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Conclusion

THE GENERAL PRINCIPLES OF LAW: WHO NEEDS THEM?

BY

Takis TRIDIMAS*

Since its establishment, the European Court of Justice ("ECJ") has used general principles of law to cover the lacunae of written law, as aid to interpretation, and as direct sources of rights and obligations. The general principles have been extrapolated from the constitutional traditions of the Member States through a creative process and developed as one of the main tools through which the ECJ has contributed to the constitutionalisation of the founding Treaties. They are often seen as a prime example of judicial activism. What is the role of general principles in contemporary European Union ("EU") law? Is there any space for them in the light of the growth of EU legislation and, especially, in the light of the Charter? Far from declining in importance, they continue to be an integral part of judicial methodology. This concluding section seeks to discuss the evolving role of general principles, their relationship to the Charter and EU legislation, and selectively some features of the case law.

EU constitutional doctrine and the general principles of law

According to the case law, the general principles derive from the Treaties. They have constitutional status and form an integral part of constitutional doctrine, namely, the fundamental rules which define the EU's system of government. General principles fulfill a threefold function. First, they operate as canons of interpretation. According to a well-established rule of interpretation which derives from the principle of hierarchy of norms, EU measures must be interpreted, as far as possible, in a way that renders them compatible with the Treaties and the general principles of law. (1) Giving

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(1) See e.g., Case 218/82, *Commission v Council* [1983] ECR 4063, para. 15; Joined Cases C-201 and C-202/85, *Klensch and others v Secrétaire d'État à l'Agriculture*, EU:C:1986:439, para. 21; Case C-314/89, *Rauh* [1991] ECR I-1647, para. 17.

preference to a construction that favours compatibility with constitutional norms is the "plain duty" of the courts. (2) The same rule applies in relation to national measures which fall within the scope of EU law. A striking example in relation to EU measures is provided by *Sturgeon* (3) where the principle of equal treatment led the Court to follow a particularly wide interpretation of Regulation No. 261/2004 on the rights of air transport passengers. (4)

Secondly, the general principles of law serve as self-standing grounds of review. Measures which infringe them are liable to be annulled by the Court. Similarly, national courts are under a duty not to apply national measures which violate the general principles of law insofar as they fall within the scope of application of EU law. Finally, general principles serve as normative standards the violation of which may lead to a right to claim compensation. In short, the general principles of law exemplify the normative force of Union values, acquiring the character of positive law, their influence extending far beyond their function as rules of interpretation. Their use as independent sources of law is illustrated prominently, but by no means exclusively, by the case law on the right to judicial protection, (5) proportionality, (6) non-discrimination, (7) and effectiveness. (8)

(2) See Justice Holmes in *Blodgett v Holden*, 275 U.S.142, 148 (1927).

(3) Joined Cases C-402/07 and C-432/07, *Sturgeon v Condor Flugdienst GmbH*, judgment of 19 November 2009.

(4) Regulation No. 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights (*OJ* (2004) L 46/1). The Court interpreted the regulation as entitling passengers to compensation not only where a flight is cancelled but also where a flight is delayed despite the absence of an express right to that effect.

(5) See e.g., Case 294/83, *Partie Ecologiste "Les Verts" v European Parliament* [1986] ECR 1339; Case 222/84, *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651; Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351.

(6) See e.g., Case C-144/04, *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981; Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd v Minister for Communications*, judgment of 8 April 2014.

(7) See e.g., Case C-13/91, *P v S and Cornwall County Council* [1996] ECR I-2143; Case C-144/04, *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981; Case C-303/06, *Coleman v Attridge Law and Steve Law*, EU:C:2008:415; Case C-236/09, *Test-Achats v Conseil des ministers*, judgment of 1 March 2011.

(8) See e.g., Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629; *Coleman*, *op. cit.*; Joined Cases C-6 and C-9/90, *Francovich and others* [1991] ECR I-5357.

Despite the importance of general principles, their identification remains somewhat elusive. The ECJ has not established firm rules of recognition. What qualities does a maxim need to possess to be granted the status of a general principle ? It appears that principles transcend specific areas of law ; they express fundamental values of the legal system and are thus constitutional in nature ; and they incorporate a minimum ascertainable normative content which facilitates reliance on subjective rights. Beyond that, it is difficult to provide guidance. Thus, in *Audiolux* the ECJ held that the principle of equality of shareholders does not possess the qualities of a self-standing principle of law. (9) Similarly, in *NCC Construction Danmark A/S*, (10) it held that although the principle of fiscal neutrality is a specific expression of the general principle of equal treatment in the field of taxation, it does not have constitutional status and requires specific legislation to be enacted. It cannot procure a normative outcome in the absence of concrete rules. But the degree of specificity required appears to be directly linked to the importance of the rule : in *Mangold* (11) the ECJ elevated the prohibition of discrimination on grounds of age to a general principle of law despite the inapplicability of the Framework Directive (12) in the circumstances of the case. General principles of law express both process and substantive values. Whilst *Kadi* (13) could be seen as a process case, *Mangold* (14) cannot.

Despite the formalization of EU law, the importance of general principles in judicial reasoning continues largely unabated. One might have thought that, given the binding effect of the Charter and the proliferation of EU legislation, there would be less need to rely on unwritten general principles of law. This is however not the case. Whilst the establishment of a more formal EU normative framework has affected the use of general principles,

(9) Case C-101/08, *Audiolux SA v Groupe Bruxelles Lambert SA (GBL)* [2009] ECR I-9823. The Court held that establishing, by means of a general principle of law, an obligation on a dominant shareholder to treat all minority shareholders equally would require the determination of the specific situations where minority shareholders required specific protection, the articulation of specific conditions under which that obligation would apply, and the means by which protection should be offered. Such a decision would require the weighing of competing interests which could only be done through the legislative process : see para. 58 of the judgment.

(10) Case C-174/08, *NCC Construction Danmark A/S v Skatteministeriet,* judgment of 29 October 2009.

(11) *Op. cit.*

(12) Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, *OJ* (2000) L 303/16.

