Fundamental rights 4

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Introduction

The protection of human rights is a central task of many modern constitutions.[1] This protective task is principally transferred onto the judiciary and involves the judicial review of governmental action.[2] The protection of human rights may be limited to judicial review of the executive.[3] But in its expansive form, it extends to the review of parliamentary legislation. And where this is the case, human rights will set "substantive" limits within which democratic government must take place.[4]

[1] On human rights as constitutional rights, see A. Sajó, *Limiting Government* (Central European University Press, 1999), Chapter 8.
[2] See M. Cappelletti, *Judicial Review in the Contemporary World* (Bobbs-Merrill, 1971).
[3] For the classic doctrine of parliamentary sovereignty in the United Kingdom, see A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Fund, 1982).
[4] On the idea of human rights as "outside" majoritarian (democratic) politics, see Sajó, *Limiting Government* (supra n. 1), Chapter 2, esp. 57 et seq.

The European Union follows this second constitutional tradition.[5] It considers itself to be "founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights".[6] Human rights are thus given a "foundational" place in the Union. They are – literally – "fundamental" rights, which constitutionally limit the exercise of all Union competences.

What are the sources of human rights in the Union legal order? While there was no "Bill of Rights" in the original Treaties, three sources for European fundamental rights were subsequently developed. The European Court first began distilling general principles protecting fundamental rights from the constitutional traditions of the Member States. This *unwritten* bill of rights was inspired and informed by a second bill of rights: the European Convention on Human Rights. This *external* bill of rights was, decades later, matched by a *written* bill of rights specifically for the European Union: the Charter of Fundamental Rights. These three sources of European human rights are now expressly referred to – in reverse order –in Article 6 of the Treaty on European Union:

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties . . .
2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

What is the nature and effect of each source of fundamental rights? And to what extent will they limit the Union? This Chapter investigates the three bills of rights of the Union. Section 1 starts with the discovery of an "unwritten" bill of rights in the form of general principles of European

[5] On this point, see *Parti Écologiste* "*Les Verts*" v. *European Parliament*, Case 294/83 [1986] ECR 1339, para. 23: "a [Union] based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty". For an extensive discussion of judicial review in the Union legal order, see Chapter 8 – Section 3.

[6] Article 2 (1) TEU.

law. Section 2 subsequently discusses possible structural limits to European human rights in the form of international obligations flowing from the United Nations Charter. Section 3 analyses the Union's "written" bill of rights in the form of its Charter of Fundamental Rights. Finally, Section 4 explores the European Convention on Human Rights as an external bill of rights for the European Union.

1. The birth of European fundamental rights

Originally, the European Treaties contained no express reference to human rights.[7] Nor did the birth of European fundamental rights happen overnight. The Court had been invited – as long ago as 1958 – to review the constitutionality of a European act in light of fundamental rights. In *Stork*,[8] the applicant challenged a European decision on the ground that the Commission had infringed *German* fundamental rights. In the absence of a European bill of rights, this claim drew on the so-called "mortgage theory". According to this theory, the powers conferred on the European Union were tied to a human rights "mortgage". *National* fundamental rights would bind the *European* Union, since the Member States could not have created an organization with more powers than themselves.[9] This argument was – correctly[10] – rejected by the Court. The task of the European institutions was to apply European laws "without regard for their validity under national law".[11] National fundamental rights could be *no direct* source of European human rights.

[7] For speculations on the historical reasons for this absence, see P. Pescatore, "The Context and Significance of Fundamental Rights in the Law of the European Communities", 2 (1981) *Human Rights Journal*, 295; as well as M. A. Dauses, "The Protection of Fundamental Rights in the Community Legal Order", 10 (1985), *European Law Review*, 399. For a new look at the historical material, see also G. de Búrca "The Evolution of EU Human Rights Law" in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford University Press, 2011), 465.

[8] *Stork & Cie* v. *High Authority of the European Coal and Steel Community*, Case 1/58, [1958] ECR (English Special Edition) 17.

[9] In Latin the legal proverb is clear: "Nemo dat quod non habet".

[10] For a criticism of the "mortgage theory", see H. G. Schermers, "The European Communities Bound by Fundamental Rights", 27 (1980) *Common Market Law Review*, 249 at 251; as well as R. Schütze, "EC Law and International Agreements of the Member States – An Ambivalent Relationship?", 9 (2006–07) *Cambridge Yearbook of European Legal Studies*, 387 at 399–402.

