Guest Editorial

MJ

Maastricht Journal of European and Comparative Law
2025, Vol. 32(2) 103–110

DOI: 10.1177/1023263X251342875
maastrichtjournal.sagepub.com
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Fundamental Rights protection in Europe: Shedding light on a system of interrelated regimes[1]

Alessandro Petti*, Christophe Hillion, and Tarjei Bekkedal***

The protection of fundamental rights in Europe involves a plurality of interrelated legal regimes. Article 6 TEU captures this plurality in the specific context of the European Union: it establishes the primary law status of the EU Charter of Fundamental Rights (EUCFR), prescribes the Union's accession to the European Convention of Human Rights (ECHR), and affirms that the rights guaranteed by the ECHR and those resulting from the constitutional traditions of the Member States 'shall constitute general principles of the Union's law'. The relationship between EU law and ECHR law had also been articulated in *Bosphorus*, a case in which the European Court of Human Rights (ECtHR) found that fundamental rights protection in EU law can be presumed to be equivalent to that provided under the Convention.[2] The *Bosphorus* presumption was established in the ECtHR's assessment of the actions of an EU Member State in pursuance of its EU law obligations. The transfer of part of EU Member States sovereign powers to the Union was central to the ECtHR's findings.[3]

The architecture of fundamental rights protection in Europe has been rendered more complex as a result of the application of constitutive elements of the EU legal order beyond the circle of EU Member States: for example, the Single Market has been extended to several EFTA states via the European Economic Area (EEA) Agreement, and so have specific dimensions of the Area of Freedom, Security and Justice through Schengen association arrangements and the Surrender Procedure agreement. Pursuant to these agreements, the EU and close partners like Norway and

1. This Special Issue is part of Project No 325328 'Welfare Across Borders: Solidarity, Equality and Free Movement' (LEVEL), led by Tarjei Bekkedal, hosted by the University of Oslo and funded by the Research Council of Norway.
2. ECtHR *Bosphorus* v *Ireland,* Judgment of 30 June 2005, Application No. 45036/98, para. 165.
3. Ibid. paras 151–158.

*Centre for European Law and Department of Private Law, University of Oslo, Oslo, Norway
**Centre for European Law and Department of Public International Law, University of Oslo, Oslo, Norway

Corresponding author:
Alessandro Petti, Centre for European Law and Department of Private Law, University of Oslo, Oslo, Norway.
Email: alessandro.petti@jus.uio.no

Iceland apply a system of mutual recognition of administrative and judicial decisions that is predicated on their mutual confidence that the structure and functioning of their respective legal systems comply with fundamental rights. The foregoing has been acknowledged by the Court of Justice of the European Union (CJEU) in its *JR* and *Alchaster* rulings.[4] That said, while EU norms extended to non-EU countries are designed and implemented in the shadow of the EUCFR, the latter is not formally part of the web of EU agreements governing that extension. The latter prompts a cohabitation of, and possible frictions between, several fundamental rights regimes within the operation of the same EU-based legal frameworks that presuppose mutual confidence.

The need for reappraising the composite system of fundamental rights protection in Europe has become even more compelling following some key judicial pronouncements. In *Holship*,[5] the ECtHR envisaged the interaction between the Single Market's economic freedoms and fundamental rights differently from what the CJEU had done in e.g., *Viking* and *Laval*.[6] The ECtHR chose not to apply the *Bosphorus* presumption in the context of the EEA agreement,[7] in view of the alleged lack of supremacy and direct effect in the framework of that agreement, and the looser reconfiguration of sovereign rights that arrangement entails.[8] Acknowledging that 'the EFTA Court has expressed the view that the provisions of the EEA Agreement "are to be interpreted in the light of fundamental rights' in order to enhance coherency between EEA law and EU law (…)", the ECtHR also referred to the fact that 'the EEA Agreement does not include the EU Charter of Fundamental Rights, or any reference whatsoever to other legal instruments having the same effect, such as the Convention'.[9] Yet, in *I.N.*, the CJEU bolstered the protection of free movement *and* fundamental rights of Icelandic (and by extension Norwegian) nationals within the EU legal order. In its reasoning, the CJEU mobilised several sources of law including the EUCFR and the Surrender Procedure agreement, as well as the Preamble of the EEA agreement and its reference to the 'special relationship (…) based on proximity, long standing common values and European identity'. The EFTA Court has seemingly embraced the CJEU's thicker conception of that special relationship,[10] referring to fundamental rights as part of the general principles of EEA law, whose protection is deemed equivalent to that of ECHR-based rights.[11]

