file/753_75_2008.pdf>.

30 *Uj v. Hungary*, Appl. No. 23954/10, Judgment of 19 July 2011.

31 *See* the case *Karsai v. Hungary*, Appl. No. 5380/07, Judgment (final) of 1 March 2010.

32 G. Halmai, 'Az emberi jogokat védő magyarországi intézmények', *in:* G. Halmai & G.A.Tóth (Eds.), *Emberi jogok*, Budapest, Osiris Kiadó 2008, pp. 920 and 215; P. Sonnevend, 'Application of EU Law and the Law of the European Convention of Human Rights in Hungary', *in:* G. Kajtár & G.Kardos (Eds.), *Nemzetközi jog és európai jog: új metszéspontok. Ünnepi tanulmányok Valki László 70. születésnapjára*, Budapest, Bibliotheca Juridica ELTE, Libri Amicorum 40, Saxum-ELTE ÁJK2011, pp. 212-215 and p. 219.

33 *Alajos Kiss v. Hungary*, Appl. No. 38832/06, Judgment of 20 May 2010 – Art. 70(5) of the Hungarian constitution 1949 provided that persons placed under total or partial guardianship do not have a right to vote. The ECtHR concluded that an indiscriminate removal of voting rights, without an individualised judicial evaluation "[…] cannot be considered compatible with the legitimate grounds for restricting the rights to vote". By this ruling the ECtHR implicitly "overruled" constitutional norms as well – *see* N. Chronowski, 'The new Hungarian Fundamental Law in the light of the European Union's normative values', *Revue Est Europa,* Numéro Spécial 1, 2012, p. 6.

34 Most recently on 19 December 2012 the Constitutional Court published its decision (AB 1149/C/2011) declaring a number of regulations contained in the Criminal Procedure Code (Act XIX of 1998) to be unconstitutional and at the same time contrary to the ECHR: the Constitutional Court has ascertained a breach of the right to a fair trial and an impartial judge. The Constitutional Court has referenced the ECtHR also in its Decision 164/2011. (XII. 20.) on the Act regarding the status of Churches on and in Decision 165/2011. (XII. 20.) concerning certain issues of media regulation. For an analysis of the most recent Hungarian developments *see* M. Dawson & E. Muir, 'Enforcing fundamental values: EU law and governance in Hungary and Romania', 19 *Maastricht Journal of European and Comparative Law* 4, 2012, pp. 469-476.

recognize the constitutional value of the rights enshrined in the Convention. It can also be stated that invoking fundamental rights in individual cases before Hungarian courts – including the Constitutional Court – based directly on the Convention has been practically impossible: only in some rare, exceptional cases can one find references to the case law of the ECtHR in court judgments.[35] These rare examples include references to Article 11 of the ECHR by the Supreme Court of Hungary[36] and references to Articles 10, 11 and 13 ECHR and ECtHR case law by the Metropolitan Regional Court.[37]

It should be added that in the Hungarian legal literature, some authors[38] interpret Article Q of the new Fundamental Law (in force since 1 January 2012) as a provision that postulates the primacy of international law over national law: in consequence, internal legal acts which are contrary to international obligations undertaken by the state could in the future be considered unconstitutional and in breach of fundamental rights, irrespective of their position in the internal hierarchy of norms.[39] It is in this spirit that – for example – the parallel reasoning attached to the decision of the Constitutional Court regarding the constitutionality of the Act on Strike should be interpreted.[40]

21.3 The Role of General Principles of Law in the Protection of Fundamental Rights

The Treaty of Lisbon has truly reformed Article 6 of the Treaty on European Union (TEU): it endowed the Charter of Fundamental Rights with binding legal force, pronouncing the rights, freedoms and principles (!) enshrined by it as an integral part of the EU legal order; it established an obligation for the Union to accede to the ECHR and has yet maintained the previous system of "unwritten fundamental rights" as general principles of EU law. At first glance, maintaining the parallel existence of written [Art. 6(1) TEU] and unwritten [Art. 6(3)

35 Sonnevend *supra,* p. 222.

36 BH 2010. 126. and EBH 2009. 2053, in connection with the dissolution of an association ('*Magyar Gárda*') for the reason that its activities violate the right to security and freedom and exhibit racism, thus endangering public security and causing public unrest.

37 5.Pf.20.738/2009/7. The Metropolitan Regional Court referred to the judgment of the ECtHR in the *Vajnai* case (*see above*), stating that wearing a uniform can be considered an element of the freedom of expression even if it creates uneasiness or revulsion, as these sentiments cannot be regarded as rational fears.

38 Sonnevend *supra*, p. 219; Fazekas & Varjú [INCOMPLETE REFERENCE], p. 1951.

39 Fundamental Law Art. Q (2): "Hungary shall ensure harmony between international law and Hungarian law in oder to fulfill its obligations under international law."

40 Constitutional Court judge Péter Kovács, in his parallel reasoning attached to Decision 30/2012. (VI.27.) AB discusses the aforementioned obligation of the Constitutional Court in a detailed manner, formulating the general obligation that interpretation by the Constitutional Court should be in conformity with international undertakings: "(…) the Strasbourg case-law and the level of protection determined by it should be followed by the Constitutional Court even if this would not necessarily follow inevitably form its previous 'precedent-like' decisions" (para. 71). *(Translation by the authors.)*

TEU] fundamental rights seems unusual and even redundant, especially having regard to Article 52(3)-(4) of the Charter. Should the dynamic development[41] of EU fundamental rights become necessary in connection with future changes of the ECHR and member state Constitutions, it would be possible achieve this beyond the scope of the written Charter, due to the dual definition of the sources of these rights. Article 6(3) TEU is seemingly unnecessary, as Article 52(3) of the Charter contains the very same obligation. This solution, which is based on a sort of competitive prevalence of the various systems and sources of fundamental rights upholds the previous set-up – one born out of necessity: the decades long practice of the Court of Justice of the European Union (CJEU) regarding fundamental rights was actually mostly based on the ECHR and the related practice of the ECtHR, 'discovering' and identifying fundamental rights required to maintain the uninterrupted functioning of integration labelled as general principles of EU law. The emergence of Article 52(3) of the Charter provides for the possibility of the same kind of judicial law-making, should it become necessary. The CJEU will in all probability reference the written rights enshrined in the Charter whenever the interpretation of EU law so requires – ample proof is provided by over 30 judgments delivered since 1 December 2009.

So when could Article 6(3) TEU become necessary independently of Article 52(3) of the Charter? At least one type of cases can be envisioned where reference to the ECHR and the common constitutional traditions of the member states – as sources of identification of the general principles of EU law – could be required. In the future, in any case that falls outside the scope of application of the Charter (meaning that with regard to all circumstances of the case, the fundamental rights compliance of an EU legal norm is not possible based on the Charter), appropriate protection of fundamental rights can only be guaranteed if reference to general principles of EU law remains possible. Furthermore, the Union surely cannot take a step back from the level of fundamental rights protection achieved until now.

Were we to accept that 'unwritten' fundamental rights as general principles must be considered applicable law (an approach promoted by the very existence of Article 6(3) TEU), then a further question arises, namely the correlation of written and unwritten fundamental rights. Should they be regarded as autonomous systems of fundamental rights existing irrespective of each other, each with its own system of application, allowing also the option of parallel references? Or are unwritten principles to be considered as subsidiary sources, only to be referenced in the absence of written provisions? Whatever answer should be given to these questions in the future, avoiding interference of interpretation regarding written and unwritten fundamental rights in cases falling under the jurisdiction of the CJEU is of utmost importance.

41 Regarding the need for advancement *see* Considerations of Working group II of the Constitutional Convention (CONV. 354/02 2002.10.22.), p. 9.