[11] *Stork* v. *High Authority*, Case 1/58 (supra n. 8), 26: "Under Article 8 of the [ECSC] Treaty the [Commission] is only required to apply Community law. It is not competent to apply the national law of the Member States. Similarly, under Article 31 the Court is only required to ensure that in the interpretation and application of the Treaty, and of rules laid down for implementation thereof, the law is observed. It is not normally required to rule on provisions

This position of the European Union towards national fundamental rights never changed. However, the Court's view evolved with regard to the existence of implied *European* fundamental rights. Having originally found that European law did "not contain any general principle, *express or otherwise*, guaranteeing the maintenance of vested rights",[12] the Court subsequently discovered "fundamental human rights enshrined in the general principles of [European] law".[13]

This new position was spelled out in *Internationale Handelsgesellschaft*.[14] The Court here – again – rejected the applicability of national fundamental rights to European law. But the judgment now confirmed the existence of an "analogous guarantee inherent in [European] law".[15] Accordingly, "respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice".[16] Whence did the Court derive these fundamental rights? The famous answer was that the Union's (unwritten) bill of rights would be "*inspired* by the constitutional traditions *common* to the Member States".[17] While thus not a direct source, national constitutional rights constituted an *indirect* source for the Union's fundamental rights.

What was the nature of this indirect relationship between national rights and European rights? How would the former influence the latter? A constitutional clarification was offered in *Nold*.[18] Drawing on its previous jurisprudence, the Court held:

> [F]undamental rights form an integral part of the general principles of law, the observance of which it ensures. In safeguarding these rights, the Court is bound to draw *inspiration* from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of those States. Similarly, international treaties for the protection of human rights on which the Member States have

of national law. Consequently, the [Commission] is not empowered to examine a ground of complaint which maintains that, when it adopted its decision, it infringed principles of German constitutional law (in particular Articles 2 and 12 of the Basic Law)." And see also *Geitling Ruhrkohlen-Verkaufsgesellschaft mbH, Mausegatt Ruhrkohlen-Verkaufsgesellschaft mbH and I. Nold KG* v. *High Authority of the European Coal and Steel Community*, Joined Cases 36, 37, 38/59 and 40/59, [1959] ECR (English Special Edition) 423.

[12] *Ibid*., 439 (emphasis added).

[13] *Stauder* v. *City of Ulm*, Case 29/69, [1969] ECR 419, para. 7.

[14] *Internationale Handelsgesellschaft mbH* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 11/70, [1979] ECR 1125.

[15] *Ibid*., para. 4. [16] *Ibid*. [17] *Ibid*. (emphasis added).

[18] *Nold* v. *Commission*, Case 4/73, [1974] ECR 491.

collaborated or of which they are signatories, can supply *guidelines* which should be followed within the framework of [European] law.[19]

In searching for fundamental rights inside the general principles of European law, the Court would thus draw "inspiration" from the common constitutional traditions of the Member States. One – ingenious – way of identifying a common "agreement" between the various national constitutional traditions was to use international *agreements* of the Member States. And one such international agreement was the European Convention on Human Rights. Having been ratified by all Member States and dealing specially with human rights,[20] the Convention would soon assume a "particular significance" in identifying fundamental rights for the European Union.[21] And yet none of this conclusively characterized the legal relationship between European human rights, national human rights and the European Convention on Human Rights.

Let us therefore look at the question of the Union human rights standard first, before analysing the constitutional doctrines on limits to European human rights.

(a) The European standard – an "autonomous" standard

Human rights express, together with the institutional structures of a polity, the fundamental values of a society. Each society may wish to protect distinct values and give them a distinct level of protection.[22] Not all

[19] *Ibid*., para. 13 (emphasis added).

[20] When the EC Treaty entered into force on 1 January 1958, five of its Member States were already parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950. Ever since France joined the Convention system in 1974, all EC Member States have also been members of the European Convention legal order. For an early reference to the Convention in the jurisprudence of the Court, see *Rutili* v. *Ministre de l'intérieur*, Case 36/75, [1975] ECR 1219, para. 32.