The 'special relationship' between the EU and EEA EFTA states (like Norway and Iceland) indeed stands at the intersection of different regimes. Studying the fundamental rights protection in this specific context has thus a significant heuristic potential for reassessing the constitutional foundations and the interactions between cohabitating enforcement mechanisms, in the broader European context. It helps establishing the extent to which equivalent standards of fundamental rights protection could be guaranteed in, and between, coexisting legal systems. Its study also sheds a valuable light on the role that EU law plays in this respect.

The *Alchaster* ruling of the CJEU confirms the potential of the 'special relationship' to establish how the EU fundamental rights regime interacts with(in) a variety of legal arrangements in the Union's geographical proximity. In the context of a request for the surrender of a person to the

4. Case C-202/24 *Alchaster*, EU:C:2024:649; Case C-488/19 *JR* EU:C:2021:206.
5. ECtHR *Holship*, Judgment of 10 June 2021, Application No. 45487/17, para. 106–108.
6. See Case C-438/05 *Viking*, EU:C:2007:772; Case C-341/05 *Laval*, EU:C:2007:809.
7. ECtHR *Holship*, para. 108.
8. ECtHR, *Konkurrenten.no*, Decision of 5 November 2019, Application no. 47341/15, para. 43.
9. Ibid.
10. Case E-15/24 *A v B*, 12 December 2024.
11. Case E-15/10 *Posten Norge* Case E-8/97 *TV 1000 Sverige AB*, EFTA Ct. Rep. 68; Case E-2/03 *Ásgeirsson*, EFTA Ct. Rep. 185; Case E-15/10 *Posten Norge v ESA,* EFTA Ct. Rep. 246; E-14/15 *Holship*, EFTA Ct. Rep. 240, Case E-15/24 *A v B*, 12 December 2024.

UK for criminal prosecution under the European Arrest Warrant and the EU-UK Trade and Cooperation Agreement (TCA), the Court of Justice was asked to navigate the coexisting systems of fundamental rights protection in Europe.[12] Comparing the legal relationship in place between the EU and the UK under the TCA to the one between the EU and Norway by virtue of the EEA, Norway's participation in the Common Asylum System, its implementation of the Schengen *acquis* and its Agreement with the EU on the Surrender Procedure, the Court found that the TCA 'does not establish, between the European Union and the United Kingdom, a relationship as special as the one [in place with Norway]. In particular, the United Kingdom is *not* part of the European area without internal borders, the construction of which is permitted, inter alia, by the principle of mutual trust.'[13] It should be noted that although asymmetrical in favour of the EU legal system, that 'special relationship' is bi-directional. Non-EU states taking part in the extended EU's legal space do play a role in ensuring the respect of fundamental rights therein. For instance, against the backdrop of a rule of law regression in Poland, the Norwegian Supreme Court expressed reservations in fulfilling its obligations of mutual recognition of judicial decisions pursuant to the Surrender Procedure agreement.[14]