The question whether general principles will still be regarded as sources of the protection of fundamental rights could have been answered for the first time by the CJEU in Case *Yoshikazu Iida v. Stadt Ulm*:[42] in January 2011, a German court requested a preliminary ruling from the CJEU, *inter alia* regarding the interpretation of Article 6(3) TEU in connection with the general principles of EU law. The case is centred around the clarification of the notion of 'family member' – a concept that is the subject of an EU directive, the Charter of Fundamental Rights, the ECHR and also the unwritten fundamental rights system contained within the general principles of EU law (especially bearing in mind the definition of the term provided earlier in the *Carpenter* judgment[43]). In its judgment of 8 November 2012, the Court of Justice avoided answering this question, since it determined that the situation of the applicant, Yoshikazu Iida, presented no connection with Union law, and thus the applicability of unwritten EU fundamental rights was not at issue either.[44] Another related question – also in connection with Article 6(3) TEU – is worth mentioning here as well: it has been raised by a national court in the *Kamberaj* case whether the ECHR "enjoys the benefits" of direct effect and primacy over national law by virtue of Article 6(3) TEU.[45] Such an interpretation was rejected by the Court of Justice, for even though that provision states that fundamental rights, as guaranteed by the ECHR (and as they result from the constitutional traditions common to the member states) are to constitute general principles of Union law, it does not govern the relationship between the ECHR and the national legal systems of the member states, and thus it does not determine how a national court should proceed in case of a conflict between the rights guaranteed by the ECHR and a provision of national law. Article 6 therefore does not transform the ECHR into a directly applicable *quasi*-EU law norm with primacy over national law.[46]

Another type of relevant cases may arise: Poland and the United Kingdom have only accepted the application of the Charter with the restrictions contained in Protocol No. 30 attached to the Lisbon Treaty, and the Czech Republic has also emphasized its intention

42 Case C-40/11, *Yoshikazu Iida v. Stadt Ulm* [Judgment of the Court of 8 November 2012, not yet reported]. The preliminary ruling was initiated by the Verwaltungsgerichtshof Baden Württemberg (Germany) on 28 January 2011 (OJ 2011 C 145, 2011.5.14.).

43 Case C-60/00, *Carpenter* [2002] ECR I-06279.

44 Case C-40/11, *Yoshikazu Iida v. Stadt Ulm* [Judgment of the Court of 8 November 2012, not yet reported], para. 80.

45 Case C-571/10, *Kamberaj* [Judgment of 24 April 2012, not yet reported]

46 Case C-571/10, *Kamberaj*, paras 59-63. The ECHR-related question raised by the Italian national court in the *Kamberaj* case (which otherwise concerned third-country nationals and social assistance) essentially aimed to ascertain whether the *Simmenthal-doctrine* (articulated in Case 106/77 *Simmenthal II* [1978] ECR 629) applied to the ECHR as well. ("When there is a conflict between the provision of domestic law and the ECHR, does the reference to the ECHR in Art. 6 TEU oblige the national court to apply Arts. 14 ECHR and 1 of Protocol No. 12 directly, disapplying the incompatible source of domestic law, without having first to raise the issue of constitutionality before the national constitutional court?") As we have seen, the CJEU has denied such an interpretation.

of opting out in a declaration at the signing of the Lisbon Treaty. The prevalence of fundamental rights as general principles of EU law could also be of relevance in connection with these states in the future.[47]

21.4 Horizontal Effect and Collision of Rights

21.4.1 The Horizontal Direct Effect of Fundamental Rights in Hungarian Law and Practice

Written and unwritten fundamental rights of individuals need to be respected by the EU institutions and bodies in connection with each of their activities, and member states are bound to comply with them when applying EU law – this axiom (based on legal regulations and the practice of the CJEU) does not require further deliberation in the framework of this study. Since the mid-1970s, bodies applying law – including, but not limited to national courts and the CJEU – are intrigued by the question as to the effect of EU fundamental rights in relationships between private persons. To paraphrase this statement: it is still an open question under what conditions a private person may claim fundamental rights protection against another private person in the sphere of application of EU law. Bearing in mind that the protection of fundamental rights in our time is a multilevel (international, European and internal) issue that at the same time poses the question of balance between these dimensions,[48] the (re)interpretation of the horizontal application of fundamental rights is a concern arising ever so often.

According to the case law of the CJEU regarding 'horizontal direct effect/horizontal effect', a private person can generally not refer to primary EU law (including provisions of the TFEU that otherwise possess direct effect) *vis-à-vis* another private person; the possibility of horizontal direct effect can only be decided upon a case-by-case basis having regard to all elements of the facts of the case individually and jointly as well. The analysis needs to cover the nature and content of the provision in question, having regard also to the role it fulfils in the framework of the internal market.[49]

From among the secondary sources of EU law, regulations are by definition[50] able to entail horizontal and vertical effects, determining rights and obligations which can serve as a basis for claims not only against the member states, but in relation to private persons as

47 For the position of the Court of Justice on Protocol 30 *see* the judgment in Joined Cases C-411/10 *N. S. v. Secretary of State for the Home Department* and C-493/10 M. *E. et al v. Refugee Applications Commissioner* [Judgment of 21 December 2011, not yet reported], further discussed *infra* in section 21.5.1. and note 73.

48 N. Chronowski, 'Alapjogvédelem, nem csak uniós fokon', *Fundamentum* 1, 2009, p. 87.

49 The origins of the horizontal effect of primary EU law can be found in Case 43/75 Gabrielle Defrenne [1976] ECR 455: *see* above all paras 39-40 of the judgment.

50 *See* Art. 288 TFEU.

well. Directives on the other hand do not, as a general rule, have direct effect as in order to reach their goal – establishing rights or obligations for private persons – legislation on behalf of the member states is necessary. Under conditions developed by the CJEU, provisions of directives may also entail direct effect, but claims based on such provisions can only be made against a member state. The judgments of the CJEU in this regard[51] were and are followed and applied in numerous cases by Hungarian courts.[52]

The acceptance of horizontal direct effect is however linked with the reception of the principle of primacy of EU law in the legal systems and practice of the member states. In Hungary, there is no high-level legal norm declaring the primacy of EU law over Hungarian law in an express form, thus we must rely solely on the case law developed by Hungarian courts.[53] One cannot help but wonder about Declaration No. 17 regarding primacy of EU law attached by the member states to the Lisbon Treaty – the case law based principle of primacy, interpreted with regard to Article 4(2) TEU, Article 53 of the Charter and (for example) Article 82(2) TFEU, could result in an interesting situation regarding the protection and application of fundamental rights within the member states: it could happen that member states guarantee a higher level of protection in criminal procedures than what is required by EU legislation.[54]

In the Hungarian legal system, horizontal effect of fundamental rights (the so-called *Drittwirkung*)[55] is noticeable most prominently in the field of labour law and social law. Especially in labour law, the legislator cannot avoid its obligations resulting from the constitution, an obligation that is more or less enforced by the institutional protection of fundamental rights as well. As labour law is a 'renitent part of private law that has essentially taken on public law characteristics',[56] the private law system of labour law could not be sustainable in the absence of the recognition of the horizontal effect of fundamental rights among private persons. Whether this horizontal effect is direct or indirect, and what obligations it entails for legislators and public authorities (especially courts) is the subject of widespread dogmatic discussions.[57]

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51 Case 152/84 *Marshall* [1986] ECR 723, para. 48; Case C-188/89 *Foste*r [1990] ECR I-3313, paras 18 and 20; Case C-91/92 *Faccini Dori* [1994] ECR I-3325.

52 For more on this *see* F. Fazekas & M. Varjú, *European Union Law before the Hungarian Constitutional Court and the Hungarian Judiciary*, 2010, <www.jhubc.it/ecpr-porto/virtualpaperroom/052.pdf> (with further cases). *See also*, Varjú & Fazekas, *supra*, pp. 1970 and 1975.

53 For a detailed analysis *see* L. Blutman & N.Chronowski, 'Hungarian Constitutional Court: Keeping Aloof from European Union Law', 5 *Vienna Journal on International Constitutional Law* 3, pp. 329-348 (<http://ssrn.com/abstract=1961034>).

54 A higher level of protection of fundamental rights guaranteed by member state law could in practice potentially limit or overwrite the principle of supremacy of EU law.

55 *See* the german concept of the so-called Drittwirkung: W. Rüfner, 'Grundrechtsadressaten', *in:* J. Isensee & P. Kirchhof (Hrsg.), *Handbuch des Staatsrechts der Bunderepublik Deutschland,* Bd V.: Allgemeine Grundrechtslehren, 1992, §117 Rn.58.

56 Gy. Kiss, *Alapjogok kollíziója a munkajogban*, Pécs, Justis Tanácsadó Bt, 2010, p. 184.

57 The so-called *Drittwirkung-phenomenon*, the relevant case law and the related European and Hungarian legal literature is analysed thoroughly by Kiss 2010, pp. 1-668.

In the Hungarian legal system, questions regarding horizontal effect also arose in connection with differences resulting from inconsistences between the different language versions of EU legal norms. In the time period immediately after EU accession, the principle of legal certainty may be infringed by the belated publication of norms possibly affecting private individuals. The problems stemming from the lack of publication in the Official Journal first appeared before national courts. The question was whether the directly applicable regulations binding on member states may be enforced against individuals in the absence of their publication.[58]

21.4.2 *Managing Conflicts Arising from the Pluralist Protection of Fundamental Rights*

The intertwined nature of international law, EU law and national law in the current complex jurisdictional system has resulted in a pluralistic system of fundamental rights.[59] The situation is complicated further by the fact that the different generations of fundamental rights are at different stages of development – and the rules guaranteeing these do not possess the same legal value. The multi-layered institutional framework of rules is not necessarily simple either. This plurality cannot be simply described by a horizontal and vertical coordinate: diagonal and bi-directional connections also exist.

