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Editorial

EU and ECHR: Conflict or Harmony?

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With the upcoming accession of the European Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) a new and possibly final stage in the remarkable development of fundamental rights in EU law has begun. According to the joint communication from Presidents Costa (the European Court of Human Rights, ECtHR) and Skouris (the Court of Justice of the European Union, ECJ) '[t]he accession of the EU to the Convention constitutes a major step in the development of the protection of fundamental rights in Europe. The Member States of the EU have enshrined the principle of that accession in the Treaty of Lisbon.'

Although fundamental rights had already been discovered and recognized by the ECJ as general principles of Community law as long ago as the 1960s with cases like *Stauder* and *International Handelsgesellschaft*,[1] it is the Lisbon Treaty that brings the expansion of the protection of fundamental rights at the level of the European Union to a climax. First, human rights are now more deeply enshrined in the Treaty as basic and foundational values of the EU. Second, Article 6(2) TEU provides for the accession of the EU to the ECHR; and third, the Charter of Fundamental Rights and Freedoms attached to the Lisbon Treaty has been given binding status, according to Article 6(3) TEU.

This new constitutional setting for fundamental rights protection in Europe raises important questions on the relationship between the EU legal order and its system of fundamental rights protection, in particular the EU Charter of Fundamental Rights, and the legal order of the ECHR; and on the relationship between the two courts, and how the accession of the EU to the ECHR is likely to affect the rather complex relationship between these two institutions. This special section within the January 2013 issue of the *Utrecht Law Review* seeks to address these intriguing questions in the areas of social security, sex discrimination, migration law, EU free movement law and the rights to strike and collective action. A comparison between these different legal areas reveals that, although the questions that are dealt with by the ECtHR and the ECJ are often very similar, the approach of the two courts may still differ to a considerable extent. This can be explained, at least in part, by the economic background of the EU compared to the human rights background of the ECHR. But the Court of Justice's mandate is clearly broader in that the European Union has meanwhile transcended the stage of market integration. As the contribution by *Burri* shows, in the field of sex discrimination, the ECJ has been able to develop a more elaborated concept of discrimination, thereby helped by the EU legislature, which has adopted specific

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1 Case 29/69, *Erich Stauder v City of Ulm – Socialamt*, [1969] ECR 419; Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratstelle für Getreide und Futtermittel*, [1970] ECR 1125.

directives, which, in combination with the Court's case law, offer EU citizens in certain cases better protection than under the Convention.

By contrast, *Veldman* argues in her contribution that the fundamental rights to strike and to take collective action have been more enhanced by the ECtHR than by the ECJ, the latter also being engaged in protecting the integrity of the internal market and the four fundamental economic freedoms, which still lie at the heart of the EU legal system and which may conflict with fundamental social rights.

In a similar vein, the different approaches of the ECJ and ECtHR in respect of the principle of non-discrimination in the treatment of third country nationals in social security cases, which are discussed by *Pennings*, can be explained by the typically distinct characteristics of the two legal orders.

Whether these diverging interpretations may eventually lead to clashes between the ECJ and the ECtHR once the EU has become a member of the ECHR remains to be seen. There is in fact a growing tendency to take note of each other's judgments, for instance in the field of migration law as *Brouwer* illustrates in her contribution. In the field of the internal market, however, the case law of the ECJ shows that where fundamental rights come into conflict with the economic Treaty freedoms, the economic freedoms may sometimes prevail over fundamental rights, which leads *De Boer* to question the *fundamentality* of the EU Treaty freedoms. Based on Rawls' political philosophy, he comes to the conclusion that only where the Treaty freedoms protect equal opportunity, should they be seen as fundamental rights. But in some cases the ECJ manages to employ a balancing exercise without subordinating fundamental rights to economic freedoms, as *De Vries* makes clear in his contribution. In other words, fundamental rights can be prioritized, even within the context of the EU Single Market.

Consequently, it appears that the two distinct legal orders have already become increasingly intertwined and that the boundaries between fundamental rights protected in national constitutions, the EU Charter and the ECHR are increasingly blurred. But questions remain as to the interpretation of fundamental rights under the ECHR and the EU Charter, the complex and complicated relationship between the ECtHR and the ECJ – to what extent can clashes between these two courts be avoided? – and ultimately the impact of the ECHR on EU and national law. Meanwhile the negotiations on the forthcoming accession of the EU to the ECHR are 'in full swing'. The many uncertainties connected to the relationship between the two legal orders are dealt with in several contributions to this journal. They stimulate the debate and clarify the issues that merit further research. One thing is clear: Fundamental rights in Europe need to be adjudicated in a 'multi-layered' or pluralist fashion and can no longer – also for the EU itself – be considered as a mere afterthought.