Further judicial and institutional developments call for a reappraisal of the composite system of fundamental rights protection in Europe. In March 2023, a new draft agreement for the EU accession to the ECHR was finalised, following the CJEU's Opinion that sanctioned the incompatibility of the earlier draft with the essential characteristics of EU law.[15] The principle of mutual trust and the specificities of the Court of Justice's jurisdiction in relation to the Common Foreign and Security Policy (CFSP) featured prominently among the essential characteristics of EU law to be safeguarded in the accession. With respect to mutual trust, Article 6 of the new draft nebulously provides that 'Accession (…) to the Convention shall not affect the application of the principle of mutual trust within the European Union. In this context, the protection of human rights guaranteed by the Convention shall be ensured'. With respect to the CFSP specificities, the incompatibility of the previous draft accession treaty with the autonomy of EU law resulted from the potentially broader scope of the jurisdiction of the ECtHR compared to the one of the CJEU in this policy. The 2020 report on the draft accession had highlighted the evolving nature of the CJEU case law on the CFSP and the increasingly narrowly construed interpretation of the exceptions to its general jurisdiction in CFSP matters.[16] The incremental jurisprudence on the scope of the CJEU's jurisdiction has been further developed in its decision in *KS and KD*.[17] Confirming that 'the basic principles of the EU legal order', 'includ[ing], in particular, respect for the rule of law and fundamental rights, values expressed in Article 2 TEU and given concrete expression to in Article 19 TEU', also apply in the context of the CFSP, the Court of Justice narrowed the gap

12. It was asked to navigate the interrelation between EU law (with a focus on Articles 49(1), 51(1) and 52(3) EUCFR and Council Framework Decision 2002/584/JHA) and the European Convention of Human Rights system (with a focus on its Article 7).
13. *Alchaster*, para. 70 emphasis added.
14. C. Hillion, 'The EU External Action as Mandate to Uphold the Rule of Law Outside and Inside the Union' (2023) 29 *Columbia Journal of European Law* 228, pp. 269–70.
15. *Opinion 2/13*, EU:C:2014:2454.
16. Comité directeur pour les droits de l'homme - Steering Committee for Human Rights, '6th Meeting of the CDDH Ad Hoc Negotiation Group ("47+1") on the Accession of the European Union to the European Convention on Human Rights' (Council of Europe 2020) 47+1(2020)R6, paras 35–39.
17. Case C-29/22 P *KS and KD*, EU:C:2024:725, para 68.

between the ECtHR and the CJEU's respective jurisdiction in that context.[18] The overall judicial evolution has a twofold function: it putatively consolidates the EU framework of fundamental rights protection in relation to the CFSP, and it may ultimately facilitate the realisation of the EU constitutional mandate to accede to the ECHR enshrined in Article 6(2) TEU.

The set of articles of this special issue aims at unravelling the emerging legal principles and interactions underlying and potentially organising the composite system of fundamental rights protection in Europe. The interplay between elements of connection and disconnection across cohabitating legal regimes is the prism of analysis of that system. The principles of homogeneity, loyalty, and mutual trust are identified as elements fostering connection in, and coherence of its operation. The elements of disconnection pertain to the different constitutional underpinnings and legal setups of the respective regimes that compose it. They are thus more controversial in that they are likely to mobilise competing understandings of the *finalités* and constitutional logics of the interrelated regimes. Elements of disconnection include the principle of autonomy of the EU legal order, both in pursuance of the 'greater good' of integration and in its different manifestations (including the principle of mutual trust); the non-EU EEA states' aversion to sovereignty transfers; the different constitutional articulations of EU and EEA primary laws; and the distinct premises and contents of the EUCFR and ECHR.