From the point of view of the individual, the advantageous expansion of the number of institutions guaranteeing the protection of fundamental rights is mitigated by uncertain elements, aggravated by the fact that even the courts themselves are not necessarily aware of the scope of the applicable law, or of the highest forum empowered to deliver authentic interpretation. This was especially true for the new member states immediately following EU accession in 2004. Misinterpreting the nature and remit of the preliminary procedure, national courts in numerous cases referred questions to the CJEU in fundamental-rights-related cases under circumstances where it was foreseeable that the Court of Justice will not deliver a judgment on the merits, due to a lack of jurisdiction.[60]

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58 More on this topic *see* T. Szabados, 'The role of language in legal interpretation: The case law of the Court of Justice of the European Union', *in:* R. Somssich & T. Szabados (Eds.), *Central and Eastern European Countries after and before the Accession*, Vol. 1, Budapest, ELTE Faculty of Law 2011, p. 158. Available at <http://jmce.elte.hu/docs/ConfDocVol1/EuropaiJogiTanulmanyok_8_2_0.pdf>.

59 *See* A. Peters, 'Die Anwendbarkeit der EMRK in Zeiten komplexer Hoheitsgewalt und das Prinzip der Grundrechtstoleranz', 48 *Archiv des Völkerrechts* 1, 2010, pp. 1-57. *See also*, F. Gárdos-Orosz, *Alkotmányos polgári jog?*, Budapest-Pécs, Dialóg-Campus 2011.

60 As a Hungarian example the aforementioned *Vajnai* case could be mentioned, which concluded without a decision on merits before the CJEU, but was later successful before the ECtHR. For more on the case in this regard *see* R. Somssich, 'Preliminary references from the new Member States – an attempt to identify problems of common interest and regional specificities', R. Somssich & T. Szabados (Eds.), *Central and Eastern European Countries after and before the Accession*, Vol. 1, ELTE Faculty of Law, Budapest 2011, pp. 105-139. Available at <http://jmce.elte.hu/docs/ConfDocVol1/EuropaiJogiTanulmanyok_8_2_0.pdf>.

Just as the international community and the European regional community is looking to find a way to 'manage' the concurrent systems of fundamental rights,[61] national legal systems – including Hungarian law – are coping with the same problem. It cannot be said that consistent and stable norms aimed at solving collision situations are readily available in Hungarian legal practice or legal literature, even though the interpretation of fundamental rights is discussed extensively in Hungarian legal literature.[62]

The phenomenon that may be problematic in practice, but can still lead to a coherent final interpretation and a high-level protection of individual rights can be described as kind of legal interference.[63] At least three forms of legal interference can be identified already at this point in legal development: firstly, the coexistence of fundamental rights norms; secondly, the emergence of similar or unified standards of protection as a result of the increased interaction of fundamental rights norms; and thirdly, the mutually deteriorating interaction of fundamental rights norms. The various forms of interference appear tendentiously more often in connection with certain generations of fundamental rights.

There are no generally accepted rules or principles of conflicts of law concerning Hungarian law and the ECHR or the Charter of Fundamental Rights: in the end, potential conflicts could be solved on the basis of the requirement of (broadly interpreted) constitutionality. As a concrete example, we could mention the Hungarian practice of legislation and law enforcement regarding the right to residence and equal treatment.[64]

Any kind of real or perceived infringement of fundamental rights requires first the clarification of a number of questions. Who caused the violation of rights? Who can be held responsible for the infringement? Which forum can be addressed in the hope of a judicial remedy? What kind of activity caused the violation (a legislative act or the lack thereof, acts of administrative bodies or other relevant bodies)?

As an example of improper implementation by the Hungarian legislator, mention needs to be made of the Race Equality Directive.[65] The story of the implementation of Directive 2000/43/EC in Hungarian law is a story of deficient implementation which has nonetheless

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61 W. Weiß,' Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights After Lisbon', *European Constitutional Law Review* 7, 2011, pp. 64-95 and particularly p. 66.

62 We will not attempt to undertake the practically impossible task of listing all of the relevant sources, mostly written in Hungarian. For a quite thorough analysis and review of the relevant literature *see* A. Jakab (Ed.), *Az Alkotmány kommentárja*, Budapest, Századvég 2009.

63 H. Sauer, 'Bausteine eines Grundrechtskollisionsrechts für das europäische Mehrebenensystem', 38 *Europäische Grundrechte-Zeitschrift* 7-8, 2011, p. 197.

64 For more on this issue *see* É. Gellérné Lukács, 'Free movement of persons – a synthesis', *in:* R. Somssich & T. Szabados (Eds.), *Central and Eastern European Countries after and before the Accession*, Vol. 1, Budapest, ELTE Faculty of Law 2011, pp. 51-101, at p. 75 and p. 78. Available at: <http://jmce.elte.hu/docs/ConfDocVol1/EuropaiJogiTanulmanyok_8_2_0.pdf>.

65 Regarding the European aspects of racial descrimination *see* K. Szajbély, *A faji diszkrimináció elleni fellépés az Európai Unióban, a standardok átültetése Franciaországban, Nagy-Britanniában és Magyarországon*, Szeged, SZTE ÁJTK Doktori Iskola, 2009, p. 237.

led to a number of sensitive court proceedings: the *Hajdúhadház roma school segregation case*[66] is perhaps the most controversial case before Hungarian courts involving the application of the Race Equality Directive.[67]

The Hungarian Equal Treatment Authority[68] was established on the basis of different EU directives concerning equal treatment. Apart from its activities as a public authority, it comment on drafts of legal acts, other legal instruments of public administration, as well as reports concerning equal treatment and makes proposals concerning governmental decisions and legislation pertaining to equal treatment. It regularly informs the public and the Government about the situation concerning the enforcement of equal treatment and continually provides information to those concerned and provides assistance in acting against the violation of equal treatment. It furthermore assists the preparation of governmental reports to international organisations – particularly to the Council of Europe – concerning the principle of equal treatment.[69] In the case of the aforementioned Hajdúhadház roma school, most of the problems for the competent Hungarian courts were caused by the difficulty in clarifying certain questions of interpretation: *i.e.* the measurability of direct and indirect discrimination and the question of the burden of proof.

21.5 Consequences of the New Binding Legal Status of the Charter of Fundamental Rights

21.5.1 The Position of the Charter in the EU Legal Order

The Charter of Fundamental Rights has come a long way from being a mere solemn declaration. After the failed Constitutional Treaty, which included the Charter in Part II of the actual Treaty text, the Lisbon Treaty took a more 'cautious' approach. The Charter, not as such included in the TEU or the TFEU, was given binding force by Article 6 TEU ("shall have the same legal value as the Treaties"). Even keeping in mind the special situation of the United Kingdom, Poland and the Czech Republic in this regard, this is an important step in establishing a common, comprehensive and consolidated fundamental rights catalogue for the European Union.

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66 The case was the subject of proceedings in three instances: Case No. 6. P. 20.341/2006/50; Case No. Pf.I.20.361/2007/8; Case No. Pf*v*.IV.20.936/2008/4. *See* Varjú & Fazekas, *supra*, pp. 1975-1976; S. Szemesi,' A diszkrimináció tilalma az emberi jogok európai rendszerében és a magyar jogrendben', 7 *Kül-Világ* 4, pp. 1-13.

67 For a detailed description of the implementation process *see* Varjú & Fazekas, *supra*, pp. 1975-1976.

68 The website of the Authority is available in English as well at <www.egyenlobanasmod.hu/index.php?lang=en>.

69 Act CXXV of 2003 regulating the Authority is available in English here: <www.egyenlobanasmod.hu/data/Act_CXXV_2003%20English.pdf>.

Already before the Lisbon Treaty, the General Court (the then Court of First Instance)[70] and Advocates General of the Court of Justice began citing the Charter, with the Court of Justice gradually also incorporating references to the Charter into its legal reasoning, though somewhat later, and at first somewhat indirectly: the initial reference of the Court of Justice rested on the fact that the preamble of the Family Reunification Directive (which was challenged by the European Parliament in an action for annulment) also made reference to the Charter.[71] In this judgment, the Court of Justice reiterated that the aim of the Charter was to reaffirm fundamental rights as they result, in particular, from the constitutional traditions and international obligations common to the member states, the Treaty on European Union, the Community Treaties, the ECHR, the Social Charters adopted by the Community and by the Council of Europe and the case law of the Court and of the European Court of Human Rights, as it is contained in the preamble of the Charter. Thus, the initial opinion of the CJEU was that the Charter represents a reaffirmation of already existing rights.

