

## Chapter 1

### The Human Rights Competence in the EU The State of the Question after Lisbon

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"I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power. They might urge with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication, that a power to prescribe proper regulations concerning it was intended to be vested in the national government. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for bills of rights."

Hamilton, *Federalist* 84 (1788)

#### 1.1. Introduction

In this famous excerpt from the *Federalist* No. 84, Alexander Hamilton warned against a federal bill of rights, fearing the attraction of legislative powers to the federal state. He anticipated that guaranteeing constitutional rights potentially applicable in other areas than those in which the federal state was delegated regulatory powers could gradually result in a usurpation of powers. His concerns were confirmed as the US Congress' power to legislate in areas pertaining to constitutional but also international human

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rights has been contested on repeated occasions since then<sup>1</sup> and as the judicial review power of the US Supreme Court has also been criticized in this respect.<sup>2</sup>

Unsurprisingly, the connection between human rights<sup>3</sup> and competences or powers<sup>4</sup> is one that has been made in other federal states as well and, more recently, within federation-like supranational structures such as the European Union (EU).<sup>5</sup> Ever since the Fundamental Rights Charter of the EU (EU FR Charter) was drafted, the question of human rights competence has become a central concern on the part of EU Member States.<sup>6</sup>

1. See the recent case law of the US Supreme Court in *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 120 S.Ct. 1740 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997). For a discussion, see Tushnet, M., "Federalism and International Human Rights in the New Constitutional Order", 47 *Wayne Law Review* (2001), pp. 841-869.

2. See e.g. US S.Ct. *Gitlow v. New York*, 268 US 652 (1925). For a discussion of the so-called incorporation doctrine, see e.g. Henkin, L., "Selective Incorporation" in the Fourteenth Amendment", *Yale Law Journal* (1963), pp. 74-88.

3. I am using "human rights", "fundamental rights" and "constitutional rights" interchangeably in this chapter. On the distinction, especially within EU and international law, see Besson, S., "Human Rights and Democracy in a Global Context – Decoupling and Recoupling", 4:1 *Ethics and Global Politics* (2011), forthcoming.

4. I am using "powers" and "competences" interchangeably in this chapter as they are both used within the context of EU law.

5. On the federal analogy in the human rights context, see also Eeckhout, P., "The EU Charter of Fundamental Rights and the Federal Question", 39 *Common Market Law Review* (2002), pp. 945-994.

6. On this question, see e.g. Blumann, C., "Les compétences de l'Union européenne en matière de droits de l'homme", 14 *Revue des affaires européennes* (2006), p. 11; Calles, Ch., "Die Charta der Grundrechte der Europäische Union – Fragen der Konzeption, Kompetenz und Verbindlichkeit", 12 *Europäische Zeitschrift für Wirtschaftsrecht* (2001), pp. 261-268; Eeckhout, P., "The EU Charter of Fundamental Rights and the Federal Question", 39 *Common Market Law Review* (2002), p. 945; Jacqué, J.P., "Droits fondamentaux et compétences internes de la Communauté européenne", in Condorelli, L. et al. (eds.), *Libertés, justice, tolérance: mélanges en hommage au Doyen Gérard Cohen-Jonathan*, (Bruxelles: Bruylant, 2004), p. 1007; Knook, A., "The Court, the Charter, and the Vertical Division of Powers in the European Union", 42 *Common Market Law Review* (2005), pp. 367-398; McGoldrick, D., "The European Union after Amsterdam: An Organisation with General Human Rights Competences?", in O'Keefe, D., Twomey, P. (eds.), *Legal Issues of the Amsterdam Treaty*, (Oxford, 1999), pp. 249-270; Pernice, I., "Europäische Grundrechte-Charta und Abgrenzung der Kompetenzen", 12 *Europäische Zeitschrift für Wirtschaftsrecht* (2001), p. 673; Weiler, J.H.H., Fries, S.C., "A Human Rights Policy for the European Community and Union: The Question of Competences", in Alston, Ph. (ed.), *The EU and Human Rights*, (Oxford: Oxford University Press, 1999), p. 147.

Originally, EU fundamental rights developed in the EU to protect Member States from EU law when the primacy of EU law required them to disapply constitutional rights or international human rights. They were meant as a result to create duties primarily for EU institutions within the scope of EU competences, and only accessorially for Member States and then only when they acted within the scope of EU law and hence as EU agents in a sense, and were not meant to bind them in areas of residual domestic competence. No general human rights competence was created for the EU outside the scope of its other competences and a general human rights competence was retained by each Member State as a result. The gradual development of new EU competences in many areas and hence of the scope of EU fundamental rights, but most importantly the recognition of EU fundamental rights in EU primary law and the Charter, have been a constant worry for Member States, however. They fear for the vertical division of powers due to the gradual erosion of their competences in areas connected to EU law where EU fundamental rights may apply due to that connection – this could be the case in areas of direct taxation, for instance,<sup>7</sup> but also the loss of their human rights competence itself. This concern has been fuelled by doctrinal calls for enhanced competence of the EU in the human rights context<sup>8</sup> and the development of the EU Commission's human rights agenda since the 1990s. As a result, the question of the human rights competence in the EU has remained a vexed one in EU law to date.<sup>9</sup>

The Lisbon Treaty has only added a further layer of complexity to the debate, but without clearly changing the status of fundamental rights in the EU. The changes it has triggered in the human rights context are important, however.<sup>10</sup> One should mention, among novelties in the sources of EU fun-

7. On the impact of EU fundamental rights in areas of residual competence of the Member States, see L. Azoulay's chapter in this volume.

8. See e.g. Weiler, J.H.H., Fries, S.C., "A Human Rights Policy for the European Community and Union", Alston, Ph., Weiler, J.H.H., "An Ever Closer Union" in Need of a Human Rights Policy", 9 *European Journal of International Law* (1998), p. 658.

9. See e.g. the debate between von Bogdandy, A., "The European Union as a Human Rights Organization? Human Rights and the Core of the European Union", 37 *Common Market Law Review* (2000), p. 1307; and Besson, S., "The European Union and Human Rights: Towards a new kind of post-national human rights institution", 6:2 *Human Rights Law Review* (2006), p. 323.