(13) *Op. cit.*

(14) *Op. cit.*

they have shown a remarkable degree of resilience. The ECJ thinks and argues in terms of general principles. What, then, might explain the Court's methodological addiction to them? It is correct to say that general principles perform a gap-filling function. This however falls far short of explaining their value in constitutional discourse. Reference to general principles may be seen as seeking to ensure ideological continuity between the EU and the national legal orders and enhance the legitimacy of the EU judiciary. This explanation has value but provides only part of the answer. In fact, ideological continuity is ensured only at the most abstract level since the Court uses general principles creatively, its dispositive synthesis not being grounded on any consistent attempt to find a common denominator among national laws. (15) Additional explanations should therefore be sought. To some extent, the use of general principles finds justification in legal tradition. They have been an integral part of judicial methodology since the inception of the European Communities. Courts, being conservative institutions, rely on established paths of argumentation. Adherence to them is assisted by the open ended mandate of Article 6 TEU which preserves their legitimizing force. However, perhaps, the most important reason behind the enduring appeal of the general principles may be found in their protean nature which enables the ECJ to engage in a perpetual adjustment of constitutional imperatives. In that respect, they epitomize the incomplete character of the constitutional bargain. Reliance on general principles can be seen as little more than an admission that a legal system cannot be exhausted in specific rules. They synergize the fundamental constitutional underpinnings of the EU which are grounded on liberal democracy, serving as the facilitators of outcomes that cannot readily be determined by concrete rules, triggering constitutional dialogue, and even serving as the exponents of judicial empathy. Furthermore, they serve as an assertion of judicial independence. By referring to general principles as a source of law alongside the written constitution, the ECJ signals that normativity is not exhausted in constitutional text. In a nutshell, reliance on general principles illustrates that the Court follows a substantive, Antigonean, perception of the rule of law and enhances the elusive concept of autonomy of EU law.

(15) This is aptly illustrated by *Mangold* where the Court declared the prohibition of discrimination on grounds of age as emanating from the common constitutional traditions of the Member States despite the fact that, at the time, the constitutions of only two Member States, Finland and Portugal, recognized it.

The general principles and the Charter

Article 6 TEU, as amended by the Treaty of Lisbon, recognizes essentially three sources of fundamental rights : the Charter, the European Convention on Human Rights, and the constitutional traditions common to the Member States. Article 6 however does not provide any guidance as to the relationship among those sources. It does not draw a priority nor does it differentiate between the Charter and the general principles of law as to their effects. The reference to general principles in Article 6(3) does not suggest that they are merely principles and not rights, since Article 6(3) itself refers to "fundamental rights" and the case law has derived enforceable rights from unwritten principles of law. Article 6 does not state that the Charter may give rise to rights but general principles may not. The fusion between the Charter and general principles is compounded since the Charter itself is said to contain both rights and principles. (16) Also, Article 6 makes reference to the general principles of EU law but does not commit itself as to their function, their status, their ranking or the criteria for their recognition. It appears that, in a spirit of deliberate but constructive ambiguity, the authors of the founding Treaties left a host of important issues undecided, leaving them in effect to the hands of the judiciary. How can then one shed light on the relationship between the Charter and the general principles of law ?

Following the entry into force of the Lisbon Treaty, the primary point of reference for the protection of fundamental rights should be the Charter. This is in keeping with the intentions of the treaty authors, which granted the Charter the same value as that of the Treaties, and also the objectives of the Charter as a document which defines the values of the EU polity. The Charter is the first source of fundamental rights protection referred to in Article 6. Viewing the Charter as the primary source of EU fundamental rights is also more in keeping with national constitutional cultures which, bred in a civil law tradition, feel more comfortable with written lists of rights, however indeterminate, than case law. (17)

The case law of the ECJ confirms that the Charter is now the primary point of reference. (18) The Charter's predominance, however, should be

(16) See Art. 6(1) TEU and Art. 52(5) of the Charter.

(17) An example of this is provided by the attitude of the German Federal Constitutional Court towards EU law. See, in particular, the *Honeywell*, judgment of the *Bundesverfassungsgericht*, BVERFG, 2 BvR 2661/06, 6 July 2010. For the English version, see : www.bverfg.de/entscheidungen/rs20100706_2bvr266106en.html.

(18) See e.g., Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission et al. v Kadi* (*Kadi II*), judgment of 18 July 2013 ; *Test Achats, op. cit.* ; *Digital Rights Ireland*,

seen in context. It does not mean that fundamental rights are exhausted in it. First, the interpretation of the Charter will be informed by the general principles of law. Furthermore, Article 6(3) TEU has been interpreted as providing an independent source of rights. In *Festersen*, (19) for example, the Court held that the right of persons to move freely and choose their residence, which is guaranteed by Article 2(1) of Protocol No. 4 to the ECHR, but is not provided as such in the Charter, is recognized by EU law and applied it to support the free movement of capital. (20) *Festersen* was decided before the Charter became binding but there is no reason to suggest that the interpretation of Article 6(3) would now be different. Indeed, post-Charter, the ECJ has invoked Strasbourg case law under Article 2(1) of Protocol No. 4 to supplement treaty provisions on citizenship and free movement. (21) The various sources of rights provided in Article 6 are interrelated in a way which may make it difficult to ascertain the autonomous input of each source but this is not to deny that Article 6(3) can found rights which supplement the Charter. Notably, in *Glatzel* the Court held that the principle of non-discrimination, laid down in Article 21(1) of the Charter, is a particular expression of the principle of equal treatment which is a general principle of EU law and is enshrined in Article 20 of the Charter. (22) The

op. cit.; Case C-131/12, *Google Spain v AEPD*, judgment of 13 May 2014; Case C-426/11, *Alemo-Herron v Parkwood Leisure Ltd*, judgment of 18 July 2013; Case C-544/10, *Deutsches Weintor EG v Land Rheinland-Pfalz*, EU:C:2012:526; Case C-283/11, *Sky Österreich GmbH v Österreichischer Rundfunk*, EU:C:2013:28

(19) Case C-370/05, *Festersen* [2007] ECR I-1129, para. 36.

(20) In *Festersen* the Court held that Danish law which required the acquirer of agricultural property to take up fixed residence in it was a disproportionate restriction on the free movement of capital. In examining the compatibility of the requirement with that freedom, the ECJ took into account the fact that it also interfered with the right to choose freely one's residence as guaranteed by the Convention. This led the Court to characterize it as particularly restrictive and follow a heightened level of review in examining its compatibility with EU law.

(21) See Case C-249/11, *Byankov*, EU:C:2012:608, para. 47, referring to *Ignatov v Bulgaria* (Application No. 50/02, judgment of 2 July 2009), and *Gochev v Bulgaria* (Application No. 34383/03, judgment of 26 November 2009).