Owing to the entry into force of the Treaty of Lisbon, the Charter has been endowed with binding force, binding primarily for the institutions and other bodies, offices and agencies of the EU. It is however of relevance for the member states as well, as the requirement to respect fundamental rights defined in the context of the EU is binding upon them when they act within the scope of EU law. The Charter does not establish any new competence or task for the Union. In the *McB* case (related to Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility[72]), the CJEU pointed out that "in the context of this case, the Charter should be taken into consideration solely for the purposes of interpreting [the Regulation], and there should be no assessment of national law as such."[73] The scope of application of the Charter came up recently in the *N. S.* and *M. E.* Judgments concerning fundamental rights and the Dublin Regulation[74]: the CJEU stressed that a decision by an EU member state on the basis of Article 3(2) of the Dublin Regulation concerning the question whether the state will examine an asylum application which is not its responsibility according to the criteria laid down in the Regulation, "implements European Union law for the purposes of Article 6 TEU and/or Article 51 of the Charter" – *i.e.* the member state's use of its discretionary power as determined by a legal act of the EU qualifies as implementation of EU law

70 For the first reference by the Court of First Instance *see* Case T-54/99 *Max mobil v. Commission* [2002] ECR II-313.

71 Case C-540/03 *Parliament v. Council* [2006] ECR I-5769, para. 38. The annulment action was unsuccessful.

72 OJ 2003 L 338/1.

73 Case C-400/10 *PPU J. McB. v. L. E.* [Judgment of the Court of 5 October 2010, not yet reported.]

74 Regulation 343/2003 establishing the criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of the member states by a third-country national (OJ 2003 L 50/1).

as far as the applicability of the Charter is concerned.[75] Furthermore, in the *Yoshikazu Iida* judgment[76] of 2012, the CJEU had to answer questions about where the limits of the applicability of the Charter lay. Mr Iida, a third-country national was refused the 'residence card of a family member of a Union citizen', the reason being that he did not satisfy the conditions for the grant of that card in accordance with Article 10 of Directive 2004/38. This situation, coupled with that fact that he voluntarily withdrew his application for the status of 'long-term resident' in accordance with Directive 2003/109, was deemed by the CJEU as exhibiting no connection with European Union law, and thus it did not review the conformity of the decision of the German authorities with the Charter.[77]

According to Article 6 TFEU, fundamental rights protection in the EU after Lisbon rests on three pillars[78]: the Charter, the ECHR and the constitutional traditions common to the member states. However, the very same article also declares that the rights constitute general principles of law in the legal system of EU law. Fundamental rights thus have "dual plane existence", with the written Charter not replacing the unwritten general principles.

Referencing a concise written document is always more 'convenient' and, from the point of view of legal certainty, preferable to citing an ever growing amount of case law. After having achieved binding character, the Charter rapidly became a frequent point of orientation: taking into account the Charter references in 86 judgments of the CJEU delivered between 2010 and 2011,[79] it may be said that the Charter has become the reference text and the primary starting

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75 Joined Cases C-411/10 *N. S. v. Secretary of State for the Home Department* and C-493/10 *M. E. et al v. Refugee Applications Commissioner* [Judgment of 21 December 2011, not yet reported], paras 55-69. The judgment also carries relevance regarding the applicability of the Charter *vis-à-vis* the United Kingdom and Poland in the light of Protocol 30 attached to the Treaty of Lisbon: the CJEU proclaimed that the aforementioned Protocol does not call into question the applicability of the Charter in the United Kingdom or in Poland: Art. 6 TEU requires the Charter to be applied and interpreted by the courts of Poland and of the United Kingdom strictly in accordance with the explanations referred to in that article. The preamble to the Protocol also states that the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes them "more visible", but does not create new rights or principles. Thus the Protocol does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those member states from ensuring compliance with those provisions (paras 116-122).

76 Case C-40/11 *Yoshikazu Iida v. Stadt Ulm* [Judgment of 8 November 2012, not yet reported)

77 The referring German court formulated quite detailed questions on the applicability of the Charter (which were answered briefly as noted above), and regarding the relationship between the general principles of EU law (*i.e.* 'unwritten' fundamental rights) and the Charter. The latter question was not analysed on the merits, as no fundamental rights review took place. The judgment is also of interest as a continuation of the case law connected to the residence rights of family members of EU citizens – for analysis of previous relevant case law *see inter alia,* Á. Mohay & D. Muhvić, 'The legal nature of EU citizenship: Perspectives from international and EU law', *in:* T. Drinóczi *et al* (Eds.), *Contemporary Legal Challenges: EU – Hungary – Croatia*, Pécs, University of Pécs 2012, pp. 155-175; L. Gyeney, 'Uniós polgárság: a piacorientált szemlélettől való elszakadás göröngyös útja',8 *Iustum Aequum Salutare* 2, 2012, pp. 141-164.

78 I. Pernice, 'The Treaty of Lisbon: Multilevel Constitutionalism in Action', 15 *Columbia Journal of European Law* 3 2009, p. 401.

79 A.S. Arnaiz & A.T. Pérez, 'Main trends in the recent case law of the EU Court of Justice and the European Court of Human Rights in the field of fundamental rights', Brussels, European Parliament 2012, p. 9.

point for the CJEU's assessment of the fundamental rights recognized thereunder.[80] Based on the case law, references to the Charter may be divided into three categories: (1) cases in which the Charter is deemed the main source for identifying and interpreting fundamental rights, (2) cases in which the Charter appears as a complementary source supporting the reasoning of the Court and (3) cases in which the ECJ did not to take the Charter into consideration, even though this was in some cases expressly requested by the referring national courts.[81]

In comparison with the ECHR, the Charter is a much more modern collection of rights – the European Parliament actually considers it the most modern codification of rights and freedoms, as it incorporates third generation human rights (solidarity rights) as well.[82] These fundamental rights are not contained in the ECHR (or any other binding international human rights treaty, for that matter), and thus represent a step forward since these are codified in a binding document which gradually became a primary (though not exclusive) point of reference for the aforementioned court.

Regarding the effect of the Charter on national jurisdictions, a direct impact can arise only in legal disputes regarding the application and implementation of EU law at the national level, and such disputes could very well induce preliminary rulings regarding the direct applicability of the Charter. To this date, we have no knowledge of regular courts in Hungary referring to the Charter to decide cases pending before them.

The Hungarian Constitutional Court does not regard itself as competent to decide on whether a national legal act is in conformity with EU law as this problem is not a question related to the constitutionality of Hungarian law.[83] In a recent case regarding the constitutionality of a Hungarian law regarding the status of public employees, the petitioners challenged the national act *inter alia* with reference to the Charter.[84] The Constitutional Court rejected the pleas in law which asked for a declaration of unconstitutionality on grounds of infringement of the Charter, once again stating that a) it does not have competence to review conformity of national acts with EU law and b) the Charter does not fall under the category of 'international law' as defined by the Hungarian Constitution.[85] Conflicts

80 *See also* Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms – Joint communication from the Presidents of the European Court of Human Rights and the Court of Justice of the European Union 2011, p. 1. Available at <http:/curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf>.

81 For this categorization and notable examples *see* Arnaiz & Pérez 2012, pp. 9-10.

82 European Parliament Report on the situation of fundamental rights in the European Union (2009) – effective implementation after the entry into force of the Treaty of Lisbon (2009/2161(INI)), para. 6.