10. See e.g. Pernice, I., "The Treaty of Lisbon and Fundamental Rights", in Griller, S., Ziller, J. (eds.), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty?*, Vienna, 2008, pp. 235-256; Rideau, J., "La protection des droits fondamentaux dans l'Union européenne: perspectives ouvertes par le Traité de Lisbonne", 16 *Revue des affaires européennes* (2007-2008), pp. 185-208.

damental rights, the binding nature of the EU FR Charter *qua* primary EU law (Art. 6(1) Treaty on European Union (EUT)) and the EU's mandate to accede to the European Convention on Human Rights (ECHR) (Art. 6(2) EUT), but also, in terms of scope of EU fundamental rights, the inclusion of the 2nd and 3rd pillars into the core of EU law and the extension of the European Court of Justice's (ECJ) jurisdiction on individual annulment applications (Art. 263(4) Treaty on the Functioning of the EU (EUF)). Despite those significant changes – and their necessary impact on our subject, I will argue – the human rights competence has not been addressed by the Treaties or at least only negatively and to confirm the status quo. Indeed, the Treaties now explicitly deny the existence of such a competence for the EU in three different locations through the “standstill clauses”. Thus, Art. 6 EUT states twice that it does not extend EU competences nor affect the allocation of competences within the EU (Art. 6(1)(2) on the Charter and Art. 6(2) on accession to the ECHR) and Art. 51(2) EU FR Charter specifies that it does not extend the field of application of Union law beyond the powers of the Union or establish any new powers or tasks for the Union. This bar on any human rights competence of the EU is confirmed by the Declaration No. 1 to the Lisbon Treaty concerning the Charter of Fundamental Rights of the European Union. Finally, Art. 4(2) EUT emphasizes the importance of national identity including national constitutional identity and presumably human rights protection within EU Member States.

My thesis in this chapter is that the current legal situation with respect to the human rights competence in the EU is not only theoretically implausible but practically untenable in the long run. As a result, the EU fundamental rights regime is gradually turning from a *sui generis* transnational system into a municipal albeit federal human rights regime. My argument will be three-pronged. I will start by presenting the current human rights regime in the EU and the way in which competences are delineated therein (1.2.). In a second step, I will assess it critically: first of all, generally by reference to the way things stand after the entry into force of the Lisbon Treaty (1.3.) and, secondly, by reference to the future accession of the EU to the ECHR more specifically (1.4.).

## 1.2. The EU human rights competence

After a presentation of the origins of the current regime of human rights competence in the EU (1.2.1.), I will present the contours of that legal regime as presented (1.2.2.) before assessing its consequences (1.2.3.).

### 1.2.1. The origins

Originally, the EU founding treaties did not include references to human rights nor did they bind EU institutions or EU Member States to any international or EU human rights duties – with the exception of the equality between men and women and the principle of non-discrimination on grounds of nationality whose justification may, however, be traced back to an economic rationale.

What Member States started to fear quite early on, however, was a levelling down of their domestic and international human rights guarantees under the pressure of EU law and the effects of the primacy of EU law.<sup>11</sup> The protection of fundamental rights within EU law required by Member States was deemed therefore to ensure a minimal and negative level of protection of individuals within the scope of EU law and hence primarily against EU institutions. In response to this requirement and the statement of various ultimatums by some domestic constitutional courts, the ECJ developed EU fundamental rights *qua* general principles of EU law.<sup>12</sup>

Given its origins, the specificity of the EU fundamental rights regime lay, and still lies, both in the sources of those rights and their scope.

On the one hand, the sources of EU fundamental rights were, and largely still are, bottom-up. EU fundamental rights were and still are indirectly derived by the ECJ in its case law *qua* general principles of EU law from national constitutional traditions and Member States' international human rights duties.<sup>13</sup> This specificity has survived in spite of their recognition in the EU Treaties and in the EU Fundamental Rights Charter (see e.g. Art. 6(3) EUT; Art. 52(4) EU FR Charter). But for a few exceptions, however, EU fundamental rights are not usually deemed to include international human rights stemming from general international law.<sup>14</sup> Their scope,

11. See e.g. German *Bundesverfassungsgericht*, 29 May 1974, *Solange I*, 2 BvL 52/77 and 22 October 1986, *Solange II*, 2 BvR 197/83. See also Italian *Corte Costituzionale*, 21 April 1989, No 232 *Fragd in Foro it.*, 1990, I, 1855; and, most recently, Spanish *Tribunal Constitucional*, 13 December 2004, DTC 1/2004.

12. See e.g. ECJ, Case 6/64, *Costa v. ENEL*, (1964) ECR 585; Case 11/70, *Internationale Handelsgesellschaft*, (1970) ECR 1125; Case 4/73, *Nold v. Commission*, (1974) ECR 491; Case 44/79, *Hauer*, (1979) ECR 3727; Cases 46/87 and 227/88, *Hoechst v. Commission*, (1989) ECR 2859.

13. See e.g. Besson, S., “The European Union and Human Rights”.

14. See on the limits of international human rights law in EU law, Ahmed, T., De Jesús Butler, I., “The European Union and Human Rights: An International Law Per-

on the other hand, was, and largely still is, limited to the implementation<sup>15</sup> of or derogation<sup>16</sup> to EU law. Those rights were, and still are, only meant to bind EU institutions, and accessorially EU Member States, only within the material scope of EU law.<sup>17</sup> EU fundamental rights are not meant to apply to areas which fall within the jurisdiction of the national legislature.<sup>18</sup> This characteristic has also survived despite the recognition of fundamental rights in the EU Treaties and in the EU Fundamental Rights Charter (see e.g. Art. 6(1) EUT; Art. 51(1) EU FR Charter).

In those respects, the EU human rights regime is a unique regime to date and may be characterized as a transnational fundamental rights regime. It is indeed situated between a municipal fundamental rights regime aimed at all institutions including the local ones in all areas of central and local law (e.g. that of a federal state like Switzerland), on the one hand, and an international human rights regime setting minimal standards aimed only at domestic institutions (e.g. the ECHR or United Nations human rights conventions), on the other.