(22) Case C-356/12, *Glatzel v Freistaat Bayern*, judgment of 22 May 2014, para. 43. This was reiterated in relation to the prohibition of discrimination on grounds of sexual orientation in Case C-528/13, *Léger v Ministre des Affaires sociales, de la Santé et des Droits des femmes*, EU:C:2015:288, para. 48. For the fusion between Charter rights and general principles see also *Benkharbouche v Embassy of the Republic of Sudan and Libya* [2015] EWCA Civ 33, at para. 81. Note also that the Court continues to refer to fundamental rights as general principles of law: Joined Cases C-141/12 and C-372/12, *YS v Minister voor Immigratie, Integratie en Asiel*, ECLI:EU:C:2014:2081, para. 54, and Case law cited therein.

subsumption of substantive equality under a pre-existing concept of formal equality is of particular importance. It illustrates that the Court follows a substantive rather than a formal understanding of the rule of law. It also has a mutually reinforcing relationship with the concept of EU autonomy. (23)

A similar pronouncement has been made in relation to the right to good administration. In *H.N.,* the Court held that, whilst Article 41 of the Charter is addressed solely to EU bodies, the right to good administration enshrined therein is a general principle of law which binds not only EU agencies but also national authorities. (24) The ECJ has thus been keen to preserve the independent normative input of general principles of law although their concrete added value in a specific case may not always be easy to discern.

One can expect that the general principles of law will, in most cases, be used to influence and morph the interpretation of the Charter rather than establish autonomous, self-standing rights. The provisions of the Charter are so abstract and all-embracing that it is more likely that the ECJ will bring within them any emerging general principles of EU law. Keeping things under one roof makes eminent sense. The Charter itself appears to require that its provisions must be interpreted in the light of general principles of law. In particular, the Charter does not intend to restrict or adversely affect fundamental rights as recognized by Union law, (25) and therefore detract from the level of protection afforded by general principles. It must also be interpreted in harmony with the national constitutional provisions and in concordance with the Convention. (26) The treaty setting therefore provides a framework for the integration of general principles into the interpretation of the Charter. Indeed, the post-Charter case law often assimilates fundamental rights as they are guaranteed by the Charter and as they derive from general principles of law. (27)

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(23) See below.

(24) Case C-604/12, *H. N. v Minister for Justice, Equality and Law Reform*, EU:C:2014:302; confirmed in Joined Cases C-141/12 and C-372/12, *YS v Minister voor Immigratie, Integratie en Asiel*, ECLI:EU:C:2014:2081. The same holds true also, for example, for the right to judicial review and, more generally, the right to judicial protection, of which Article 47 of the Charter should be viewed as an expression. See e.g., *Les Verts*; *Kadi*; Case C-506/04, *Wilson v Ordre des avocats du barreau de Luxembourg*, EU:C:2006:587, para. 46. Case 222/84, *Johnston* [1986] ECR 1651, para. 18.

(25) See Art. 53.

(26) See Art. 52(4).

(27) See e.g., Case C-131/12, *Google Spain v AEPD*, judgment of 13 May 2014, para. 68; Case C-176/12, *AMS v Union locale des syndicats CGT*, judgment of 15 January 2014, para. 42; Case C-555/07, *Seda Kücükdeveci v Swedex GmbH and Co. KG*, [2010] ECR I-365, para. 21-22.

General principles have a substantive, independent input and, as stated above, the possibility exists that they may be relied upon as self-standing sources of rights. They also continue to have a value as underlying principles of the constitution which influence the interpretation and application of the law and provide yardsticks for determining the validity of legislation. This applies for example to the principle of protection of legitimate expectations and the principle of legal certainty which have been used to annul EU measures or determine the scope of their application. (28) Whether, post-Lisbon, reference is made to legal certainty as a self-standing principle or, perhaps, as part of the right to judicial protection is of less importance. The essence is that, by design, Article 6 TEU recognizes multiple sources of fundamental rights which are complementary and mutual reinforcing.

In principle, it should be accepted that both the Charter and the general principles of law have the same scope of application and that Charter provisions which overlap with general principles are coterminous with them in terms of their normative content. It would be odd to accept that general principles have a wider scope of application or a different normative content. (29) Still, one might envisage circumstances where they have added value. This may occur, first, where the principles, rights or freedoms enshrined in the Charter are limited. Thus, as already stated, the Charter provides for the right to good administration only in relation to EU institutions and bodies but the case law has held that that right is a general principle of law which applies also to the national authorities. (30) Secondly, it may occur where the application of the Charter is expressly excluded. Thus, Protocol No. 30 limits the application of the Charter to Poland and the United Kingdom. Whatever the effects of the protocol might be, it does not appear to affect the application of the general principles of law to those Member States.

Thirdly, the general principles may be of importance in other contexts. In many instances the Charter states that rights or principles are to be applied

(28) See e.g., Case 120/86, *Mulder v Minister van Landbouw en Visserij* (*Mulder I*) [1988] ECR 2321 ; Case C-143/93, *Van ES Douane Agenten v Inspecteur der Invoerrechten en Accijnzen* [1996] ECR I-431.

(29) *Cf.* the Opinion of Trstenjak Advocate General in Case C-282/10, *Dominguez v CICOA*, EU:C:2011:559. In her Opinion, the Advocate General took the view that the right to annual leave is a general principle of EU law which could bind individuals but that the equivalent right expressly provided in Article 31(2) of the Charter did not have horizontal effect and, in the interests of harmonised interpretation of the two rights, came to the conclusion that the direct application of the general principle should be rejected. See para. 75 *et seq.*

(30) See *H.N.*, *op. cit.*, and the discussion above.

in accordance with national law. (31) In such cases, national law does not have a free hand but any limitations that it may provide must be compatible with the general principles of law, such as the principle of proportionality. Finally, general principles may apply in other cases where the Charter might be said to be non-applicable. It could be argued, for example, that the Charter does not bind individuals or that it does not apply to EU institutions when they do act in their capacity as such but as delegates of the Member States, for example, in the context of the European Stability Mechanism Treaty. In the view of the present author, the Charter does apply in the aforementioned situations but, even if it were held not to apply, the general principles could be said to remedy the resulting gap in judicial protection. (32)

Beyond the Charter, the general principles of law continue to serve a number of functions. They serve to fill the lacunae of written law. They promote a systematic, teleological and consistent interpretation rationalizing polynomy and ensuring coherence. (33) They serve to promote the development of a *jus communae* even in areas which hitherto have been largely untouched by EU law, namely private and criminal law.

Finally, general principles fulfill an important methodological function. Proportionality, in particular, has developed into a universal standard of constitutionality. The methodology followed by the ECJ in interpreting the Charter is no different from its traditional methodology in applying the general principles of law. If anything, the Charter appears to have inspired a somewhat more coherent rights-based analysis and a higher standard of review. (34) The judicial inquiry has become more structured but it is by no means obvious that cases decided before the Charter came into force would have been decided differently if the Charter was applicable at the time.