1. Co-existence: Convention, Charter, Constitutions

A first cluster of contributions examines the place and role of the sources of different regimes of fundamental rights protection. De Witte's article addresses the role played by the ECHR system and its Court in the EU legal order. The author perceptively characterises the ECHR as a semi-binding source of fundamental rights in the Union. Bringing to the fore the complex layers of interaction among different fundamental rights regimes in the EU, De Witte argues that the entering into force of the EUCFR as the autonomous written and binding set of human rights did not constitute a disconnection of the EU legal order from the ECHR. In fact, Article 6 TEU could be construed as granting a firmer status to the ECHR within the Union. The author posits that the ECHR provisions may suggest that 'the rights of the Convention are general principles of EU law and not just, as in earlier pre-Lisbon times, *a source of inspiration for those principles*'. Yet, the analysis of the case law indicates that the CJEU 'treats the ECHR as an external source of human rights protection that does not bind the EU [as an internal instrument]', thus 'implicitly den[ying] that the ECHR is now binding on EU law, as the text of Article 6 TEU could seem to suggest'. The complexity of the interrelated regimes of fundamental rights protection in the EU results also from Article 52(3) EUCFR and the ensuing interpretation by the CJEU in a delicate balance between connection and disconnection: between the need to ensure the necessary consistency between the rights contained in the Charter and the corresponding rights guaranteed under the ECHR on the one hand, and the need to safeguard the autonomy of EU law on the other hand. De Witte enriches his analysis by discussing the role of the ECHR as a reference point in EU legislation, as a normative standard in the EU's external and enlargement policy, and as a source of law for national authorities and courts applying EU law.

Einarsson's article examines the role which the EFTA Court plays in ensuring convergence of fundamental rights protection in the EEA in light and despite of the asymmetries in the EU and

18. Editorial comments, 'From Opinion 2/13 to KS and KD: Confronting a Legacy of Constitutional Tensions' (2024) 61 *Common Market Law Review*, p. 1455.

EFTA pillars of the Area. It discusses the challenges that the EUCFR may pose to the homogeneity in EEA law. The author reflects on the relationship between the ECHR and the EUCFR, with a particular focus on the cases whereby EU Charter rights find no equivalence in the ECHR. The author discusses the extent to which other sources of law or 'building blocks' that may help the EFTA Court in ensuring homogeneity. These include the Charter of Fundamental Social Rights of Workers and the European Social Charter, and the general principles of EEA law. Einarsson highlights how these sources and building blocks enable the EFTA Court to apply the same interpretative method as the CJEU's.

In the first cluster, the constitutional asymmetries of the different legal regimes and the reluctance of the EEA EFTA States to transfer sovereignty to supranational institutions emerge as elements of disconnection. In turn, the ECHR as a source of law common to all EEA states, the EEA Agreement's preamble referring to 'longstanding common values and European identity', and the principles of homogeneity and mutual trust can be construed as elements of connection.

2. (Dis)connections: Triangulation, Autonomy, Shareability

A second cluster of contributions reflects on fundamental rights protection in Europe in consideration of the nature, components, and dynamics animating the coexisting regimes, with a focus on the interaction between primary and secondary law. Muir identifies a triangulation (in fundamental rights protection in Europe) as emerging from the interplay of national constitutions, the EU Charter and the European Convention on Human Rights. The EU's relations with Norway, Iceland and Liechtenstein are hence regarded as an useful laboratory 'to explore the interactions between norms and actors in the field of European fundamental rights law through triangulation'. She argues that the 'multilayered system of fundamental rights protection in the EU' going 'well beyond what a narrow reading of Article 6 TEU could suggest', is poised 'to have an increasing influence on the shaping of fundamental rights in Europe, and in EEA EFTA States in particular'. The author brings to the fore the 'slow, yet major, process of institutional changes in European fundamental rights law'. With a view to investigating these changes, she discusses first the growing political engagement of EU political institutions with fundamental rights. This is due not only to the greater visibility given by the Charter to fundamental rights but also to the development of the digital dimension of internal market law, the engagement of the EU in Council of Europe Conventions in those domains, and the need to balance selected EU policy priorities with fundamental rights. Then, she discusses the impact on the EEA of the increase in internal market legislation shaping or balancing fundamental rights. Subsequently, her contribution sheds light on the mechanisms and techniques characterizing the triangulation on the substantive and institutional levels. On the substantive plane, she powerfully illustrates how EU legislation can 'download' EU fundamental rights from the Charter, and how some of the EU Charter rights can be construed as instances of uploading of rights from earlier EU secondary legislation provisions. Muir also describes the complex interaction between internal and external human rights standards. On the institutional plane, the author unravels the role played by internal and external actors in the design and application of EU fundamental rights law in Europe.