The reason for the specificity of the EU human rights regime lies in the absence of a direct general human rights competence of the EU. Nowadays, the EU has some specific human rights competences (e.g. Art. 19 EUFT in the field of anti-discrimination law) and also a duty to protect and respect human rights indirectly within the scope of its other competences (e.g. human rights protection in the asylum context). As of late, the ECJ has even recognized the possibility to require Member States to respect EU law and hence EU fundamental rights in the context of their retained competences, given the constant reduction of areas of purely internal competence and Member States' duties of loyalty (Art. 4(3) EUT).<sup>19</sup> What the EU does not have, however, is the direct and general power to legislate or adopt measures to respect, protect and promote human rights outside the

spective"; 17/4 *European Journal of International Law* (2006), pp. 771-801.  
<sup>15</sup> See ECJ, Case C-5/88, *Wachauf*, (1989) ECR 2609; Case C-101/01, *Lindqvist*, (2003) ECR I-12971; Case C-275/06, *Promusicae*, (2008) ECR I-271.  
<sup>16</sup> See ECJ, Case C-260/89, *ERT*, (1991) ECR I-2925; Case C-309/06, *Marks & Spencer*, (2008) ECR I-2283.  
<sup>17</sup> See ECJ, Case 36/75, *Rutili*, (1975) ECR 1219; Case 222-84, *Johnston*, (1986) ECR I 651; Case 22/86, *Heylens and Others*, (1987) ECR 4097.  
<sup>18</sup> See ECJ, Case C-60 et 61/84, *Cinéthèque*, (1985) ECR 2605; Case C-144/95, *Maurin*, (1996) ECR I-2909, Paras. 12-15; Case C-299/95, *Kremzow*, (1997) ECR I-2629, Paras. 15-18; Case C-328/04, *Vajnai*, (2005) ECR I-8577.  
<sup>19</sup> See e.g. ECJ, C-60/00, *Carpenter*, (2002) ECR I-6279, Paras. 43-4; ECJ, C-135/08, *Rotmann*, (2009) ECR 0000.

scope of its other competences in the EU Treaties. This applies as much to an explicit as to an implied human rights competence.<sup>20</sup>

The reason behind the absence of an EU general human rights competence goes back to the Member States' resistance to the EU in the human rights context and to their original motivation to set human rights limitations on the EU but not on themselves. EU human rights were conceived therefore and from the very beginning as negative and defensive.

That resistance was, and still is, motivated by different reasons. The primary one is of course the threat to their own human rights competence. If the EU were delegated a general and direct human rights competence, that competence would work out very differently to that of other international human rights institutions. The EU is a political entity with law-making powers; EU law benefits from immediate validity, absolute primacy and direct effect in domestic legal orders; and, finally, the ECJ's jurisdiction is direct and not subsidiary and its decisions are binding and vested with the same effects as EU law. Actually, given the mutual relationship between human rights and democratic sovereignty, Member States have always insisted on retaining their human rights competence. A loss of competence in the human rights context would also therefore imply a loss in democratic sovereignty and this would signal a further step in the development of the EU's political autonomy.<sup>21</sup> Another explanation may lie in the competition with the Council of Europe, given the original division of labour with the EU post-1945. The jealousy of the Council of Europe has actually been perceptible at every stage of the development of EU fundamental rights and has triggered various truces and agreements between the two organizations over time.<sup>22</sup>

### 1.2.2. The legal regime

The origins of the current legal regime of the human rights competence in the EU being clarified, it is time to turn to a presentation of that regime. It is useful to distinguish between the internal competence (i) and the

<sup>20</sup> See ECJ, *Opinion 2/94*, (1996) ECR I-1759, Paras. 27-30; ECJ, Case C-249/96, *Grant v. South-West Trains*, (1998) ECR I-62, Para. 45.  
<sup>21</sup> This is something I have described elsewhere as the third stage in the development of the EU fundamental rights regime in Besson, S., "Decoupling and Recoupling".  
<sup>22</sup> See e.g. De Schutter, O., "The Two Europes of Human Rights: The Emerging Division of Tasks between the Council of Europe and the European Union in Promoting Human Rights in Europe", 14 *Columbia Journal of European Law* (2008), pp. 509-561.

external competence (ii.). The internal competence of the EU in the human rights context pertains to what the EU may or may not do with respect to human rights within its territorial boundaries, whereas the external competence pertains to what the EU may or may not do outside its territorial boundaries.

### 1.2.2.2. The internal competence

In this section, I will discuss the scope, content, type and allocation of the internal competence. Those categories of competences match the general categories used in the context of the discussion of the vertical division of powers between the EU and its Member States.

There are no clear statements in the Treaties or the Charter as to how the human rights competence is organized in the EU. Given the principle of conferred powers (Art. 4(1) and Art. 5(1) and (2) EUT), this is a crucial element in favour of the absence of such a general and direct human rights competence. Of course, there are negative statements of general competence (see the “standstill clauses” of Art. 6 EUT and Art. 51 EU FR Charter) and a few positive statements of specific human rights competences as explained below.

#### 1.2.2.2.1. The scope

EU human rights competences may be divided into direct and indirect competences depending on whether they have their own scope or whether they apply within the scope of its other material competences. In this section, the human rights competences discussed are direct competences as they are the controversial ones.

A few words on indirect competences are in order, however. The EU has indirect human rights competences when exercising other competences. This is the case, for instance, in the context of asylum law, which ought to be enacted and implemented in full respect of EU fundamental rights. There is still uncertainty about whether those other competences of the EU should have been acted upon for EU fundamental rights to apply and provide the EU an indirect competence. Following Advocate-General Eleanor Sharpston, I suggest we should understand indirect competences as meaning that “provided that the EU had competence (whether exclusive or shared) in a particular area of law, EU fundamental rights should protect

the citizen of the EU even if such competence has not yet been exercised”<sup>23</sup>. If the EU has human rights duties, those should require the EU to act upon any competences with which it is vested and this applies even though it has not yet adopted any measures on that basis. It is no longer free to do so or not to do so, as it were.

#### 1.2.2.2.2. The content

EU competences may be general or specific in content. In the human rights context, as well, it is useful to distinguish between the general human rights competence of the EU and specific human rights competences of the EU. The former refer to human rights in general, while the latter pertains to specific human rights such as freedom of movement or the right not to be discriminated against.

With respect to the former, there is no explicit mention of a general human rights competence in the EU Treaties. Quite the contrary, if one refers to the standstill clauses of Art. 6(1) and (2) EUT and Art. 51(2) EU FR Charter. Moreover, the ECJ actually denied the existence of a general human rights power in its famous *Opinion 2/94*.<sup>24</sup> Recently, however, the Preamble of the Regulation 168/2007 pertaining to the EU Fundamental Rights Agency seems to indicate that, on the contrary, Art. 352 EUT may be used to legislate in the human rights context given that human rights can be found

23. Advocate-General Sharpston, Case C-34/09, *Zambrano*, not yet published, Para. 163.  
24. See ECJ, *Opinion 2/94*, Paras. 27-30: “27. No Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field. 28. In the absence of express or implied powers for this purpose, it is necessary to consider whether Article 235 of the Treaty may constitute a legal basis for accession. 29. Article 235 is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty. 30. That provision, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community. On any view, Article 235 cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose.” For contrasting views on the *Opinion 2/94*, see e.g. Jacqué, J. P., “Droits fondamentaux et compétences internes de la Communauté européenne”; Weiler, J. H. H. and Fries, S. C., “A Human Rights Policy for the European Community and Union”.

among the EU's objectives according to the Preamble to the EUT and Art. 2 EUT.<sup>25</sup> The question remains open as a result.