In the Charter itself the relationship between principles and rights is somewhat muddled. The Charter draws a distinction between the two but the differences are not clear and, to the extent that they are, remain normatively unsatisfactory. Article 51(1) draws a distinction between rights

(31) See e.g., Art. 10(2) (right to conscientious objection is to be recognized in accordance with the national laws governing the exercise of the freedom of thought, conscience and religion); Art. 14(3) (right to education); Art. 16 (freedom to conduct a business); Art. 52(1) (general restriction on limitations of rights which must, *inter alia*, provided by law, which includes national law).

(32) *Cf.* the view of the Advocate General in *Dominguez.*

(33) An example of this is the principle of abuse of right which has been recognized by the Case law as a general principle of EU law. See e.g., Case C-321/05, *Hans Markus Kofoed v Skatteministeriet* [2007] ECR I-5795.

(34) See e.g., *Digital Rights Ireland* and *Google Spain*, *op. cit.*

and principles laid down in the Charter. Such a distinction is also made in Article 6(1) TEU and the Preamble to the Charter which in fact recognizes three categories, namely "rights, freedoms and principles". (35) The distinction is material since some provisions of the Charter apply only to rights and freedoms but not to principles. (36) Rights are to be observed whilst principles are to be respected. (37) It is unsatisfactory however that the Charter attributes legal significance to a distinction which it assumes but does not explain. Article 53(5) states as follows: "The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality."

According to the Explanations accompanying the Charter, the difference is that, whilst rights give rise to "direct claims for positive action" by the Union and national authorities, principles must be implemented by legislative or executive action at Union or State level and become material only for the purposes of the interpretation or judicial review of such acts. (38) Although these observations go some way towards explaining the distinction, it remains elusive. First, there is no reason why articles of the Charter which incorporate principles rather than rights should be denied any interpretative value in the absence of implementing action. Indeed, the value of constitutional principles is precisely to inform the interpretation of normative rules, including those that have not been adopted specifically in order to implement them. This is the case for example with the principle of environmental protection which is proclaimed in Article 37 of the Charter. (39) Secondly, as the Explanations themselves acknowledge, articles of the Charter may incorporate elements of both principles and rights. (40)

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(35) See Preamble, recital 7.

(36) See Art. 52(1) which circumscribes the limitations on the rights defined by the Charter.

(37) See Art. 51(1). This is reiterated in the Explanations Relating to the Charter of Fundamental Rights, *OJ* (2007) C 303/17, at p. 35. For the status of the explanations, see below.

(38) Explanations, *op. cit.*, p. 35.

(39) Examples of provisions which lay down principles rather than rights are Article 25 (rights of the elderly), Article 26 (integration of persons with disabilities), Article 37 (environmental protection).

(40) This is the case, for example, in relation to Articles 23 (equality between men and women), 33 (family and professional life) and 34 (social security and social assistance). Article 34 was considered in Case C-571/10, *Kamberaj*, EU:C:2012:233.

Thirdly, the normative limitations imposed on principles by Article 53(5) appear somewhat contradictory. The case law has derived rights from general, unwritten, principles. (41) By virtue of Article 6(3) TEU, those principles continue to be a source of fundamental rights. The distinction drawn in the Charter therefore does not prevent the Court from ruling that a principle can give rise to enforceable rights.

The interaction between general principles and EU secondary law

The interaction between the general principles of law and EU measures calls for a number of comments. The starting point is that, as an integral part of the Treaties, general principles rank above legislation which, as far as possible, should be interpreted to comply with them. (42) Where a compatible interpretation is not possible and a contradiction ensues, the legislation is liable to be annulled. The relationship between the two, however, is more nuanced and goes beyond a linear normative ranking.

In an activist mode, the ECJ has used general principles to supplement or even rewrite legislation. *Sturgeon* (43) and *Test Achat* (44) suggest that, in its quest to uphold substantive values, the Court does not shy away from assuming the role of co-legislator. *Mangold* (45) signaled the apex of activism projecting a novel use of general principles. The case is important in a number of respects. First, it illustrates an aggressive use of proportionality as a principle of merits rather than a principle of process. (46) Secondly, by labeling the Framework Directive (47) as a mere illustration of the unwritten principle of equality and reading the two as coterminous, the Court granted constitutional force to the Directive liberating it from the remedial limita-

(41) See e.g., *Mangold*, *op. cit.*

(42) See above.

(43) Joined Cases C-402/07 and C-432/07, *Sturgeon v Condor Flugdienst GmbH* [2009] ECR I-10923.

(44) Case C-236/09 *Test-Achats v Conseil des ministers*, judgment of 1 March 2011.

(45) Case C-144/04, *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981.

(46) Although discourse on the judgment focuses on the Court's reasoning and the principle of non-discrimination, in particular, the way the Court discovered a general, unwritten, principle of law prohibiting discrimination on grounds of age with little support from the national constitutional traditions, an equally important aspect of the judgment is the way the Court applied an intense proportionality test over a national social policy adopted by the German Parliament. For a discussion of the judgment, see T. Tridimas, "Constitutional Review of Member State action: The virtues and vices of an incomplete jurisdiction", *International Journal of Constitutional Law* (2011), (9), 737, at 746.

(47) *Op. cit.*

tions ordinarily arising from the lack of horizontal direct effect. Such fusion of legal sources is problematic both from the point of view of democracy and the point of view of legal certainty since, potentially, any legislative outcome can be seen as the illustration of an underlying constitutional principle. In *Mangold*, the adoption of the Framework Directive operated merely as a triggering mechanism activating the application of a pan-European constitutional principle. This construction sought to justify the constitutional entrenchment of the prohibition of discrimination on grounds of age whilst respecting the principle that EU fundamental rights are not self-standing and cannot by themselves expand EU competence. Despite its noble objectives, as a matter of legal orthodoxy, this reasoning remains problematic. Although the *Mangold* doctrine can be taken to apply to all forms of discrimination outlawed by Article 21 of the Charter, its possible application to other general principles has received cold welcome. Subsequent case law has confirmed its exceptional character as the Court refused to extend the *Mangold* reasoning to other directives. (48)

Still, *Mangold* is not the final word. The case law has vacillated from intense activism to consummate retreat. In *Dano* (49) and *Alimanovich*, (50) in the sensitive area of immigration, the ECJ gave preference to legislation over primary law refusing to interpret the Citizenship Directive (51) in the light of the Charter and suggesting that Treaty rights are exhausted in legislation. Whilst in *Mangold* the Court used legislation to empower the general principles, in *Dano* and *Alimanovich*, it used it to negate constitutional imperatives. This sudden conversion to majoritarianism was assisted, at least in *Dano*, by weak facts and may be seen as an attempt to achieve constitutional containment in the light of an adverse political climate. But the Court's reasoning is hardly consistent with its approach in earlier cases on citizenship and free movement and questions the fundamental paradigm of integration rights, according to which they derive from the founding Treaties which also define autonomously their minimum content. EU directives must be construed according to the Treaties and the Charter at the point of

(48) See Case C-282/10, *Dominguez v CICOA*, judgment 24 January 2012; Case C-176/12, *AMS v Union locale des syndicats CGT*, judgment of 15 January 2014.