83 A. Bragyova, 'Az alkotmánybíráskodás jövője' (Fórum), *Fundamentum* 1, 2010, p. 61.

84 AB 29/2011. (IV. 7.).

85 Art. 7 § 1 of the Constitution (Act XX of 1949) declares that the legal system of the Republic of Hungary accepts the generally recognized principles of international law, and shall harmonize the country's domestic law with the obligations assumed under international law. The consideration that EU law is not international law is repeated in multiple judgments of the Constitutional Court [AB 72/2006. (XII. 15.); AB 1053/E/2005. AB 87/2008. (VI. 18.)]. For further reading concerning this problem *see* P. Kovács, 'A la recherché du bon chemin…ou l'affaire du mandate d'arret europeen devant la Cour Constitutionelle Hongroise', *in:* J. Mouton (Ed.), *La France, l'Europe et le Monde. Mélanges en l'honneur de Jean Charpentier*, Paris Pedone 2009, pp. 363-379.

between national law and Union law are excluded from the sphere of constitutional issues (and thus review) by the Constitutional Court according to its established case law.[86]

It has to be mentioned that during the preparation of the new Hungarian Fundamental Law (replacing the previous Constitution), it was proclaimed by the drafters of the text that the section regarding rights and freedoms will be based on the EU Charter.[87] A resolution adopted by the European Parliament concerning the new Fundamental Law claims that the "incorporation of the Charter of Fundamental Rights of the European Union into the new Constitution may give rise to overlaps in competences between Hungarian and international courts".[88] The idea that a national bill of rights formulated at the uppermost level of the national legal order should correspond as far as possible to the rights, freedoms and principles protected by the European Union as a whole does not seem problematic. The EP resolution refers in this regard to the related opinion of the Venice Commission – without however specifying which one it refers to: the opinion given in March before the actual text of the Fundamental Law was drafted, or the one following the finalization of the new Fundamental Law.

The earlier opinion[89] does mention that an incorporation of the Charter as a whole or some parts of it as such could lead to 'legal complications', arising *inter alia* from the possible 'hidden supranational origin' of the provisions Charter – using the Charter as a source of inspiration, on the other hand, is seen by the Venice Commission as beneficial, as it can insure greater congruence of the rights protected on different levels.[90] (It is probably safe to say that the overall verbatim incorporation of the Charter as part of the Fundamental Law was never a realistic option.)

No jurisdictional concerns are formulated in the later opinion assessing the final text of the Fundamental Law,[91] with the Venice Commission expressly welcoming the efforts made to establish a constitutional order in line with the common European democratic values

86 For a thorough and detailed analysis of the issue *see* L. Blutman & N. Chronowski, 'Hungarian Constitutional Court: Keeping Aloof from European Union Law', 5 *Vienna Journal on International Constitutional Law* 3 2011, pp. 329-348.

87 <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20110608+ITEM-011+DOC+XML+V0//EN>.

88 European Parliament resolution of 5 July 2011 on the Revised Hungarian Constitution (P7_TA(2011)0315).

89 Opinion no. 614/2011 on three legal questions arising in the process of drafting the new constitution of Hungary [CDL-AD(2011)001].

90 The issue of competing internal competences was also raised in the first opinion. That concern rested on the hypothesis that should the Charter be incorporated into the Fundamental Law as a whole *and* if this incorporation would mean that only the Constitutional Court would have the competence to assess the compliance of Hungarian laws enacted in the scope of EU law with the Charter, then this could be contrary to primary EU law, as it would bereave national courts of their right to assess and insure the compatibility of national law with EU law (taking into account direct effect and supremacy, and possibly making use of the preliminary ruling procedure). As neither aspects of this hypothesis arose, we shall not give this question further consideration.

91 Opinion no. 621/2011 on the new constitution of Hungary [CDL-AD(2011)016].

and standards and to regulate fundamental rights and freedoms in compliance with the international instruments which are binding for Hungary, including the ECHR and the recent EU Charter. It is indeed hard to see why a substantive overlap (congruence) of rights protected at national and European level would cause a jurisdictional conflict.[92]

A possible beneficial outcome of the application of the now binding Charter in the multilevel constitutional system of the European Union could be that as national courts will necessarily cooperate and communicate with the Court of Justice regarding cases which concern Union law via the preliminary ruling procedure, a high(er) level of protection of fundamental rights may be deemed the standard even in matters which are not directly related to EU law.[93] This, of course, can only be the case where the Charter does indeed guarantee the highest level of protection, bearing in mind the non-restriction clause in Article 53, which aims to guarantee that the most beneficial provision is to be applied regarding the protection of fundamental rights.

Turning our view towards the future, it should be mentioned that it is unclear through what kind of formal procedure amendments to the Charter could possibly be adopted, as it is not a part of the Treaty, but it does possess the same legal status.[94] The most appropriate method would be some kind of convention method, as the Charter was born from the first convention organized within the EU framework. Since Lisbon, Article 48 TFEU defines the convention method as one of the means of modifying the Treaties via ordinary revision: the Convention is to be composed of representatives of the national parliaments, of the Heads of State or Government of the member states, of the European Parliament and of the Commission (also consulting the European Central Bank in the case of institutional changes regarding monetary policy).

21.5.2 The Status of 'Principles' within the Framework of the Charter

The Charter of Fundamental Rights contains rights, freedoms and principles. Under EU law, the term fundamental rights is used as a kind of 'catch-all" term that covers classic

92 It has to be mentioned, however, that Opinion No. 621/2011 does include criticism as well in connection with the regulatory scope of 'cardinal laws' (adopted by Parliament by a two-thirds majority of the MPs present), claiming that if not only the fundamental principles but also very specific and "detailed rules" on certain issues are enacted in cardinal laws, the principle of democracy could be at risk, and thus urged the restriction of the fields and scope of cardinal laws (paras 24-27). The Opinion also takes notice of the conceptual difference between the EU Charter and the Fundamental Law, noting that the Charter is centred around individual rights, whereas the Fundamental Law in some areas opts for more a collectivistic approach (para. 57). States nevertheless enjoy constitutional autonomy (noted also by para. 19 of the Opinion), and a wide margin of appreciation in establishing the scope and level of detail of the constitutional provisions (para. 25), even if these rules need to be analysed "in the light of European standards, above all the case-law of the ECtHR" (para. 19).

93 Pernice 2009, p. 402.

94 *See also* G. De Búrca, *Reflections on the EU's Path from the Constitutional Treaty to the Lisbon Treaty*, Fordham Law Research Paper, 2008, p. 13 (<http://ssrn.com/abstract=1124586>).

civil rights, political participation rights, social and economic rights and certain rights restricted solely to Union citizens.[95]

According to the Charter itself, there exists a degree of differentiation between rights and freedoms on the one hand, and principles on the other. The principles contained in the Charter only *may* be implemented by the institutions and the member states, and they are considered 'judicially cognisable' only in the interpretation of and in the ruling on their legality of EU law or national law implementing Union law.[96] According to the Explanations Relating to the Charter of Fundamental Rights,[97] this means that these so-called principles do not give rise to direct claims for positive action by the Union's institutions or member states authorities.

It must be noted that the Charter was originally developed without such a division in mind, and thus does not strictly reflect this separation: for example the principle enshrined in Article 27, labelled as "Workers' right to information and consultation within the undertaking", stating that workers or their representatives must be guaranteed information and consultation in good time "in the cases and under the conditions provided for by Union law and national laws and practices" is unenforceable as such, and requires implementing measures according to the Article itself, whereas the single Article which speaks of principles according to its title (Art. 49 – Principles of legality and proportionality of criminal offences and penalties) confers rights which the Court of Justice has applied constantly in its case law without further implementing measures.[98]

21.6 Consequences of the Accession of the EU to the ECHR

21.6.1 EU Accession to the ECHR – Added Value or Procedural Complications?

It is common knowledge that in the first decades of integration, the protection of fundamental rights was – due to the lack of a primary EU law legal basis – dependent on the constitutions of the member states. Later on, as it became clear that Community law (today: Union law) enjoyed supremacy[99] (primacy of application) *vis-à-vis* national law, the

95 D. Anderson & C.C. Murphy, *The Charter of Fundamental Rights – History and Prospects in post-Lisbon Europe*, EUI Working Papers 2011/8, European University Institute, p. 5. (<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1894386>).

96 *See* Art. 52(5) of the Charter. The wording of Art. 51 of the Charter also reflects a difference, as it mentions the obligation to "respect" the rights and "observe" the principles. The official Hungarian translation contains a slight difference between the two articles, as in Art. 51 the word "principles" *("elvek")* is used, whereas Art. 52 talks about "basic principles' *("alapelvek")*. The German version uses the expression basic principles *(Grundsätze)* in all instances; the French version only uses "principles" (*principes*).

97 OJ 2007 C 303/02.

98 For more on this *see* Anderson & Murphy 2011, p. 6.

99 *See in general,* Case 6-64, *Flaminio Costa v. E.N.E.L.* [1964] ECR 585, and more specifically regarding fundamental rights Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125.

fundamental rights protection mechanisms embedded in national legal systems have lost weight. Thus, the danger was apparent that a vacuum of fundamental rights protection could arise in Europe. The Court of Justice – in spite of its earlier reservations – gradually filled this empty space by defining and establishing the system of EC (EU) fundamental rights – basic rights which stand in line with the aims of integration.