By contrast, there are many specific human rights competences of the EU scattered in the Treaties. They are largely piecemeal, as they have grown within specific areas of EU activity. Furthermore, their material scope is very broad and they may as a result apply in an indeterminate number of cases provided this is within the scope of EU law generally. Thus, one may mention Art. 19 EUFT in the context of anti-discrimination law or Art. 157(3) EUFT in the context of gender equality. Again, even though Art. 19 EUFT foresees that anti-discrimination law may not allow EU institutions to reach out beyond the limits of the powers conferred to them by the Union, the practice has shown how far-reaching the directives and the case law on racial or age discrimination have been and how they have gradually moulded Member States and EU actions into new directions. This has occurred in particular through the ECJ's case law and its interpretations of the various anti-discrimination directives, first one by one and then by reference to their mutual coherence.

#### 1.2.2.2.3. The type

EU competences can be explicit, implied or subsidiary. In the human rights context, as well, it is useful to distinguish between the general and the specific human rights competences of the EU.

With respect to the former, there is no explicit general human rights competence in the EU in the current state of the EU Treaties. Quite the contrary, if one refers to the standstill clauses of Art. 6 (1) and (2) EUT and Art. 51(2) EU FR Charter. In combination with the idea that the principle of conferred powers is most compatible with explicit competences, the standstill clauses seem to deny the existence of an explicit general human rights competence of the EU. The same may be said as a result of an implied general competence of the EU. There has been a long-standing controversy, however, with respect to the existence of a subsidiary power of the EU in the human rights context. The ECJ denied the existence of such a power in its famous *Opinion 2/94* and confirmed this again in the *Grant* case.<sup>26</sup>

25. Council Regulation 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ L 53, 22.2.2007, Para. 31.

26. See ECJ, *Opinion 2/94*, Para. 30. See also ECJ, Case C-249/96, *Grant v Southwest Trains Ltd*, Para. 45. However, although respect for the fundamental rights which

Recently, however, the Preamble of Regulation 168/2007 pertaining to the EU Fundamental Rights Agency seems to indicate that, on the contrary, Art. 352 EUFT can be used to legislate in the human rights context, given that human rights can be found among the EU's objectives according to the Preamble to the EUT and Art. 2 EUFT.<sup>27</sup>

As to specific human rights competences, some may be explicit while others are, albeit more rarely given the sensitive nature of the area, implied. Some explicit human rights competences were presented in the previous section.

#### 1.2.2.2.4. The allocation

EU competences can be exclusive, shared or complementary (Arts. 2-6 EUFT). It is interesting to assess whether EU human rights competences, whether general or specific and explicit, implied or subsidiary, are exclusive, shared or complementary competences.

Regarding the general human rights competence of the EU, its controversial nature makes it highly unlikely that it would be anything else than a complementary competence exercised both by Member States and the EU, or at least a shared competence exercised in a complementary way. This can be explained by reference to the ways in which human rights bind public authorities at all levels of governance.

The exact allocation of specific human rights competences will vary from one competence to the other. Interestingly, human rights are not mentioned in the different lists of exclusive, shared or complementary competences of Arts. 3-6 EUFT either generally or specifically. If one takes the example of Art. 19 EUFT, however, different kinds of allocation surface from the text of the provision. Para. 1 seems to refer to a shared competence, while the second paragraph seems to imply a complementary competence.

form an integral part of those general principles of law is a condition of the legality of Community acts, those rights cannot in themselves have the effect of extending the scope of the Treaty provisions beyond the competences of the Community (see, inter alia, on the scope of Article 235 of the EC Treaty as regards respect for human rights, Opinion 2/94 (1996) ECR I-1759, paragraphs 34 and 35)."

27. Regulation 168/2007, Para. 31: "31) The contribution made by the Agency to ensuring full respect of fundamental rights in the framework of Community law is likely to help achieve the Community's objectives. With regard to the adoption of this Regulation, the Treaty does not provide for powers other than those set out in Article 308 [Art. 352 EUFT]." (emphasis added).

### 1.2.2.3. The external competence

EU external competences apply to activities of the EU that occur outside its territorial boundaries, i.e. that of the territories of its Member States. Internally, the situation is relatively complex as explained previously. It is actually even more difficult to find clear answers to whether there is an external human rights competence of the EU and what its scope, content, type and allocation could be.

What is clear at any rate is that the EU has the duty to respect and promote human rights within the scope of its other competences, including external competences whether explicit, implied or subsidiary, whether exclusive, shared or complementary and whether they have been exercised yet or not. This is an indirect external competence in the human rights context. With the full inclusion of the 2nd pillar into the scope of EU law, it has become even clearer than before that when the EU is engaged in external activities on grounds of external competences, it is bound by EU fundamental rights. This implies, of course, that EU fundamental rights are granted extraterritorial effects and in cases where the EU is exercising effective control outside of its territory.<sup>28</sup> This has not yet been settled by the case law but there seems to be no reason why this would not be the case. Of course, the indirect human rights competence will vary depending on whether the direct external competence it complements is exclusive, shared or complementary.

What has not been established, however, besides a few mentions of human rights within the objectives of the EU as an international actor (e.g. Art. 3(5) EUT), is that the EU has a direct human rights competence in its external relations. This is clearly not the case for a general and explicit external human rights competence. As there is no clear general international human rights competence of the EU, it is difficult to argue in favour of a general and implied external human rights competence or a subsidiary one – unless one draws a subsidiary one from the general and subsidiary internal human rights competence identified in the Preamble of Regulation 168/2007. Confirmation of the latter hypothesis may be found in the fact that the EU is gradually binding itself directly to international human rights law (e.g. the UN Convention on the Rights of Persons with Disability) the

28. This could be done along the lines of the extraterritorial effects of the ECHR, e.g. even though the ECHR is an external source of human rights for its Member States unlike EU fundamental rights for the EU. See e.g. ECtHR, Chamber, *Al-Saadon and Mufdhi v. United Kingdom* (No. 61498/08), 2 March 2010.

way Member States are.<sup>29</sup> One may consider safely, however, that the EU has direct and specific external human rights competences. This would be the case in the field of association agreements, for instance. There may also be direct and specific external human rights competences that are not explicit, but implied from specific internal ones. This may be the case in the anti-discrimination law area, for instance. The question of their exclusive, shared or complementary nature is crucial in any case given the international human rights duties of EU Member States and their extraterritorial effects, on the one hand, and their greater residual competences in foreign affairs, on the other.