(49) Case C-333/13, EU:C:2014:2358.

(50) Case C-67/14, EU:C:2015:597. *Dano* and *Alimanovich* were followed in Case C-299/14, *Vestische Arbeit Jobcenter Kreis Recklinghausen v Jovanna García-Nieto*, EU:C:2016:114. See also C-308/14, *Commission v United Kingdom*, EU:C:2016:436.

(51) Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, *OJ* (2004) L 158/77 (consolidated version 2004L0038-EN, 30 April 2004, 000.003-1).

their interpretation. (52) But in *Dano* this fundamental constitutional maxim was not applied.

Salient features of the case law

In the light of recent developments, one may identify, among others, the following trends in the case law on general principles : the increasing resonance of fundamental rights, the enduring appeal of proportionality, the functioning of effectiveness as concretized primacy, the evolving nature of judicial balancing, and the ascending role of autonomy.

Deepening and Expanding Fundamental Rights

One of the most prominent aspects of the case law since the 2000s is that the ECJ has both broadened and deepened its human rights jurisdiction. In an effort to enhance the legitimacy of the Union, it has sought to provide a one stop forum for the protection of fundamental rights. This, in turn, defines its relative position *vis-à-vis* Strasbourg and the national constitutional courts. The case law projects an inclusive, centralized approach to the protection of fundamental rights placing the Charter at the apex of the edifice.

Such expansion and deepening has occurred in many ways. First, it has taken place through a broad interpretation of the fundamental freedoms of movement. Since a national restriction on free movement can only be justified if it respects fundamental rights, it follows that the broader the interpretation of free movement, the broader the jurisdiction of the ECJ to apply EU fundamental rights. *Carpenter* (53) and the iconoclastic judgment in *Karner* (54) provide examples of free movement and fundamental rights functioning as converging forces of integration. Secondly, the ECJ has held that fundamental rights, being an integral part of the founding treaties, can

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(52) According to the standard Case law, directives must necessarily be interpreted in the light of fundamental rights and the Charter, see e.g., *Connolly v Commission*, C-274/99 P, EU:C:2001:127, para. 37 ; *Österreichischer Rundfunk and Others*, C-465/00, C-138/01 and C-139/01, EU:C:2003:294, para. 68 ; and *Google Spain and Google*, C-131/12, EU:C:2014:317, para. 68.

(53) Case C-60/00, *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279. But see for a somewhat narrow understanding of that case : Case C-457/12, *S v Minister voor Immigratie, Integratie en Asiel*, judgment of 12 March 2014.

(54) Case C-71/02, *Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH* [2004] ECR I-3025.

be used to mitigate rights emanating from free movement. In contrast to the previous situation, fundamental rights operate here as centrifugal forces. *Schmidberger* (55) and *Omega* (56) embrace the national constitutional traditions and endorse an integration model based on value diversity. Thirdly, the ECJ has deepened its jurisdiction through the increasing use of the "outcome" approach in preliminary references. Under that approach, the ECJ reaches a conclusive result as to whether a national measure complies with EU fundamental rights, leaving no discretion to the referring court as to how to apply its ruling. This way, it provides leadership specifying a normative outcome rather than offering guidance to the national court. (57) Finally, there is no doubt that the resonance of fundamental rights has been increased by the Charter. Since the entry into force of the Lisbon Treaty, litigation on fundamental rights has increased and the most prominent judgments delivered by the Court tend to involve such rights rather than matters of classic economic integration. The Court has been particularly activist in three areas: the right to judicial protection, (58) the principle of non-discrimination, (59) and the right to the protection of personal data. (60)

The enduring appeal of proportionality

Proportionality is a key instrument of judicial methodology which permeates all areas of EU law and has developed into the pre-eminent balancing tool. Its appeal lies in its protean, malleable nature which enables the Court to condition state intervention to constitutional rights and values and, as such, appears well suited to rights-based review. Proportionality fulfills three distinct but inter-related functions. It is a market integration mechanism

(55) Case C-112/00, *Eugen Schmidberger, Internationale Transport und Planzüge v Austria* [2003] ECR I-5659.

(56) Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609. See also Case C-244/06, *Dynamic Medien Vertriebs GmbH v Avides Media AG* [2008] ECR I-505.

(57) For examples, of outcome cases, see *Carpenter*, *op. cit.*; *Schmidberger*, *op. cit.*; *Omega*, *op. cit.*; Case C-544/10, *Deutsches Weintor eG v Land Rheinland-Pfalz*, judgment of 6 September 2012; Case C-283/11, *Sky Österreich GmbH v Österreichischer Rundfunk*, judgment of 22 January 2013. In some cases, the ECJ will provide the referring court with a strong presumption leaving it to make the final determination: see e.g., Case C-131/12, *Google Spain SL v Agencia Española de Protección de Datos (AEPD)*, judgment of 13 May 2014. For a detailed discussion of the "outcome" and other approaches followed by the Court, see T. Tridimas, above, n. 46.

(58) See e.g., *Kadi*, *op. cit.*

(59) See e.g., *Sturgeon*, *op. cit.*; *Test Achat*, *op. cit.*

(60) See e.g., *Digital Rights Ireland*, *op. cit.*; *Google Spain*, *op. cit.*; C-362/14, *Schrems v Data Protection Commissioner*, judgment of 6 October 2015.

used to determine the legality of national restrictions on free movement. It is an instrument for the protection of civil liberties and fundamental rights *vis-à-vis* interference by public (EU or Member States) authorities. Finally, under Article 5(4) TEU, it is, more generally, a premise of governance seeking to limit the scope and intensity of EU action.