[21] See *Höchst* v. *Commission*, Joined Cases 46/87 and 227/88, [1989] ECR 2859, para. 13: "The Court has consistently held that fundamental rights are an integral part of the general principles of law the observance of which the Court ensures, in accordance with constitutional traditions common to the Member States, and the international treaties on which the Member States have collaborated or of which they are signatories. The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter referred to as 'the European Convention on Human Rights') is of particular significance in that regard."

[22] "Constitutions are not mere copies of a universalist ideal, they also reflect the idiosyncratic choices and preferences of the constituents and are the highest legal expression of the country's value system." See B. de Witte, "Community Law and National Constitutional Values", 2 (1991/2) *Legal Issues of Economic Integration*, 1 at 7.

societies may thus choose to protect a constitutional "right to work",[23] while most liberal societies will protect "liberty"; yet, the level at which liberty is protected might vary.[24]

Which fundamental rights exist in the European Union, and what is their level of protection? From the very beginning, the Court of Justice was not completely free to invent an unwritten bill of rights. Instead, and in the words of the famous *Nold* passage, the Court was "*bound to* draw inspiration from constitutional traditions *common* to the Member States".[25] But how binding would that inspiration be? Could the Court discover human rights that not all Member States recognize as a national human right? And would the Court consider itself under the obligation to use a particular standard for a human right, where a right's "scope and the criteria for applying it vary"?[26]

The relationship between the European and the various national standards is not an easy one. Would the obligation to draw inspiration from the constitutional traditions *common* to the States imply a common *minimum* standard? Serious practical problems follow from this view. For if the European Union consistently adopted the lowest common denominator to assess the legality of its acts, it would run the risk of undermining its legitimacy. This would inevitably lead to charges that the European Court refuses to take human rights seriously. Should the Union thus favour the *maximum* standard among the Member States,[27] as "the most liberal interpretation must prevail"?[28] This time, there are serious theoretical problems with this view. For the maximalist approach assumes that courts always balance private rights against public interests. But this is not necessarily the case;[29] and, in

[23] Article 4 of the Italian Constitution states: "The Republic recognises the right of all citizens to work and promotes those conditions which render this right effective."

[24] To illustrate this point with a famous joke: "In Germany everything is forbidden, unless something is specifically allowed, whereas in Britain everything which is not specifically forbidden, is allowed." (The joke goes on to claim that: "In France everything is allowed, even if it is forbidden; and in Italy everything is allowed, especially when it is forbidden.")

[25] *Nold* (supra n. 18), para. 13 (emphasis added).

[26] *AM & S Europe Limited* v. *Commission*, Case 155/79, [1982] ECR 1575, para. 19.

[27] In favour of a maximalist approach, see L. Besselink, "Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union", 35 (1998) *Common Market Law Review*, 629.

[28] This "Dworkinian" language comes from Stauder (supra n. 13), para. 4.

[29] The Court of Justice was faced with such a right-right conflict in *Society for the Protection of Unborn Children Ireland Ltd* v. *Stephen Grogan and others*, Case C-159/90, [1991] ECR I-4685, but (in)famously refused to decide the case for lack of jurisdiction.

any event, the maximum standard is subject to a communitarian critique.[30] Worse: *both* the minimalist and the maximalist approach suffer from a fatal flaw: they subject the Union legal order "to the constitutional dictate of individual Member States",[31] and the Court has consequently rejected both approaches.[32]

What about the European Convention on Human Rights as a Union standard? The Convention has indeed developed into a standard that is (partly) independent from what the Court sees as the constitutional traditions of the Member States.[33] But what is the status of the Convention in the Union legal order? The relationship between the Union and the European Convention has remained ambivalent. The Court of Justice has not applied the "succession theory" to the ECHR – and that for good reasons.[34] And in implicitly rejecting the "succession theory", the European Court has never considered itself materially bound by the interpretation given to the Convention by the European Court of Human Rights. This interpretative freedom has created the possibility of a distinct *Union* standard.[35]

Have subsequent Treaty amendments transformed the indirect relationship between Union fundamental rights and the ECHR into a direct relationship? The argument had been made following the Maastricht Treaty. The (old) Article 6(2) EU expressly called on the Union to respect fundamental

[30] J. Weiler, "Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights" in N. Neuwahl and A. Rosas (eds.), *The European Union and Human Rights* (Brill, 1995), 51 at 61: "If the ECJ were to adopt a maximalist approach this would simply mean that for the [Union] in each and every area the balance would be most restrictive on the public and general interest. A maximalist approach to human rights would result in a minimalist approach to [Union] government."