In the human rights context, however, it has become fashionable to oppose the external human rights competence of the EU to the internal one.<sup>30</sup> The argument has always been indeed that the EU could paradoxically require more from third countries (e.g. through human rights conditionality<sup>31</sup> or democracy and human rights programmes<sup>32</sup>) in terms of human rights than from its own Member States. And this has been considered an unacceptable discrepancy in its human rights policy, and even arguably in its competence. There is less in that distinction than it first appears, however. First of all, as we have just seen, by contrast to the internal one, the actual existence of an external human rights competence, or at least of a direct one, is less clear than claimed.<sup>33</sup> The human rights policy that is usually mentioned refers to human

29. See e.g. De Schutter, O., De Jesta Butler, L., "Binding the EU to International Human Rights Law", 27 *Yearbook of European Law* (2008), pp. 277-330, referring to the UN Convention on the Rights of Persons with Disabilities.

30. See e.g. Clapham, A., Cassese, A., Weiler, J. (eds.), *Human Rights and the European Community*, Baden-Baden: Nomos 1991; Weiler, J.H.H., Fries, S.C., "A Human Rights Policy for the European Community and Union", Alston, Ph. and Weiler, J., "An Ever Closer Union in Need of a Human Rights Policy", Williams, A., *EU Human Rights Policies. A Study in Irony*, Oxford: Oxford University Press, 2004, pp. 111-127.

31. See e.g. Bancls, L., *Human Rights Conditionality in the EU's International Agreements*, Oxford: Oxford University Press, 2005; Fierro, E., "Legal Basis and Scope of the Human Rights Clause in EC Bilateral Agreements", 7 *European Law Journal* (2001), pp. 41-68; Leino, P., "European Universalism? The EU and Human Rights Conditionality", 24 *Yearbook of European Law* (2005), pp. 329-383.

32. See e.g. Council Regulation No. 1257/96 of 20 June 1996 concerning humanitarian aid, OJ 1996 L 163 p. 1; or Regulation No. 1889/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide, OJ 2006 L 386, p. 1. See also Balfour, R., "Principles of Democracy and Human Rights: a Review of the European Union's Strategies towards its Neighbours", in Lucarelli, S., Manners, I. (eds.), *Values and Principles in European Union Foreign Policy*, London, 2006, pp. 114-129.

33. See e.g. Arnulf, A., "Left to its Own Devices? Opinion 2/94 and the Protection of Fundamental Rights in the European Union", in Dashwood, A., Hillion, C. (eds.), *The General Law of EC External Relations*, London, 2000, pp. 61-78.

rights protection in third countries and by those third countries' institutions, and not by the EU itself. Not everything that is called a human right in the EU's external relations is a human right *stricto sensu*, i.e. a source of direct duties for EU institutions or EU Member States.<sup>34</sup> Moreover, there may be differences in policy between external and internal activities of the EU, but this does not yet reflect the existence or a lack of a normative competence. And, finally, it is unclear why a difference between human rights and duties between the external and the internal sphere of competence is unjustified. This is certainly the case on the part of an international organization. And even as a federal state-like entity, the state analogy does not necessarily warrant the same level of human rights protection on the inside and the outside.

### 1.2.3. The consequences

To understand the consequences of the complex regime of human rights competence in the EU, it is useful to draw again on the distinction between direct and indirect human rights competence.

The upshot of the existing legal regime of EU fundamental rights and of the complex human rights competence of the EU is that the EU has no direct human rights competence. This applies at least to an EU human rights competence of a general and explicit type, but not to specific ones, as the EU is vested with specific human rights competences. This is the case in the context of anti-discrimination law, for instance. Outside of its specific competences, the EU may not legislate on human rights. Nor may it adopt specific policy measures outside the scope of its competences. The EU may not, moreover, control the activities of its institutions or of its Member States outside the scope of its competences. There are elements indicating that there may be a general human rights competence of the EU of a subsidiary type, but this has not been confirmed by the Treaties and is arguably invalidated by the Lisbon Treaty's standstill clauses.

Of course, it has indirect human rights competences when exercising other (shared or exclusive) competences. This is the case, for instance, in the context of asylum law. In that context, the EU has negative and positive human rights duties. They are duties to respect, protect and implement human rights. These duties also apply to Member States when they implement or derogate to EU law. As a result, EU fundamental rights have become a condition of legality of EU law. Their respect may trigger judicial control

<sup>34.</sup> Hence, the widespread use of the term "human rights policy" in this context.

of EU law by the ECJ. They may also, however, imply adopting certain policies in the human rights context provided they fall into the scope of its other competences. And this applies whether the EU has already exercised its competences or not.<sup>35</sup> Note that each type of competence involved is relevant when defining the proper scope of protection by fundamental rights. Thus, implementing EU fundamental rights within the material scope of the EU's shared competences implies granting Member States' own fundamental rights a complementary role.<sup>36</sup>

Of course, this regime leaves important gaps in practice. This is the case with respect to cross-cutting human rights issues. One may think, for instance, of child protection in the EU whose scope falls both within domestic and EU competences depending on the situation.

## 1.3. A general critique

In this section, I argue that the opposition between the EU's indirect human rights duties within the EU's spheres of competence, on the one hand, and a direct human rights competence of the EU of a general kind, on the other, are neither theoretically plausible nor practically tenable.

### 1.3.1. The theoretical critique

There are two main critiques one may venture from a theoretical perspective to the current legal status of the human rights competence in the EU.

The first theoretical critique pertains to the relationship between human rights duties and human rights competences. It is a well-taken argument among contemporary human rights theorists that human rights can only be understood fully if one understands their supply side, i.e. their correlative duties. One often assumes that competences are a prior condition for duties to arise, but it seems, on the contrary, that they are a normative consequence of human rights and the corresponding duties. Rights give rise to specific duties that in turn may imply creating competences. That is at least the case in a unitary political entity where human rights duties may trigger, in certain circumstances, the creation of new competences or at least the

<sup>35.</sup> See in the same direction, Advocate-General Sharpston, Case C-34/09, *Zambrano*, Para. 165.

<sup>36.</sup> See Advocate-General Sharpston, Case C-34/09, *Zambrano*, Para. 168.



re-allocation of existing competences. In a federal polity, the question of the vertical attraction of competences based on human rights duties of the federal entity would be raised in this context.