It is a truism to say that proportionality hides diverse standards of scrutiny. In contrast to US courts, the ECJ does not normally refer to different levels of scrutiny although, unusually, in *Digital Rights Ireland*, it expressly engaged with the level of review. (61) When functioning as a market integration mechanism, proportionality carries, in general, a high level of scrutiny. With the demise of *Keck*, (62) it has been reinstated as the primary criterion for determining the boundaries between permissible and impermissible obstacles to trade. The Court may assess not only the necessity but also the suitability of the measure which may bring it closer to exercising review of merits. Also, in examining the necessity of the measure, it may inquire into the possible existence of less restrictive alternatives. Although this is far from a mechanical exercise, it can be applied intrusively. A recent example can be provided by the *Scotch Whisky case.* (63) There, the Court found a regional measure imposing a minimum price per unit for the retail sale of alcohol to be disproportionate on the ground that the objective of health protection could be served as effectively by increasing taxation. The Court held that an increase in tax would be less restrictive of free movement because minimum prices imposed a significant restriction on the freedom of traders to determine their prices. (64) Furthermore, by reason of its general application affecting all alcoholic products, a fiscal measure could not be said to be less effective. It would entail a generalized increase in prices, affecting both drinkers whose consumption of alcohol is moderate and those

(61) It held that the discretion of the EU legislature may prove to be limited depending on a number of factors, including, in particular, the area concerned, the nature of the right at issue guaranteed by the Charter, the nature and seriousness of the interference, and the objective pursued by the interference. Although those factors could be derived by an analysis of the case law, it is rare that the Court refers to them explicitly. In the circumstances of the case, review was strict given the important role played by the protection of personal data in the light of the fundamental right to respect for private life and the extent and seriousness of the interference caused by the directive. See para. 47-48.

(62) See the successive erosion of *Keck*, resulting *inter alia*, from C-110/05, *Commission v Italy*, EU:C:2009:66 Case C-142/05, *Åklagaren v Percy Mickelsson Joakim Roos*, EU:C:2009:336, and *Scotch Whisky Association v Lord Advocate*, EU:C:2015:845, discussed below.

(63) Case C-333/14, *Scotch Whisky Association v Lord Advocate*, EU:C:2015:845.

(64) *Op. cit.*, para. 46.

whose consumption is hazardous or harmful. The Court continued by stating that an increase in tax was capable of procuring additional benefits as compared with the imposition of a minimum price. (65) By expressing a preference for a fiscal measure, the ECJ intervened in a matter of economic policy constraining heavily national discretion.

An example of a high standard of scrutiny is also provided by *Mangold.* (66) If *Mangold* and *Scotch Whiskey* illustrate a particularly strict use of proportionality, *Gauweiler* (67) illustrates a somewhat acontextual use of the principle which takes it beyond rights-based review. The Court was faced with a challenge to the legality of the ECB's Outright Monetary Transactions (OMT) programme, which conferred upon it power to purchase government bonds in secondary markets. Having established that the OMT programme fell within the scope of monetary rather than economic policy and thus being within the powers of the ECB, the ECJ proceeded to examine whether it complied with the principle of proportionality, namely whether it was appropriate and necessary to achieve its monetary policy objectives. Applying a soft standard of review, it found, in principle, the programme to be both suitable and necessary for the achievement of its objectives but outlined certain safeguards. (68) The reasoning is somewhat problematic in that proportionality was not applied to limit a state restriction on an individual right but determine whether the OMT decision was proportionate *vis-à-vis* its objectives. This inquiry however is best internalized as part of an *ultra vires* — excess of authority review by reference to the scope of the Treaty provisions which provide the legal basis for ECB action. Proportionality appears to have little added value here being merely the fifth wheel in the Court's chain of reasoning.

An important aspect in the development of proportionality has been its transition from a market integration mechanism to a principle for the protection of fundamental rights. This reflects the evolving shift in the character of the EU from a regional organization preoccupied with trade and economic matters to an all embracing legal system with strong federal features. In recent years, the principle is employed more frequently in the context of Charter rights and the field of freedom security and justice than in the field of free trade. All in all, the judicial elaboration of proportionality suggests

(65) The Court stated that an increase in tax contributed to the achievement of the general objective of combating alcohol misuse, and that was a factor supporting its introduction in preference to the imposition of a minimum price: see para. 47-48.

(66) See above.

(67) Case C-62/14, *Gauweiler and Others v Deutscher Bundestag*, EU:C:2015:400.

(68) *Gauweiler*, *op. cit.*, para. 69, and 82 *et seq.*

that it is a powerful principle for the protection of the individual but an ineffective tool to tame the expansion of EU competence. (69)

Given that proportionality enables a wide-ranging inquiry, it raises questions pertaining to the proper limits of the judicial province. Critics would argue that it can easily degenerate into a principle of substance enabling the judiciary to impose its own policy preferences. How can unelected judges justify giving preference to one or other choice of social or economic policy by striking down a measure which represents the outcome of a democratic political process ? The answer is that there is nothing inherently illegitimate with the principle of proportionality and that, subject to certain safeguards, its use can be justified by a number of considerations.

First, proportionality is a methodological tool. It provides a framework of analysis and can influence a result but does not prescribe an outcome. Its value should thus be judged by how well it shapes the judicial inquiry. It is submitted that it does so well as it enables the judiciary to take into account, *inter alia*, the importance of the right in issue, the intensity of restriction, and the importance of the public interest pursued. Secondly, as already stated, it is an umbrella principle which incorporates diverse degrees of scrutiny. Thirdly, it is well suited to a legal system based on constitutionally entrenched rights. Within such a system, it is understandable that rights-review is effects rather than objectives based, focusing on the effects of state action on a set of fundamental rights rather than its putative objectives. In EU law, proportionality finds specific grounding in the limitations clause of Article 52(1) of the Charter and supported by the substantive version of the rule of law followed by the EU legal order and exemplified by the values referred to in Article 2. Fourthly, as a ground of judicial review, it has a negative input : the ECJ may strike down a measure but cannot dictate a preferred policy choice. It should thus be seen as an integral part of a system of checks and balances which condition governance in a liberal democracy. Fifthly, in the context of the preliminary reference procedure, which provides the primary mechanism for assessing the compatibility of national measures with EU law, the task of applying the principle is shared between the ECJ and the national courts. The ECJ may, and in most cases does, provide guidelines to the national court leaving the latter to make

(69) Thus, challenges to the validity of harmonization measures adopted under Article 114 on the ground that they go beyond internal market objectives are extremely rarely successful. For the only successful challenge : see Case C-376/98, *Germany v Parliament and Council* (*Tobacco* case) [2000] ECR I-8419.

the ultimate evaluation as to whether national law complies with EU law. Judicial review is thus exercised on a shared agency basis. (70)

No doubt, one may identify cases where the ECJ could be said to have applied the principle too intrusively or, perhaps, too leniently or have interfered too much with the legislative process. Those criticisms however by no means detract from the legitimacy of the principle as a methodological tool.