Owing to this aforementioned process, the EU became the only international organization which guarantees the protection of fundamental rights against its own legal acts – for almost four decades.[100] The balance of these conflict-ridden decades is not bad at all: wide-ranging, and on the whole consistent case law by the Luxembourg court, a written Charter of Fundamental Rights with binding force equivalent to that of the Treaties, and a level of protection deemed equivalent by national supreme courts[101] and in essence by the ECtHR as well (by a presumption of equality).[102] The accession of the EU to the Convention almost seems to imply a *non-plus-ultra* effect.

The anticipated increased level of protection is intended to compensate for (at least some of the) current shortcomings of the EU fundamental rights protection system. The tenor of these deficiencies is of course relative in nature – and should be evaluated and interpreted in light of the 'price to be paid' for the accession to the ECHR: namely the possibility of procedural complications and uncertainties.

During the course of this occasionally wavering, yet all in all expanding evolutionary process of fundamental rights protection in the EU, the Court of Justice, as the trustee of this process, has been the target of much criticism. One of the most often repeated deficiencies has been the 'cursory' approach of the Court of Justice to reasoning – the lack of the establishment of a dogmatical basis intended for EU fundamental rights.[103]

It is a fact furthermore, that individual legal acts have come under scrutiny by the Court of Justice much more often than general secondary norms. In the past decades, a large number of individual acts (predominantly those adopted by the Commission) in the field of competition,[104] EU staff regulations[105] and customs regulations have been the subject of judgments related to fundamental rights. The EU courts have often examined individual acts of EU institutions, and frequently declared an infringement of fundamental rights.

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100 F.C. Mayer, 'Der Vertrag von Lissabon und die Grundrechte', *Europarecht*, Beiheft 1, 2009, p. 87.

101 *See* in this regard the *Solange-II* and *Maastricht* decisions of the German federal constitutional court (which has been the most critical of the process (BVerfGE 73, 339 (387) – *Solange II*-Judgment; BVerfGE 89, 155 (175) *Maastricht*-Judgment).

102 ECtHR, 30 June 2005, Application nº 45036/98, Case of *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, paras 149-158.

103 W. Schroeder, 'Neues zur Grundrechtskontrolle in der Europäischen Union', *Europäische Zeitschrift für Wirtschaftsrecht* 2, 2011, p. 463.

104 Case 155/79, *AM&S Europe Limited v. Commission of the European Communities* [1982] ECR 1575.

105 Case C-340/00 P *Commission of the European Community v. Michael Cwik* [2001] ECR I-10269.

The acts of the legislators of the Union (the Council and the Parliament) have however not been the subject of fundamental rights scrutiny of an equal intensity and prevalence. In the last ten to 15 years, the intensity of EU law-making reached unprecedented new heights – at the level of primary and secondary law as well. The 'fundamental rights sensitivity' of EU legal acts (produced in large numbers and at a swift pace) became somewhat underplayed.[106] Questions of conformity with fundamental rights and the principle of proportionality will however arise more and more often in relation to internal market harmonization measures, with reference to the affirmation of a "high level of protection" in Section 3 of Article 114 TFEU – *see e.g.* the recent *Vodafone* case regarding high roaming prices.[107] Moreover, legal acts of the Union concerning the Area of Freedom, Security and Justice affect individual rights more intensely than ever, as the acts themselves are – one could say: by definition – personal in nature.[108]

The ever expanding personal scope and subject of the legal acts of the Union will result in an increasing number of serious conflicts centred around fundamental rights, the settlement of which require a different 'culture' of fundamental rights than that shared by EU institutions until now. Provided that the member states intend to maintain the Union as an entity based on the rule of law, one of the necessary steps (apart from bestowing primary law status upon the Charter of Fundamental Rights) is to introduce the institutions into the wider European fundamental rights system that is embodied by the ECHR and the ECtHR, operating in the framework of the Council of Europe. The accession will hopefully not only result in the ECHR becoming binding and thus directly invokable *vis-à-vis* the institutions of the Union, but also in an increased convergence and approximation of the dual standard of interpretation regarding fundamental rights (Luxembourg – Strasbourg).

As part of the aforesaid fundamental rights culture, coherent high-level fundamental rights norms are essential, but are not the only necessity: the possibility of judicial remedy has to be insured as well. Setting up an effective and transparent system of judicial remedies in the framework of the two concerned (and quite unique) international organizations is an exceptionally difficult undertaking, in particular in light of the great number of member states affected. Thus, even a system of judicial remedies that is at least coordinated could be considered a fortunate outcome.

The price to be paid for the elevated level of fundamental rights protection cannot be estimated yet. Theoretically, problems could arise regarding the regulation of intervention and the position of co-respondents in procedures before the ECtHR: the draft accession

106 M. Herdegen, *Europarecht*, 12th edn, C.H. Beck 2010, § 8. 22.

107 Case C-58/08, *The Queen, on the application of Vodafone Ltd and Others v. Secretary of State for Business, Enterprise and Regulatory Reform* [2010] ECR I-4999.

108 *See e.g.*, regulations that have led to the much discussed *Kadi* cases (*e.g.*, Regulation 2002/881/EC), or Framework Decision 2002/584/JHA on the European Arrest Warrant.

treaty currently makes these positions available for both the EU member states and the Union (Art. 3).[109] The draft text however speaks of a possibility and not an obligation, which could become problematic in a case where the infringement of a fundamental right enshrined in the ECHR was not caused by an act of an EU member state, but by an act that was in fact issued based on an act of the Union, and either the EU or a member state is the only respondent in the case concerned. Infringement of the ECHR can of course be declared regarding just one party – the infringement, on the other hand, will continue to exist if the responsible actor was not party to the case: after all, the EU and the member states can only revise acts of their own. This state of affairs seems controversial, especially with regard to the fact that one of the goals of EU accession to the ECHR is indeed to establish a system where the ECtHR would not have to choose from among the potential actors responsible for the infringement.

From a procedural point of view, even more problems could arise from situations where the EU acts as an intervener or a co-respondent in a case, but has not yet assessed the compatibility of the provision of European Union law in question with the Convention rights at issue (Art. 3 para. 6). In the early stages of negotiation, the possibility of introducing a kind of preliminary ruling procedure (from the ECtHR to the Court of Justice) was raised.[110] This option is however not included in the draft treaty anymore, apparently because it would (at least most probably) infringe the autonomy of the EU legal order, as far as its own procedural system is concerned. The introduction of such a preliminary procedure would in all probability also mean the infringement of Protocol No. 8 relating to Article 6(2) of the TEU. According to Article 3 Paragraph 6 of the draft treaty, it is for the EU to ensure that the assessment of conformity of an EU law provision is made in such a way so as not to unduly delay proceedings before the Strasbourg court.[111] It is apparent that this provision could cause a general delay in proceedings – thus, it seems that this is the price that every actor concerned will have to pay for an increase in the level of the protection of fundamental rights.

At its extraordinary session held between 12-14 October 2011, the Steering Committee for Human Rights (CDDH) made public the draft text of the accession treaty (made up of 12 Articles) complete with detailed reasoning.[112] Some of the members of the

109 Report to the Committee of Ministers on the elaboration of legal instruments for the accession of the European Union to the European Convention on Human Rights. Strasbourg, 14 October 2011, CDDH (2011) 009. p. 3-4. (<www.coe.int/t/dghl/standardsetting/hrpolicy/cddh-ue/cddh-ue_documents_EN.asp>).

110 European Parliament Report from 6 May 2010 on the institutional aspects of the accession of the European Convention for the Protection of Human Rights and Fundamental Freedoms (A7-0144/2010)

111 Art. 3. 6 of the Draft Agreement: "The European Union shall ensure that such assessment is made quickly so that the proceedings before the Court are not unduly delayed."

112 Report to the Committee of Ministers on the elaboration of legal instruments for the accession of the European Union to the European Convention on Human Rights. Strasbourg, 14 October 2011, CDDH (2011) 009, p. 3-4. (<www.coe.int/t/dghl/standardsetting/hrpolicy/cddh-ue/cddh-ue_documents_EN.asp>).