From a starting point of disaggregating various components of EU free movement law (rights, values, principles, statutes), Nic Shuibhne explores the possible 'shareability' of these components in the EEA context. She effectively illustrates how free movement of persons constitutes 'a bundling of different elements, i.e., rights, values, principles and statuses'. The sources of this bundling are multifarious and have evolved significantly since the conclusion of the EEA Agreement

especially with respect to EU Treaties and Charter provisions. In that light, the author addresses the tension between the absorption of free movement law components in EU citizenship law and the extension of these rights in contexts where the notion of citizenship is absent. The problematic aggregation of different elements of free movement law is discussed with a special focus on the occurrences whereby this aggregation is used to expand and absorb rights in the overarching notion of EU citizenship. For the EEA, she asks the question of 'whether the reference to "persons" in Article 1(2) EEA carries enough legal weight to substitute, in effect, for "Union citizens"'. The author then identifies methodological and systemic questions related to the shareability of EU law, something that is, she argues, often overlooked within EU scholarship. For example, in the composite system of fundamental rights protection in Europe, the autonomy of the EU legal order may instate an element of disconnection between the EU and the EEA legal systems. Moreover, while homogeneity offers and mandates for a re-composition of differences among the systems, the absence of the EU Charter in the EEA EFTA pillar is only partly mitigated by the substantive bridge of ECHR in terms of substantive standards. Against the background of the complex and problematic aggregation of different components of free movement law in the EU, the author advocates for more responsibility by EU institutions in considering the articulation of free movement law in the EEA, in light of the differences between the legal systems.

In this second cluster, the significance of the principle of autonomy for EU law, shielding inter alia the distinctive status of EU citizenship, brings to the fore the constitutional asymmetries across regimes when a lens of shareability is applied. For the EEA specifically, however, elements of connection are found in the political and international instruments to which both the EU and EEA EFTA States are party; in the wider sense of commitment to shared standards; and in the very dynamics of interactions among the parties to the Agreement.

3. (In)coherence: Trust, Discretion, Protection

A third cluster of contributions focuses on the operationalisation and implementation of principles such as mutual trust and state liability in the judicial mosaic of the system of fundamental rights protection in Europe. Spaventa offers a novel conceptualisation of the principle of mutual trust in EU law by setting it against the background of the European system of protection of fundamental rights. Two main articulations of mutual trust are thus identified: mutual trust as a systemic principle and mutual trust as and administrative tool. The foregoing distinction allows the author to shed new light on the granular operation of the principle in different domains of EU law. As a systemic principle, 'mutual trust can be operationalised through the free movement provisions and accordingly can be limited on public interest grounds, including the protection of fundamental rights. Mutual trust is systemic insofar as it facilitates integration. In Spaventa's understanding, moreover, 'As an administrative tool, mutual trust imposes a duty to trust that other Member States respect EU law, but in cases not relating to free movement, mutual recognition requires secondary legislation to be activated, whether this relates to harmonised standards or co-ordination of legal systems.' In that light, the author first examines the operation of mutual trust and mutual recognition in the internal market where the enforcement mechanisms are more far-reaching both with respect to the systemic and administrative dimension of mutual trust. Then, she examines the operation of mutual trust in several 'legal products' in the Area of Freedom Security and Justice where mutual trust serves to enhance the effectiveness of 'coordinating mechanisms' in absence of harmonisation and stronger enforcement techniques. Through the study of the European Arrest Warrant and the Common European Asylum System, Spaventa establishes the explicatory potential

of her novel analytical framework. She discusses the different CJEU approaches in the relationship between mutual trusts and fundamental right protection in these domains by taking also into account the different margin of discretion granted to national courts and authorities. As a distinctive characteristic of EU law, mutual trust thus emerges as a possible element of disconnection between the EU legal system and its underlying constitutional values, including fundamental rights protection. The discussion on disconnection is enriched by an analysis of the ECtHR case law on the potential rebuttal of the *Bosphorous* presumption in mutual recognition mechanisms of EU law, especially in case these mechanisms are detrimental to fundamental rights. The author identifies a room, often occupied by national courts and the ECtHR, for ensuring that 'fundamental rights protection would not be sacrificed on the altar of European Integration' especially in the Area of Freedom Security and Justice where the legal system is more fragmented, the enforcement mechanisms are looser, and their mobilisation more sensitive.