Notably, recent judgments challenge the preeminence of proportionality in the context of entitlement to social assistance benefits. In *Alimanovich*, (71) the Court not only gave priority to the Citizenship Directive over the Treaties as the defining source of rights following *Dano*, (72) but also rejected the "individual assessment" approach. It held that, under Article 24(1) of the Citizenship Directive, Union citizens can claim equal treatment with nationals of the host Member State in relation to social assistance only if they are resident therein in accordance with the conditions of the Directive. (73) They cannot derive any additional rights from Article 18(1) TFEU or EU citizenship. Although in earlier case law the Court has held that the Directive requires a Member State to take account of the individual situation of the person concerned before it adopts an expulsion measure or finds that the residence of that person is placing an unreasonable burden on its social assistance system, (74) it expressly rejected that such individual assessment is necessary in the context of access to social assistance. (75) The Court stated that compliance with the letter of the directive enabled those concerned to know their rights and obligations (76) and essentially gave priority to the principle of legal certainty over the principle of proportionality. (77)

The overarching principle of effectiveness

Effectiveness is an overarching principle of EU law which has evolved to the primary standard for determining the constitutional expectations of the emergent EU legal order from national laws. The principle of direct effect, the emphasis on securing *l'effet utile* of EU law, and the obligation of national courts to provide full and effective protection of EU rights are illus-

(70) See above, n. 46, T. Tridimas.

(71) *Jobcenter Berlin Neukölln v Alimanovic*, C-67/14, EU:C:2015:597.

(72) *Dano*, C-333/13, EU:C:2014:2358.

(73) *Alimanovich*, *op. cit.*, para. 49; *Dano*, *op. cit.*, para. 69.

(74) See *Brey*, C-140/12, EU:C:2013:565, para. 64, 69 and 78.

(75) *Alimanovich*, *op. cit.*, para. 59.

(76) *Op. cit.*, para. 61.

(77) *Alimanovich* was followed in *Vestische Arbeit Jobcenter Kreis Recklinghausen v Jovanna García-Nieto*, Case C-299/14, EU:C:2016:114.

trations of the same underlying principle. Effectiveness functions both as an instrument of interpretation and a supplementary source of EU law. (78)

The principle acquires particular importance in the field of remedies. According to established case law, in the absence of EU provisions, it is for the domestic legal system to provide rules of procedure and remedies for the protection of EU rights provided that those rules must comply with the requirements of equivalence and effectiveness. (79) As the case law evolved, the requirement of effectiveness gradually transitioned from a minimum standard to a demanding rule of conditionality leading to the hybridization of national remedies : recalibrated in the light of effectiveness, those remedies may now be said to stand with one leg on national law but with the other on EU law. Effectiveness has assumed in relation to remedies the role of the golden standard traditionally enjoyed by proportionality in the field of rights and become a proxy for the heavy hand of EU primacy.

The problem with the intervention of EU law in this area is that it has a deconstructive character and may have a corrosive effect on the national law of remedies. EU has to rely on national remedies but these have to be reinvented, jettisoning the elements which fall short of the effectiveness standards, thus challenging the conceptual coherence of national law and generating uncertainty.

Notably, the case law appears to suggest that, where national law provides for more than one remedies, each of them must satisfy the principle of effectiveness. (80) The intrusion of EU law into the national law of remedies is such that the maxim that EU law is not intended to create new remedies, except in highly exceptional circumstances, (81) may be questioned.

Balancing of interests

In constitutional adjudication, courts engage in the delicate task of balancing opposing legitimate interests. The ECJ is no foreigner to such balancing. Already at an early stage in the development of EU integration, it had to counterpoise the EU value of free trade with national interests such as

(78) See M. Ortino, "A Reading of the EU Constitutional Legal System through the Meta Principle of Effectiveness", ces *Cahiers* (2015), pp. 91 and foll.

(79) See Case 33/76, *Rewe v Landwirtschaftskammer für das Saarland* [1976] ECR 1989, and Case 45/76, *Comet v Productschap voor Siergewassen* [1976] ECR 2043.

(80) See Case C-362/12, *Test Claimants in the Franked Investment Income Group Litigation v Commissioners of Inland Revenue* (*FII III* case), EU:C:2013:834.

(81) See Case 158/80, *Rewe v Hauptzollamt Kiel* (*Butter Cruises* case), [1981] ECR 1805 ; Case C-432/05, *Unibet*, judgment of 13 March 2007.

the protection of public health or public security. As integration developed, the balancing exercise acquired more dimensions. Thus, in the 1990s, the ECJ infused substantive standards of justice to free movement by requiring that national restrictions on free trade must respect fundamental rights. (82) More recently, the evolution of the European Union to an organization with strong federal elements has had a qualitative effect on judicial balancing. The expansion of EU competence, the growth of Union legislation, and the proliferation of EU constitutional rights has resulted in the EU embracing a wider spectrum of interests and the ensuing need to compromise them where they are in a trajectory of conflict. Whilst in earlier years, judicial balancing involved compromising an EU interest *vis-à-vis* a State interest, it now increasingly involves balancing diverse EU interests *vis-à-vis* each other. The Charter, being all embracing, protects a variety of principles, rights and freedoms which may be contradictory and priority may need to be given to one or other of them in specific circumstances depending on various factors. Also, EU directives increasingly cover diverse aspects of economic life and may protect opposing interests. Such statutory conflicts are often concretizations of tensions between clashing constitutional rights. In terms of political power, the colonization of rights and state imperatives by EU law has made the weighing game more horizontal and less vertical. The judgments in *Weintor* and *Sky Ostericht* provide apt examples. (83) The Court has stressed that an assessment must be carried out in accordance with the need to reconcile the opposing rights and strike a fair balance between them. (84) The duty to provide a fair balance is imposed on both the national authorities when they implement or apply a directive and the courts in interpreting the measures in issue. (85) In general, rules which foreclose balancing are unlikely to find judicial favour. (86)

The starting point of the balancing exercise will differ depending on the value accorded to the conflicting rights in issue. There may be no obvious hierarchy in which case the starting point is one of neutrality and the

(82) Case C-260/89, *ERT* [1991] ECR I-2925 ; Case C-368/95, *Vereinigte Familiapress Zeitungsverlags und Vertreibs GmbH v Bauer Verlag* [1997] ECR I-3689 ; and see, later, *Carpenter*, *op. cit.*

(83) *Op. cit.*

(84) See, e.g., Case C-275/06, *Promusicae* [2008] ECR I-271, paras. 65 and 66 ; *Weintor*, para. 47.