CDDH – including the Secretary General of the Council of Europe, and a number of states including both EU members and non-EU member countries – recommended the expeditious adoption of the document, deeming it a draft representing a balanced compromise. The representative of the European Commission on the other hand put forward that there was no common position yet among the member states of the European Union, as negotiations were still ongoing within the organization. The Articles most debated by certain EU member states are the ones regulating intervention and the position of co-respondents (Draft Art. 3, paras 2-3) and the system of the supervision of the execution of judgments against member states of the European Union (Draft Art. 7, para. 2, letters b and c).
In light of all the foregoing, the Steering Committee decided that – because of the unresolved political questions at hand – the Draft should be sent to the Council of Ministers for further deliberation. In spite of the fact that the Treaty of Lisbon has codified an obligation (!) for the EU to accede to the ECHR, representing the consensus of the member states regarding this issue, the precautionary (and in some cases uncertain) approach of the member states is clearly palpable. It should be noted that even though negotiations on the subject of ECHR accession were already well underway during the Hungarian presidency, only the *stricto sensu* professional sector was able to gather detailed information regarding the progress achieved and the substantive positions of individual member states. The situation is quite different in legal literature, as an impressive number of scientific articles have set out to analyse various aspects and possible future effects of the accession.

21.6.2 The Tenability of the Bosphorus-Presumption

In its famous *Bosphorus* judgment, the ECtHR held that the protection of fundamental rights by EU (then Community) law can be considered (at the time relevant to the case) "equivalent" to that of the ECHR system.[113] The judgment was considered an important contribution to the protection of fundamental rights in the multilevel structure of the European legal order.[114]
The presumption of equivalent protection construed and applied by the ECtHR however puts the EU and the member states in a privileged position – although the latter only in case the EU legal norm in question gives them no discretionary freedom whatsoever. How flexible a notion is the *Bosphorus-presumption*? The answer to this question will have to be answered by

113 *Bosphorus Hava Yollari Turizm v. Ireland*, Appl. No. 45036/98. By equivalent protection the ECtHR referred to the protection of fundamental rights, "as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides" (para. 155).

114 F. Schorkopf, 'The European Court of Human Rights' Judgment in the Case of *Bosphorus Hava Yollari Turizm v. Ireland*', 6 *German Law Journal*, 2005, p. 1263.

the future case law of the ECtHR.[115] It would seem reasonable to ensure on the one hand that the *Bosphorus-presumption* does not lead to a decrease in the level of protection afforded by ECHR, and on the other hand that it does not result in demanding a higher level of protection from the EU or the EU member states than what is expected of other ECHR signatories. In the *Kokkelvisserij* case, the danger of a double standard was successfully avoided.[116]

To the knowledge of the authors of this study, the *Bosphorus-presumption* has not been directly referred to in proceedings before Hungarian courts. Thus, the question of how the Constitutional Court and other courts will handle the problem of the equivalence of EU and ECHR fundamental rights protection in the future cannot be answered yet.

The accession of the EU to the ECHR rightly poses the question of the tenability of the *Bosphorus-presumption*. The answer is at least as complex as the situation of the protection of fundamental rights in Europe today – the majority opinion in legal literature seems to accept the sustainability of the *Bosphorus-presumption*,[117] if for nothing else but for simple practical reasons: the caseload of the ECtHR is a statistical fact. Within the limits of this report, we cannot engage in deep analysis regarding the *Bosphorus-presumption* – one circumstance, however, definitely needs mentioning.

The *Bosphorus-presumption* has put the EU and the CJEU in a more privileged position than national courts and constitutional courts – a situation requiring either some kind of correction, or perhaps the extension of the presumption to national courts as well. As an argument for the extension of the presumption, one could mention the principle of subsidiarity in the ECHR,[118] and the need for a higher level of trust towards national supreme courts[119] – a development that from the point of view of Hungarian courts (as described above) definitely seems laudable. On the other hand, arguments against this extension seem to carry more weight, supported by numerous academic scholars[120]: for instance,

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115 Unlike in the *Bosphorus* case (Appl. No. 45036/98, *Bosphorus Hava Yollari Turizm. Ticaret Anonim Sirketi v. Ireland,* Judgment of 30 June 2005), in the *Kokkelvisserij* case the ECtHR undertook a detailed analysis of the rebuttability of the presumption (Appl. No.13645/05, *Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij v. Netherlands*, Judgment of 20 January 2009).

116 In the *Kokkelvisserij* case it was stated that the fact that it is not possible for the parties to submit observations regarding the opinion of the Advocates General of the CJEU does not mean a violation of Art. 6 ECHR (right to a fair trial).

117 Literature on the tenability of the *Bosphorus presumption* and the consequences of accession is vast, though not as abundant in Hungarian legal literature. For detailed analysis *see inter alia,* J. Polakiewicz, 'Durchsetzung von EMRK-Standards mit Hilfe des EU-Rechts? Chancen und Risiken erläutert am Beispiel der Verfahrensgarantien im Strafverfahren', 37 *Europäische Grundrechte-Zeitschrift* 1, 2010, pp. 11-20.; W. Schroeder, 'Neues zur Grundrechtskontrolle in der Europäischen Union', *Europäische Zeitschrift für Wirtschaftsrecht* 12, 2011, pp. 462-467.

118 Art. 35(1) ECHR.

119 It is not a coincidence that such an opinion was formulated by non other than the resigning president of the German federal constitutional court, Jürgen Papier in 2010: 'Scheidender BVerfG-Präsident Hans-Jürgen Papier warnt EGMR vor Akzeptanzverlust', *Europäische Grundrechte-Zeitschrift* 2010, p. 368.

120 L. Wildhaber, 'Bemerkungen zum Vortrag von BVerfG-Präsidenten Dr. H.-J. Papier auf dem Europäischen Juristentag 2005 in Genf', 32 *Europäische Grundrechte-Zeitschrift* 22-23, 2005, p. 743; J. Baumann, 'Auf dem Weg zu einem doppelten EMRK-Schutzstandard?', 38 *Europäische Grundrechte-Zeitschrift* 1-4, 2011, p. 10.

different interpretations of national supreme courts would, even if equivalence is guaranteed, result in the fragmentation of the coherent interpretation provided by the case law of the ECtHR. The main opposing argument however rests in the very essence of the ECHR: the possibility of individual judicial review could be jeopardized.

21.6.3 The Charter of Fundamental Rights of the EU and National Fundamental Rights Protection Systems as Competing Layers

Let us now turn to a particular issue within the general scheme of fundamental rights protection: namely, what is the role of national and EU fundamental rights systems of review regarding member state measures in situations where the member state measure in question actually originates from EU law? This issue arises primarily regarding the implementation of EU directives by member states, as the directive and the implementing measure are in functional unity. It is thus presumable that the member state measure has to – in essence – be in conformity with EU fundamental rights.

What is unclear in this regard is to what extent the national legislator has to comply with EU fundamental rights on the one hand and 'internal' fundamental rights on the other hand when adopting an implementing measure. The CJEU has stated relatively unambiguously that it upholds the possibility of EU fundamental rights review[121] – and by doing so it extends the possibility of fundamental rights review to any kind of implementing or executive measure adopted by the member states. The point of view of the CJEU could be disputed on the basis of Article 53 of the Charter of Fundamental Rights in cases where the national fundamental rights measures are capable of providing a higher level of protection than EU fundamental rights. The parallel nature of EU and national fundamental rights presents itself content wise in at least three dimensions.[122] It is evidently unproblematic in practice if a member state measure is in violation of fundamental rights both according to national and EU standards. In the second type of situations, the protection provided by national measures is of a higher level that the EU standard of protection – this should be resolved by reference to Article 53 of the Charter. The third category of cases contains the real potential for conflict: situations where the EU standard guarantees a higher level protection of fundamental rights than the national standard. In such a case, in accordance with the subsidiarity principle formulated in Article 51(1) of the Charter, EU

121 In the *Family Reunification Directive* case, the Court of Justice declared that when implementing directives, member states are bound to comply with requirements flowing from the protection of EU fundamental rights. *See* Case C-540/03, *Parliament v. Council* [ECR 2006 Page I-05769], para. 104.