[31] *Ibid*., 59.

[32] For the early (implicit) rejection of the minimalist approach, see *Hauer* v. *Land Rheinland-Pfalz*, Case 44/79, [1979] ECR 3727, para. 32 – suggesting that a fundamental right only needs to be protected in "*several* Member States" (emphasis added).

[33] For example: in *Hauer* (supra n. 32), the Court began by looking at the ECHR (paras. 17–19) and only after a finding that the Convention would not generate a sufficiently precise standard would the Court turn to the "constitutional rules and practices of the nine Member States" (paras. 20–1).

[34] On the succession theory, see Chapter 2 – Section 4(d) above.

[35] Yet it equally entailed the danger of diverging interpretations of the European Convention in Strasbourg and Luxembourg; see in particular: *Höchst AG* v. *Commission* (supra n. 21). For an excellent analysis see: R. Lawson, "Confusion and Conflict? Diverging Interpretations of the Europe Convention on Human Rights in Strasbourg and Luxembourg" in R. Lawson and M. de Blois (eds.), *The Dynamics of the Protection of the Rights in Europe* (Martinus Nijhoff, 1994), vol. III, 219 and esp. 234–50.

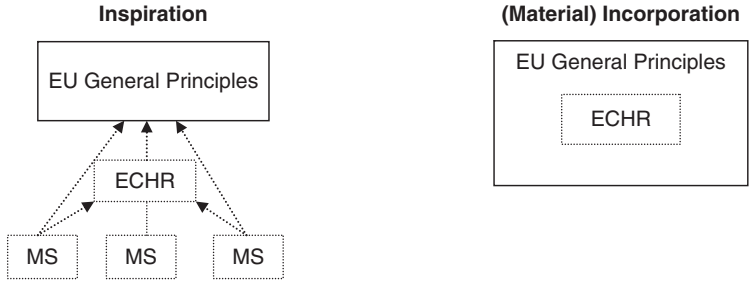

Figure 4.1 Inspiration theory versus incorporation theory

rights "as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms". Some commentators consequently began to argue that "[t]he ECHR is now *formally* integrated into EC law".[36] More moderate voices limited the binding effect to its material de facto dimension.[37] However, neither view was accepted by the Court.[38] Yet the Lisbon amendments might have changed this overnight. Today, there are strong textual reasons for claiming that the European Convention is *materially* binding on the Union. For according to the (new) Article 6(3) TEU, fundamental rights as guaranteed by the Convention "shall constitute general principles of the Union's law". Will this formulation not mean that all Convention rights *are* general principles of Union law? If so, the Convention standard would henceforth provide a direct standard for the Union. But if this route were chosen, the Convention standard would – presumably – only provide a *minimum* standard for the Union's general principles.

In conclusion, the Union standard for the protection of fundamental rights is an *autonomous* standard. While drawing inspiration from the constitutional traditions common to the Member States and the European Convention on Human Rights, the Court of Justice has – so far – not

[36] L. B. Krogsgaard, "Fundamental Rights in the European Community after Maastricht", 19 (1993) *Legal Issues of European Economic Integration*, 99 at 108 (emphasis added).

[37] F. G. Jacobs, "European Community Law and the European Convention on Human Rights" in D. Curtin and T. Heukels (eds.), *Institutional Dynamics of European Integration* (Martinus Nijhoff, 1994), vol. II, 561 at 563 (emphasis added): "As a result of the development of the case-law, now confirmed by the Single European Act and the Treaty on European Union, the [Union] can be said to be subject *in effect* to, if not bound formally by, the European Convention on Human Rights."

[38] See *Schmidberger, Internationale Transporte und Planzüge* v. *Austria*, Case C–112/00, [2003] ECR I–5659.

considered itself directly bound by a particular national or international standard. The Court has thus been free to distil and protect what it sees as the shared values among the majority of people(s) within the Union and has thereby assisted – dialectically – in the establishment of a shared identity for the people(s) of Europe.[39]

(b) Limitations, and "limitations on limitations"

Within the European philosophical tradition, certain rights are absolute rights. They cannot – under any circumstances – be legitimately limited.[40] However, with the exception of the most fundamental of fundamental rights, human rights are *relative* rights that may be limited in accordance with the public interest. Private property may thus be taxed and individual freedom be restricted – *if* such actions are justified by the common good.