(85) Case C-12/1131, *McDonagh v Ryanair Ltd*, judgment of 31 January 2013, para. 43 ; Case C-275/06, *Promusicae* [2008] ECR I-271, para. 68.

(86) See Joined Cases C-468/10 and C-469/10, *Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF) v Administración del Estado*, judgment of 24 November 2011.

judiciary must achieve a fair balance. Much will also depend on the context of the case and the specific remedy which the person invoking the right claims. (87) Thus, for example, in the context of the provision of online services, the Court has held that national authorities and courts must strike a fair balance between the protection of intellectual property rights, which is enshrined in Article 17(2) of the Charter, and the freedom to conduct a business which is protected by Article 16. (88) They must also balance the protection of intellectual property *vis-à-vis* the right to protection of personal data and the freedom to receive or impart information. (89)

The gradual shift towards a more horizontal juxtaposition of conflicting EU interests makes judicial intervention more constitutional in nature as the EU or national source of the opposing right matters less. More horizontality however need not mean less involvement of national courts. The latter may also perform that balancing subject to oversight by the ECJ whose optimal intervention is one of providing guidance to the national courts rather than prescribing outcomes in preliminary references. (90)

The rise of autonomy

Recent years have witnessed increasing judicial reliance on the principle of autonomy. The value of the principle is interpretational but its meaning remains elusive. To what extent and in what respects can EU law be said to be autonomous? Autonomy bears several meanings. EU law could be defined as autonomous *vis-à-vis* international law and *vis-à-vis* the domestic law of the Member States. In *Van Gend en Loos*, (91) the ECJ did both by proclaiming the distinct nature of EU law, juxtaposing it from international law, and extrapolating the doctrine of direct effect from its novel features. It may be said that EU law is autonomous from international law in that it is distinct from it and also in that the Treaties are not subordinate to international law. In *Kadi* (92) the Court declared that all EU measures

(87) See e.g., for the granting of an injunction to protect intellectual property rights in music from misuse by an online social network platform: *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV*, Case C-360/10 EU:C:2012:85; Case C-70/10, *Scarlet Extended* [2011] ECR I-11959.

(88) *Belgische Vereniging van Auteurs*, *op. cit.*, para. 44; *Scarlet Extended*, *op. cit.*, para. 46.

(89) *Belgische Vereniging van Auteurs*, *op. cit.*, para. 51; *Scarlet Extended*, *op. cit.*, para. 53.

(90) See T. Tridimas, *op. cit.*, n. 46.

(91) Case 26/62, *Van Gend en Loos* [1963] ECR 1.

(92) *Op. cit.*

must comply with fundamental rights as understood in EU law including measures intended to give effect to UN Security Council resolutions. It thus understood the Union as having an enclosed constitutional space the imperatives of which cannot be pierced by the Union's or the Member States' international obligations.

Furthermore, autonomy can be understood as definitional or conceptual. The Court has held that terms and concepts used in EU measures which make no express reference to the law of the Member States for the purposes of determining their meaning must normally be given an autonomous and uniform interpretation throughout the European Union. (93) The same applies in relation to provisions of the Treaty. Such conceptual autonomy can, however, only be partial since EU law is fundamentally incomplete and interacts very closely with the national legal systems. It can only stand on the edifice of the legal systems of the Member States which provide its foundations and with which it must ensure ideological continuity. It also has to rely on national norms and agents for its making, implementation, and enforcement.

The judicial articulation of autonomy can best be understood as a defence mechanism. Founded on primacy, it seeks to safeguard the Court's own jurisdiction and its defining role in the development of EU law. The fundamental attributes of autonomy in this respect are the following. First, it makes the exclusivity of the ECJ's jurisdiction as an untouchable, *sine qua non*, attribute of EU law. Thus, the Court has held that the obligation of Member States to respect the jurisdiction of the Court of Justice, which is a fundamental feature of the EU system, is part of the principle of autonomy. (94) Secondly, it requires that the ECJ remains at the apex of the judicial system and has the final say on the interpretation and validity of EU law. As the Court's Opinion 2/13 on the Accession of the EU to the ECHR shows, (95) such judicial monopoly cannot be challenged. Thirdly, it means that the obligations of Member States *vis-à-vis* the EU and *vis-à-vis* each other when they act within the scope of application of EU law must be determined exclusively by EU law. As the Court has put it, by reason of their membership of the EU, the Member States have accepted that relations

(93) See e.g., Case C-487/11, *Laimonis Treimanis v Valsts ieņēmumu dienests*, 6 September 2012, para. 22; Case 327/82, *Ekro* [1984] ECR 107, para. 11; Case C-287/98, *Linster* [2000] ECR I-6917, para. 43; and Case C-170/03, *Feron* [2005] ECR I-2299, para. 26.

(94) See Opinion 2/13 *on the Accession of the EU to the European Convention for the Protection of Human Rights*, EU:C:2014:2454, para. 202.

(95) Opinion 2/13, *op. cit.*

between them as regards the matters covered by EU law are governed by it to the exclusion, if EU law so requires, of any other law. (96)

The case law illustrates that the Court applies a very exacting standard on any arrangements that might interfere with its jurisdiction relying on a criterion of potential rather than actual interference and sometimes showing a decree of distrust towards other international tribunals. (97) The rise of autonomy can be seen as a sign of maturity of EU law and increasing confidence on the part of the Court. It has however a Janus-like face : whilst in *Kadi* it was used to enhance fundamental rights, in Opinion 2/13 it was used to lessen their protection. It is essentially a principle that defines the EU's judicial universe according to a set of priorities established by the ECJ.

Conclusion

In the post-Lisbon era, the general principles remain a potent source of law and an integral part of the Court's methodology. Whilst the Charter is the primary point of reference for the protection of fundamental rights, the general principles endure not only as an interpretational tool and supplementary sources but also as the predominant methodological tool which shapes judicial reasoning and helps to morph outcomes. Their protean nature facilitates the ranking of constitutional imperatives and plays an important role not only in defining rights but also relations among institutional actors. The principles of proportionality, effectiveness and autonomy have played a particularly prominent role in recent years. All in all, the Court's methodological addiction to general principles derives from its adherence to a substantive version of the rule of law. The general principles synergize the constitutional underpinnings of the EU polity, shape the normative content of EU values, and facilitate constitutional dialogue.

(96) *Op. cit.*, para. 194.

(97) See, in relation to bilateral investment treaties, Case C-205/06, *Commission v Austria*, and C-249/06, *Commission v Sweden* [2009] ECR I-1335 ; Case C-118/07, *Commission v Finland* [2009] ECR I-10889.