Ellingsen's contribution enriches the discussion on the regimes of fundamental rights protection in Europe by focusing on the fundamental rights guarantees related to State liability for judicial breaches under the EEA Agreement. The author asks the question of whether the *Köbler* doctrine, established by the CJEU, applies to the EEA system. Ellingsen discusses the asymmetries and elements of disconnection between the EU and EFTA pillars of the EEA with a particular focus on the mechanisms of judicial dialogue. She sets these asymmetries against the background of the principle of homogeneity as an overarching element of connection. In that light, it is argued that the EEA as a shared legal order mandates national courts 'to establish a legal avenue through which effective implementation of EEA law and the right to effective judicial protection of individuals' EEA rights are ensured'. The role of national courts and their duties to enforce EEA law are thus seen as an element of connection. Yet, as the author recognises, especially in the EFTA pillar, the *Köbler* doctrine could entail that the same judges may in effect end up judging themselves. This calls for keeping a close eye on the development of the various remedies of State liability within the EEA that the author examines.

In this third cluster, again the principle of autonomy of EU law and the asymmetries between primary and secondary law seem to suggest a disconnection across regimes. In turn, the principles of homogeneity and mutual trust are thought to be conducive to fostering connections and coherence. Yet, when intended as a particular expression of the principle of autonomy of EU law, mutual trust may become an element of disconnection. Similarly, the *Köbler* doctrine of state liability, even in case it will be upheld in the EFTA pillar, can be construed as an element of disconnection highlighting the institutional differences between the EU and the EFTA pillars of the EEA.

4. The Charter? Inspiration, Application, Homogeneity

In the concluding contribution, Bekkedal considers the asymmetries and potential disconnections of the EU and EFTA pillars of the EEA in fundamental rights protection. The article posits that common values are 'the prerequisite for the principle of mutual trust that underpins the special relationship between the EU Member States and the EFTA States'. The paper argues that the restraint of the EFTA Court towards the EUCFR is controversial, and it is predicated more on a judicial approach than on the structures of the EEA Agreement. In the author's view, 'in the absence of the Charter, the creation and maintenance of a "homogeneous European Economic Area" without borders, as prescribed by Article 1 EEA, is not possible to achieve'. To substantiate this claim, the author puts forward two entwined arguments. First, the non- application of the Charter in the EFTA pillar would undermine effective judicial protection. The analysis of the CJEU case

law leads the author to maintain that 'unless the EFTA Court allows EU citizens to *rely* on the Charter within the EFTA pillar of the EEA Agreement, the principle of effective judicial protection will not be fully observed'. Secondly, the non-application of the Charter leads to the lack of legal certainty, especially in the case of Charter rights that find no immediate correspondence in the ECHR. The fragmented approach of the EFTA Court which mobilises the CJEU's interpretative and balancing tools without applying the Charter is not tenable in the ECHR system. The absence of the *Bosphorus* presumption ensuing from this approach requires the ECHR system and techniques to be applied in full. The *Holship* case is paradigmatic in this regard and brings to the fore the risks of disconnection and fragmentation in the protection of fundamental rights in Europe. Finally, the author reflects on how the structure and objectives of the EEA Agreement provide for the 'shadow effect of the Charter' in the EFTA pillar, advocating for its full application.

ORCID iDs

Alessandro Petti https://orcid.org/0000-0001-9866-5729
Christophe Hillion https://orcid.org/0009-0007-0846-620X
Tarjei Bekkedal https://orcid.org/0009-0000-1521-1925