In any case, what is certain is that human rights and their corresponding duties require a clarification of the allocation of competences in each specific case. Human rights are indeterminate in their application in the sense that the corresponding duties are numerous and will be specified depending on the circumstances at hand. Every time a duty is specified, however, competences will have to be clarified. They will also have to be acted upon.<sup>37</sup> This is particularly evident in the case of positive human rights duties. This very difficulty is at the core of the current negotiations for accession to the ECHR (I will come back to this question in the third section of this chapter).

A second theoretical critique pertains to the relationship between human rights and democracy, and more generally between human rights and political legitimacy. It is a well implanted approach in political theory to see human rights and democracy in a mutual relationship and as being grounded in political equality which they both contribute to protect. It would be wrong therefore to think of human rights as distinct from citizenship or, at least, as a mere consequence of citizenship *qua* political status. As a matter of fact, the way in which EU citizenship is defined in Art. 19 EUFT confirms the mutual relationship between EU (fundamental) rights and citizenship. This is actually what distinguishes EU fundamental rights from international human rights such as the ECHR or UN human rights regimes: they are the rights of the citizens of a new polity and not only of the subjects of many different polities.<sup>38</sup> And this is actually confirmed by the recent case law on EU citizenship that gradually turns citizenship, to quote Advocate-General Sharpston, into more than “the non-economic version of the same generic kind of free movement rights”<sup>39</sup> and makes it, at last, the “fundamental status of the nationals of Member States”.<sup>40</sup>

37. See of the same opinion, Advocate-General Sharpston, Case C-34/09, *Zambrano*, Para. 165.

38. See Advocate-General Maduro, Case C-380/05, *Centro Europa*, (2008) ECR I-349, Paras. 18-19.

39. Advocate-General Sharpston, Case C-34/09, *Zambrano*, Para. 3. See also ECJ, C-135/08, *Rottmann*.

40. Advocate-General Sharpston, Case C-34/09, *Zambrano*, Para. 170.

The question, however, is whether EU fundamental rights can remain the rights of the citizens of a non-municipal polity in the long run. I have argued elsewhere that they cannot and that there are already signs of the EU's transformation into a municipal polity albeit a federal one.<sup>41</sup> These transformations and especially the human rights-based transformations are actually reminiscent of the ones that took place in the United States from the 18th century onwards.

This close relationship between human rights and democratic sovereignty explains why the more ineluctable the transformation towards a municipal polity with its own human rights competence becomes, the more resistant Member States become to the idea and the more standstill clauses they insert into the Treaties.<sup>42</sup> Interestingly, and this confirms the trend, the vexed question of the human rights competence of the EU is resurfacing now that the Lisbon Treaty has entered in force. The fact that the United Kingdom, Poland and the Czech Republic have opted out of the EU Fundamental Rights Charter when it became binding in 2009 shows the resistance there is against EU law becoming a direct source of human rights and hence potentially attracting a human rights competence.<sup>43</sup> Earlier critiques of the Charter pre-2000 already signalled some Member States' fears. Such resistance is in contradiction to the development of the practical situation, however.

### 1.3.2. The practical critique

The current legal status of the human rights competence in the EU is not only theoretically problematic, but practically untenable in the long run. There are three critiques one may venture in this respect.

The first practical critique pertains to the gradual but steady development of the human rights component of all competences of the EU. The EU has the duty indeed to respect and promote human rights in all its fields of competences. This is also referred to as the indirect human rights competence or functional human rights competence. This occurs primarily through positive human rights duties, and in particular through duties to legislate

41. See Besson, S., “Decoupling and Recoupling”.

42. See the discussion in von Bogdandy, A., “The European Union as a Human Rights Organization?”; and Besson, S., “The European Union and Human Rights”.

43. Declaration No. 1 to the Lisbon Treaty (2007).

in other fields of EU law but in a way that respects and promotes human rights.

The second critique pertains to the increasing human rights impact not only on EU competences themselves, but on Member States' retained powers. Those duties are in principle immune to EU law. However, through a conjunction of factors, the impact of EU fundamental rights on Member States residual domestic competences is increasing. One may mention, for instance, the constant reduction of the scope of 'purely internal situations' given that some kind of transnational element and a past or future occasion of free movement can almost always be found.<sup>44</sup> One should also mention the increasing insistence on Member States' duty of loyalty (Art. 4(3) EUT) that requires that when exercising their retained competences, Member States must nevertheless comply with EU law<sup>45</sup> and contribute to the overall development of EU law.<sup>46</sup> And this also includes compliance with EU fundamental rights.

A third practical critique refers to the gradual development of EU specific human rights competences. One may multiply the examples of this trend and it suffices to mention anti-discrimination law (Art. 19 EUFT). In that area, the EU has negative and positive duties and may legislate to protect specific human rights. As those specific human rights competences have a largely indeterminate scope, the EU may gradually expand its scope of competence. One may think of the scope of age discrimination, for instance, which is specified but also expanded by the ECJ case after case.

With time, all three factors contribute to the consolidation in practice of a general and direct human rights competence of the EU. This may also be coined the federalization<sup>47</sup> of EU fundamental rights in practice. The phenomenon has actually been confirmed, albeit discretely, by the creation

44. See ECJ, Case C-60/00, *Carpenter*, (2002) ECR I-6279, Paras. 43-4. See also ECJ, Case C-135/08, *Rotmann*, Para. 42. And see most recently Advocate-General Sharpston, Case C-34/09, *Zambrano*, Paras. 69-74, 75-80 and 91-97. See also the application in ECJ, Case C-457/09, *Chartrij* (pending).

45. See ECJ, Case C-438/05, *Viking Line*, (2007) ECR I-10779, Para. 40; Case C-544/03 et C-545/03, *Mobistar*, (2005) ECR I-7723, Para. 27.

46. See Advocate-General Maduro, Case C-380/05, *Centro Europa*, Paras. 18-19.

47. This term is borrowed from Advocate-General Sharpston's opinion in the Case C-34/09, *Zambrano*, Para. 173. See also Eeckhout, P., "The EU Charter of Fundamental Rights and the Federal Question"; Spaventa, E., "Federalisation versus Centralisation: Tensions in Fundamental Rights Discourse in the EU", in Dougan, M., Currie, S. (eds.), *50 Years of the European Treaties: Looking back and Thinking forward*, Oxford, 2009, pp. 343-364.

of the EU Fundamental Rights Agency in 2007 and the fact that the legal basis invoked in Regulation 168/2007 was Art. 352 EUFT, i.e. the flexibility clause and a subsidiary general human rights competence of the EU.<sup>48</sup> Furthermore, with time, the EU is also gradually binding itself directly to international human rights law (e.g. the UN Convention on the Rights of Persons with Disability) the way Member States are.<sup>49</sup> This demonstrates the existence of an implied or subsidiary general external human rights competence that is derived from an internal one.