122 N. Matz-Lück, 'Die Umsetzung von Richtlinien und nationaler Grundrechtsschutz', 38 *Europäische Grundrechte-Zeitschrift* 8-9, 2011, pp. 207-211; J. Kokott & Ch. Sobotta, 'Die Charta der Grundrechte der Europäischen Union nach dem Inkrafttreten des Vertrags von Lissabon', 37 *Europäische Grundrechte-Zeitschrift* 10-13, 2010, pp. 265-272.

fundamental rights protection could also be invoked. Thus when EU fundamental rights protection guarantees a higher standard, the conflict can be resolved – to the benefit of the EU fundamental rights standard – on the basis of the primacy of application of EU law.
Consequently, having regard also to the foregoing considerations formulated in this report, it can be stated that the burden of ensuring that national measures with EU law relevance are in conformity with the EU fundamental rights standard rests primarily on the Hungarian legislator. Judgments of the CJEU regarding the Charter are, to our knowledge, not yet traceable in the practice of Hungarian courts. Generally speaking, positive expectations are perceptible on the side of academics and practitioners, mostly when approaching the question from the point of view of public law, even though some doubts are also formulated from a private law standpoint.[123]
At this point, a recent scientific debate is worth mentioning. In the international and Hungarian legal literature, increased attention has been paid in recent years to the parallel existence of national and European fundamental rights, especially following the construction by the European Court of Human Rights of the *Bosphorus-presumption* regarding the relationship between the ECHR and Union law (in many aspects echoing the '*Solange-formula*'). Consequently – taking into account the entry into force of the Charter of Fundamental Right as well – the 'reverse-*Solange-presumption*' concerning the relationship of the Charter and national fundamental rights also emerged.[124] Armin von Bogdandy and his colleagues were the first to publish (in English and German, and then Hungarian scientific journals[125]) the concept which essentially aims to establish a kind of sequence of application for national courts in legal disputes requiring fundamental rights review. The main idea of the presumption is to provide national courts with assistance in cases of fundamental rights 'emergency' (*i.e.* in case of a serious and persistent breach of fundamental

123 A less positive role of the Charter is discussed in A. Harmathy, 'Az Európai Unió Alapjogi Chartája és a nemzeti jogalkalmazás', *Állam- és Jogtudomány* 3, 2009, pp. 273-293.

124 According to Armin von Bogdandy, the essence of the presumption is the following: "Real problems, theoretical considerations and jurisprudential inconsistencies call to reconsider EU fundamental rights protection against the Member States. In this vein we propose to complement the established doctrines with an innovative approach. With regard to the recently acquired status of Union citizenship it is time to lay open and expand its connection to fundamental rights. The 'substance of the rights' conferred on a Union citizen within the meaning of Ruiz Zambrano should basically be defined by the essence of fundamental rights enshrined in Art. 2 TEU and be framed in a reverse *Solange doctrine*. Outside the Charter's scope it should be presumed that the Member States comply with their fundamental rights obligations arising out of violations, Union citizens can rely on Art. 20 TFEU to seek redress before national courts and the ECJ." *See* Armin von Bogdandy *et al.,* 'Reverse Solange – Protecting the Essence of Fundamental Rights against EU Member States', 49 *Common Market Law Review* 2, 2012, p. 518. *See also* 'An EU Rescue Package for Media Freedom in the Member States', *in:* C. Zoltán, S. Balázs & S. Pál (eds.), *Viva Vox Iuris Civilis – Tanulmányok Sólyom László tiszteletére 70. születésnapja alkalmából*. Budapest, SZIT 2012.

125 For a summary and short comparison of the main elements of international legal literature on the subject in Hungarian *see* F. Fazekas, 'A bátrak igazsága? A "fordított Solange"-javaslat és kritikája', *Fundamentum* 1, 2012, pp. 111-119.

rights) in order to enable them to provide EU citizens with at least the minimal level of EU fundamental rights protection – even against the state if necessary.[126] Arguing for and against this presumption are both exciting challenges, and its application would require a self-conscious and brave approach by national courts.

21.6.4 The Position of the ECHR in the Legal System of the Union

In our view, no general human rights competence exists under the current system of primary EU law, even if the CJEU strives to require compliance with the EU fundamental rights standard more intensively than previously. Today it is not disputed any longer that the Union has to commit to the protection of fundamental rights in the course of its operation.[127] In order to establish a general human rights competence at the level of the EU on the other hand, increased substantial coherence and less ambiguity would be required – the road towards such a situation is now however open, owing to the endowment of the Charter with legally binding force and the (yet unfinished) accession of the EU to the ECHR. A realistic chance for the formation of a true general fundamental rights competence would in our view only arise if a procedural correction would also take place: in case a direct possibility to individually invoke fundamental rights would be introduced on the basis of constitutional complaints common to numerous national legal systems – this option was already raised earlier, although to no avail.[128] It offers some consolation that the new wording of Article 263 TFEU allows for a somewhat easier action for annulment by private persons – a change that could lead to an increase in fundamental-rights-based reviews of the legal acts of the Union by the CJEU.

Following the entry into force of the accession treaty, the ECHR will possess a status between the spheres of primary and secondary EU law. International treaties concluded by the EU are, according to Article 218 TFEU, subordinate to primary law, but rank higher in the hierarchy of norms than secondary sources of EU law. Thus, the special principles of Union law – direct applicability, direct effect and primacy of application – would probably apply to ECHR rights incorporated into the Union legal order in the future as well.[129] As

126 We will not attempt an analysis of the elements of the presumption within the confines of this study. Some of the logical steps involved in the *Solange-presumption* are discussed in earlier works of the author. *See* E. Szalayné Sándor, 'Az alapjogok három jogrendszer metszéspontjában', *Állam és Jogtudomány* 3, 2009, pp. 365-398.; E. Szalayné Sándor, 'Új távlatok az európai alapjogvédelemben', *Közjogi Szemle* 3, 2010, pp. 33-40.; E. Szalayné Sándor, 'Az uniós polgárság: Az EUM-Szerződés 20-25. cikkéhez fűzött kommentár', *in:* A. Osztovits (Ed.), *Az Európai Unióról és az Európai Unió működéséről szóló szerződések magyarázata*, Budapest, Complex 2011, pp. 1010-1043; E. Szalayné Sándor, 'Az Európai Unióról szóló Szerződés 7. cikke Nizza előtt és után – az Ausztriával szembeni szankciók háttere és következményei', *Európai Jog* 3, 2001, pp. 3-8.

127 As required by Arts. 2 and 6 TEU. The fourth paragraph of the preamble of the Charter even requires the strengthening of the protection of fundamental rights.

128 W. Schroeder, 'Neues zur Grundrechtskontrolle in der Europäischen Union' *Europäische Zeitschrift für Wirtschaftsrecht* 12, 2011, p. 467.

129 For a similar view *see* Weiß 2011, p. 72.

an integral part of the EU legal order, the ECHR will in all probability assume a special interim status. It can accordingly be assumed that the ECtHR will be the final judicial forum of fundamental rights review regarding secondary sources of EU law.

The competence for fundamental rights review in our opinion follows the division of competences between the member states and the EU – this division of powers has to serve, directly or indirectly, the interests and rights of individuals. If this takes place in a pluralistic system, judicial remedies also need to align with this arrangement. The highest responsibility must rest however on the actor which makes the decisions in a given situation of life – be that the legislator, the executive or a forum of judicial remedy. Evidently, the EU is a vitally important actor – its decision-making institutions can only fulfil their duties in a legitimate way if they do so while ensuring respect for fundamental rights. Recently, the Court of Justice of the European Union increasingly strives to submit EU legal acts to a more stringent fundamental rights review, especially since the entry into force of the Charter of Fundamental Rights.[130]

21.7 Concluding Remarks

In the current state of interconnected legal systems,[131] it is not easy to ascertain the role of national constitutional traditions: some national constitutional courts resent the loss of their monopoly of interpretation, while other constitutional courts – such as the Hungarian Constitutional Court – mostly treat the fundamental rights standard stemming from international obligations undertaken by the state only as a point of reference. The ECtHR is at times criticised for its self-restraint, whereas the CJEU is sometimes accused of 'imperialism'.[132] The correlation of national constitutions and EU fundamental rights protections is not a static relationship and not a one-way street either. The 'traffic regulations' are defined by the states concerned – as member states of the Union, and as members of a wider fundamental rights community (*i.e.* the ECHR signatories) at the same time. The content, the boundaries, the limits and the means of protection of fundamental rights at the international, European and national levels are quite diverse – but as neither level can guarantee effective protection on its own, their continued coexistence seems indispensable.

130 *E.g.*, the protection of natural persons regarding management of their personal data was the basis for review under Arts. 7-8 of the Charter. *See* Joined Cases C-92/09 and C-93/09, *Volker und Markus Schecke GbR and Hartmut Eifert v. Land Hessen* [ECR 2010 Page I-11063].

131 K.-H. Ladeur, 'Ein Recht der Netzwerke für die Weltgesellschaft oder Konstitutionalisierung der Völkergemeinschaft?', 49 *Archiv des Völkerrechts* 3, 2011, pp. 246-275.

132 A. Peters, 'Die Anwendbarkeit der EMRK in Zeiten komplexer Hoheitsgewalt und das Prinzip der Grundrechtstoleranz', 48 *Archiv des Völkerrechts* 1, 2010, pp. 1-57, at p. 56.