Nonetheless, liberal societies would cease to be liberal if they permitted unlimited limitations to human rights in pursuit of the public interest. Many legal orders consequently recognize limitations on public interest limitations. These "limitations on limitations" to fundamental rights can be relative or absolute in nature. According to the principle of proportionality, each restriction of a fundamental right must be "proportionate" in relation to the public interest pursued.[41] The principle of proportionality is thus a relative principle. It balances interests: the greater the public interest protected, the greater the right restrictions permitted. And in order to limit this relativist logic, a second principle may come into play. According to the "essential core" doctrine,[42] any limitation of human rights – even proportionate ones – must never undermine the "very substance" of a

[39] T. Tridimas, "Judicial Federalism and the European Court of Justice", in J. Fedtke and B. S. Markesinis (eds.), *Patterns of Federalism and Regionalism: Lessons for the UK* (Hart, 2006), 149 at 150 – referring to the contribution of the judicial process "to the emergence of a European *demos*".

[40] The European Court of Justice followed this tradition and recognized the existence of absolute rights in *Schmidberger* (supra n. 38, para. 80): "the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction".

[41] *Hauer*, Case 44/79 (supra n. 32), para. 23. On the proportionality principle in the Union legal order, see Chapter 8 – Section 3 (b/ii) below.

[42] For the German constitutional order, see Article 19 (2) German Constitution: "The essence of a basic right must never be violated."

fundamental right. This sets an absolute limit to all governmental power by identifying an "untouchable" core.

Has the European legal order recognized limits to human rights? From the very beginning, the Court clarified that human rights are "far from constituting unfettered prerogatives",[43] and that they may thus be subject "to limitations laid down in accordance with the public interest".[44] Yet the Court equally recognized "limitations on limitations". Indeed, the principle of proportionality is almost omnipresent in the jurisprudence of the Court.[45]

By contrast, the existence of an "essential core" doctrine is still unclear. True, the Court has used formulations that come – very – close to the doctrine,[46] but its relationship to the proportionality principle has remained ambivalent.[47] The Court may however have recently confirmed the existence of the doctrine by recognizing an "untouchable" core of European citizenship rights in *Zambrano*.[48] Two Colombian parents had challenged the rejection of their Belgian residency permits on the ground that their children had been born in Belgium and thereby assumed Belgian and – thus – European citizenship.[49] The Court held that even if the Belgian measures were proportionate as such, they would "have the effect of

[43] *Nold* v. *Commission*, Case 4/73 (supra n. 18), para. 14 (emphasis added). [44] *Ibid*.

[45] On the proportionality principle, see T. Tridimas, *The General Principles of EU Law* (Oxford University Press, 2007), Chapters 3–5.

[46] The European Courts appear to accept the doctrine implicitly; see e.g., *Nold* (supra n. 18, para. 14): "Within the [Union] legal order it likewise seems legitimate that these rights should, of necessity, be subject to certain limits justified by the overall objectives pursued by the [Union], on condition that the substance of these rights is left untouched"; as well as *Wachauf* v. *Bundesamt für Ernährung und Forstwirtschaft*, Case 5/88, [1989] ECR 2609, para. 18: "[R]estrictions may be imposed on the exercise of those rights, in particular in the context of a common organization of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the [Union] and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights."

[47] This point is made by P. Craig, *The Lisbon Treaty: Law, Politics, and Treaty Reform* (Oxford University Press, 2010), 224, who points out that the Court often merges the doctrine of proportionality and the "essential core" doctrine.

[48] *Zambrano* v *Office national de l'emploi*, Case C-34/09 (nyr). Admittedly, there are many questions that this – excessively – short case raises (see "Editorial: Seven Questions for Seven Paragraphs", 36 (2011) *European Law Review* 161). For a first analysis of this case, see K. Hailbronner and D. Thym, "Case Comment", 48 (2011) *Common Market Law Review*, 1253.

[49] According to Article 20 (1) TFEU: "Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship."

depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union".[50]

2. United Nations law: external limits to European human rights?

The European legal order is a constitutional order based on the rule of law.[51] This implies that an individual, where legitimately concerned,[52] must be able to challenge the legality of a European act on the basis that his or her human rights have been violated. Should there be exceptions to this constitutional rule? This question is controversially debated in comparative constitutionalism.[53] And it has lately received much attention in a special form: will European fundamental rights be limited by international obligations flowing from the United Nations Charter?