#### 1.4. The human rights competence after the EU's accession to the ECHR

In this section of the argument, I would like to move to a second and more specific critique of the current status of the human rights competence in the EU. This critique pertains to the consequences of the EU's accession to the ECHR. After a brief reminder of the status of the ECHR within the EU legal order, I will present the accession mandate and process before turning to the question of the human rights competence after accession.

##### 1.4.1. The ECHR in the EU legal order

The ECHR is a source of fundamental rights in EU Member States. Indeed, according to the ECHR is one of the conditions of accession to the EU (Art. 49 EUT). This actually explains the special significance of the ECHR in the EU and in particular in the ECJ's case law.<sup>50</sup> This being said, the ECHR is not a source of fundamental rights for the EU and in EU law because the EU is not yet a party to the ECHR.

Of course, the ECHR is part of EU fundamental rights *qua* general principles of EU law (Art. 6(3) EUT; Art. 52 and 53 EU FR Charter).<sup>51</sup> This occurs through the ECJ case law and enables the ECJ to interpret the ECHR in a way that respects the objectives of EU law.<sup>52</sup> Because of the differences in nature between the two legal orders, but also between the role and

48. Regulation 168/2007 Preamble, Para. 31. See, however, Regulation 168/2007, Art. 3.

49. See De Schutter, O., Butler, I., "Binding the EU to International Human Rights Law".

50. ECJ, Case C-36/02, *Omega Spielhallen*, (2004) ECR I-9609.

51. ECJ, Case 36/75, *Rutili*, (1975) ECR 1219.

52. See e.g. ECJ, Case C-465/07, *Elgafaji*, (2009) ECR I-9.

jurisdiction of the two European courts, divergences in interpretation of the same rights in the two legal orders or even of the same rights in the ECHR remain possible.<sup>53</sup> Horizontal clauses in the EU FR Charter (Art. 52(3) and Art. 53) and in the ECHR (Art. 53) are meant to minimize the occurrence of such divergences, but in practice those two clauses remain very difficult to apply. The possibility of divergences has constituted a difficulty for Member States bound by both courts' case law and, more generally, for the coherence of fundamental rights in Europe. Recently, however, both courts have developed a constructive dialogue that has reduced the possibility of conflicting jurisprudence.<sup>54</sup> The accession mandate of Art. 6(2) EUT should also help alleviate potential conflicts between the two courts in the future.

#### 1.4.2. The accession mandate

With the entry into force of the Lisbon Treaty, EU institutions have received a mandate to negotiate accession with the EU in the form of Art. 6(2) EUT.

Accession has been a project of EU institutions, and especially the Commission, since the 1970s. Different projects have failed successively, however, and in 1996 the ECJ eventually rejected the possibility for lack of competence of the EU in its famous *Opinion 2/94*.<sup>55</sup> Efforts were then reported on the development of the EU's own catalogue of fundamental rights: the EU Fundamental Rights Charter that was adopted in 2000 and which finally became binding in 2009.

Shortly after the entry into force of the Lisbon Treaty, negotiations with the Council of Europe started and the aim is to complete them by June 2011. Of course, the existence of a mandate is no guarantee of success. The accession treaty, if adopted – and this requires the Council's unanimity – will have to be ratified by all EU Member States (Art. 218(6)

53. See e.g. ECJ, Case C-206/91, *Koua Poiriez*, (1992) ECR I-668; Case C-138/79, *Roquette Frères*, (1980) ECR 3333; Case C-17/98, *Emesa Sugar*, (2000) ECR I-665. See Callewaert, J., "The European Convention on Human Rights and European Union Law: A Long Way to Harmony", 6 *European Human Rights Law Review* (2009), pp. 768-783.

54. See e.g. for the ECJ: ECJ, *Elgafaji*, and for the ECHR, *Bosphorus v Ireland* (n. 45036/98) EHRR 2005-VI; *Kokkelvisserij v. The Netherlands* (n. 13645/05) EHRR 2009.

55. See e.g. De Schutter, O., Lejeune, Y., *L'adhésion de la Communauté à la Convention européenne des droits de l'homme. A propos de l'avis 2/94 de la Cour de justice des Communautés européennes*, Cahiers de droit européen, Vol. 5-6, (1996), pp. 555-606.

and (8) EUT). EU institutions have divergent opinions on the difficulties accession raises and Member States are not united either.<sup>56</sup>

Numerous and quite intractable questions remain to be addressed. Declaration No. 2 to Art. 6(2) of the Treaty on the European Union and Protocol No. 8 to the Lisbon Treaty relating to Art. 6(2) EUT identify some of them.<sup>57</sup> It would be beyond the scope of the present chapter to address them all, however.<sup>58</sup> I will take one of them that constitutes, I will argue, one of the major obstacles to accession: the question of the human rights competence of the EU.

#### 1.4.3. The competence question

The human rights competence should lie at the core of discussions about the EU's accession to the ECHR. The accession, if it succeeds, will indeed definitely affect the current legal regime of that competence in the EU. After a presentation of the status quo proposal that is propounded officially, I turn to the theoretical plausibility of that proposal before discussing its practical feasibility.

##### 1.4.3.1. The status quo proposal

The EU and the Member States have specified in many places in the Treaties that the EU's accession to the ECHR will have no impact on EU competences:

56. For the ECJ's position, see the document dated 5 May 2010: [http://euria.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention\\_en\\_2010-05-21\\_12-10-16\\_272.pdf](http://euria.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en_2010-05-21_12-10-16_272.pdf).

57. See also the results of the Council of Europe's Steering Group on Human Rights entitled "Technical and Legal Issues of a Possible EC/EU Accession to the European Convention on Human Rights", Strasbourg, 28 June 2002, Doc CDDH (2002)010 Addendum 2.