The classic answer to this question was offered by *Bosphorus*.[54] The case dealt with a European regulation implementing the United Nations embargo against the Federal Republic of Yugoslavia.[55] Protesting that its fundamental right to property was violated, the plaintiff challenged the European legislation. And the Court had no qualms in judicially reviewing the European legislation – even if a lower review standard was applied.[56] The constitutional message behind the classic approach was clear: where the Member States decided to fulfil their international obligations

[50] *Zambrano* (supra n. 48), para. 42; and see also para. 44: "In those circumstances, those citizens of the Union would, as a result, be unable to exercise the substance of the rights conferred on them by virtue of their status as citizens of the Union."

[51] See *Parti Écologiste*, Case 294/83 (supra n. 5).

[52] On the judicial standing of private parties in the Union legal order, see Chapter 8 – Section 3 (c).

[53] For discussion of the idea of an "emergency constitution" in a comparative constitutional perspective, see C. L. Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Harcourt, Brace & World, 1963).

[54] *Bosphorus Hava Yollari Turizm ve Ticaret AS* v. *Minister for Transport, Energy and Communications and others*, Case C-84/95, [1996] ECR I-3953.

[55] Council Regulation (EEC) No. 990/93 of 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro) (OJ 1993 L102, 14) was based on UN Security Council Resolution 820 (1993).

[56] For a critique of the standard of review, see I. Canor, "'Can Two Walk Together, Except They Be Agreed?' The Relationship between International Law and European Law : The Incorporation of United Nations Sanctions against Yugoslavia into European Community Law through the Perspective of the European Court of Justice", 35 (1998) *Common Market Law Review*, 137 at 162.

under the United Nations *qua* European law, they would have to comply with the constitutional principles of the Union legal order, and in particular: European human rights.

This classic approach was challenged by the General Court in *Kadi*.[57] The applicant was a suspected Taliban terrorist, whose financial assets had been frozen as a result of European legislation that reproduced United Nations Security Council Resolutions.[58] Kadi claimed that his fundamental rights of due process and property had been violated. The Union organs intervened in the proceedings and argued – to the surprise of many – that "the Charter of the United Nations prevail[s] over every other obligation of international, [European] or domestic law" with the effect that European human rights should be inoperative.[59] To the even greater surprise – if not shock – of European constitutional scholars,[60] the General Court accepted this argument. How did the Court come to this conclusion? It had recourse to a version of the "succession doctrine",[61] according to which the Union may be bound by the international obligations of its Member States.[62] While this conclusion was in itself highly controversial, the dangerous part of the judgment related to the consequences of that conclusion. For the General Court recognized "structural limits, imposed by general international law" on the judicial review powers of the European Court.[63] In the words of the Court:

> Any review of the internal lawfulness of the contested regulation, especially having regard to the provisions or general principles of [European] law relating to the protection of fundamental rights, would therefore imply that the Court is to consider, indirectly, the lawfulness of those [United Nations] resolutions. In that hypothetical

[57] *Kadi* v. *Council and Commission*, Case T-315/01, [2005] ECR II-3649.

[58] The challenge principally concerned Council Regulation (EC) 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaeda network and the Taliban, and repealing Regulation 467/2001, [2002] OJ L139/9. The Regulation aimed to implement UN Security Council Resolution 1390 (2002) laying down the measures to be directed against Osama bin Laden, members of the Al-Qaeda network and the Taliban and other associated individuals, groups, undertakings, and entities.

[59] *Kadi*, Case T-315/01 (supra n. 57), paras. 156 and 177.

[60] P. Eeckhout, *Does Europe's Constitution Stop at the Water's Edge? Law and Policy in the EU's External Relations* (Europa Law Publishing, 2005); as well as R. Schütze, "On 'Middle Ground': The European Community and Public International Law", *EUI Working Paper* 2007/13.

[61] *Kadi*, Case T-315/01 (supra n. 57), paras. 193 et seq.

[62] On the doctrine, see Chapter 2 – Section 4(d) above.

[63] *Kadi*, Case T-315/01 (supra n. 57), para. 212.