58. See e.g. a detailed and interesting discussion of the various issues, in De Schutter, O., "L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme: feuille de route de la négociation", *Revue trimestrielle des droits de l'homme* (2010), p. 535. See also Jacobs, F. G., "The European Convention on Human Rights, the EU Charter of Fundamental Rights and the European Court of Justice: the Impact of European Union Accession to the European Convention on Human Rights", in Pernice, J., Kokott, J., Saunders Ch. (eds.), *The Future of the European Judicial System in a Comparative Perspective*, Baden-Baden, 2006, pp. 291-296; Malenovsky, J., "L'enjeu délicat de l'éventuelle adhésion de l'Union européenne à la Convention européenne des droits de l'homme", 113 *Revue générale de droit international public* (2009), pp. 753-784; Verstichel, A., "European Union Accession to the European Convention on Human Rights", in Lemmens, P., Vandenhole, W. (eds.), *Protocol n° 14 and the Reform of the European Court of Human Rights*, Antwerp, 2005, pp. 123-144.

As a result, the competence question is not one of the core issues on the official negotiation agenda; it is deemed to be untouched by the accession.

This is stated in one of the standstill clauses of Art. 6 EUT, but also in Art. 2 of Protocol No. 8 to the Lisbon Treaty relating to Art. 6(2) EUT. This had already been stated in the Final Report of Working Group II in 2002.<sup>59</sup> Accession may neither extend EU competences in the human rights context nor impact on the vertical division of competences between the EU and its Member States. The EU would only be bound by ECHR duties to the extent that it has competence to act in that context according to EU law.<sup>60</sup>

My argument is that this status quo proposal is neither theoretically plausible nor practically tenable and that, by not being clearly located at one level, the human rights competence in the EU will become a core difficulty in the European Court of Human Rights' (ECtHR) monitoring of the EU. And this in turn will bring the issue of vertical competence allocation within the EU in general back to the fore and generate a new *contentieux de la compétence* before the ECJ, thus leading eventually to important changes in the EU human rights regime.

#### 1.4.3.2. Theoretical plausibility

As I have argued before, human rights and human rights duties may require the exercise of existing competences and at least the clarification of the

59. Final Report of Working Group II (2002), 13: "The Group agrees on the central importance of the fact that accession by the Union to the ECtHR – like incorporation of the Charter – will in no way modify the allocation of competences between the Union and the Member States. According to the Group's common understanding, the legal 'scope' of the Union's accession to the ECHR would be limited to issues in respect of which the Union has competence; it would thus not lead to any extension of the Union's competences, let alone to the establishment of a general competence of the Union on fundamental rights. Accordingly, 'positive' obligations of the Union to take action to comply with the ECHR would arise only to the extent to which competences of the Union permitting such action exist under the Treaty. The Group recommends the use of certain technical devices in order to clarify with certainty that the Union's accession to the ECHR does not modify the allocation of competences. Firstly, a provision clarifying this point could be included in the possible legal basis authorising accession. Secondly, upon accession, a statement stressing the Union's limited competences in the area of fundamental rights could be included in a provision in the accession treaty and/or in an accompanying declaration made by the Union. Thirdly, a mechanism allowing the Union and a Member State to appear jointly as 'co-defendants' before the Strasbourg Court could ensure that that Court would not make any ruling on the allocation of competences between the Union and the Member States." (emphasis added).

60. See also for this position, De Schutter, O., "L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme".

allocation of duties, on the one hand, and may even require a new competence or a re-allocation of competences in certain cases, on the other. If this is the case, it is even more likely when the human rights and corresponding duties stem from an international agreement such as the ECHR. The internal allocation of competences may indeed not be invoked as a reason for violating one's international duties (Art. 27 Vienna Convention on the Law of Treaties).

As a result, the EU could be held liable for violations of the ECHR not only in the exercise of its own direct or indirect human rights competences, but also in the scope of competences it has not exercised, on the one hand, or even in the scope of competences that should have been allocated differently, on the other.<sup>61</sup> The scope and content of human rights negative duties, but most importantly positive duties, cannot be determined in advance but only in concrete circumstances. It cannot therefore match closely existing EU competences or at least exercised EU competences. Or else this would imply that EU duties under the ECHR would be pro forma duties at the most: the EU could only be bound under the ECHR by human rights duties it already has under existing EU law. This proposal would imply, de facto at least, maintaining the *Bosphorus* presumption of equivalence regarding the allocation of competences within the EU and this would mean maintaining the special status of the EU among parties to the ECHR.

In case the perpetuation of the *Bosphorus Sonderfall* is rejected by the negotiators, the EU will have to respond before the ECtHR for violations of the ECHR related to the lack or non-exercise of its competences. The EU's accession to the ECHR implies holding it accountable in the future to external human rights standards the way its Member States have been so far. None of the federal states that are parties to the ECHR have been able to maintain such a strict separation between human rights duties of the federal state and local states' competences. ECHR violations have sanctioned the lack of exercise of competences, but also, in certain cases, required a re-allocation of competences that matches the requirements of the Convention.<sup>62</sup> Of course, as in the case of State Parties, the way in which a violation of the ECHR by the EU is remedied is left to domestic discretion. It will have to be dealt with somehow, however, and this will bring the question of the human rights competence in the EU back into the debate.

61. I am not arguing, however, that those cases would be the most frequent ones, but only that they could occur.

62. This has been the case in Switzerland, for instance.

Of course, EU Member States may want to be the ones facing liability for the vertical allocation of competences in the EU. And given that they remain full parties to the Convention, this may actually have to be the case depending on the criteria of allocation of responsibility that will be chosen. This creates, however, a question of attribution of liability and of joint liability that is complex and not completely settled under EU law. And the application of the International Law Commission (ILC)'s Draft Articles on Responsibility of International Organizations<sup>63</sup> to the ECHR *qua* mixed agreement of the EU and its Member States is not clear.<sup>64</sup> What complicates things even further is that the question of the correct allocation of competences in the EU and hence of attribution of liability can only be settled by the ECJ, and not by Member States themselves nor by the ECtHR.<sup>65</sup>

#### 1.4.3.3. Practical feasibility

Practically, the idea that accession could not affect the division of competences within the EU nor contribute to the expansion of the EU human rights competence is untenable. This becomes clear when one looks at the question of the allocation of liability with respect to competence (over the violation itself) and with respect to implementation (of the ECtHR's decision).

The first practical difficulty pertains to the allocation of liability with respect to the division of competences in the EU as discussed before, but also with respect to the implementation of EU law by Member States (Art. 291(1) EUFT) or its transposition into domestic law (Art. 288(3) EUFT) by Member States. Practically, that question will become quite central, given the complex articulation of competences in the EU.

One solution would be to devise a list of allocated competences in the EU and to insert it into the accession treaty. Besides the rigidity this would imply, experience has shown that EU Member States have never succeeded in devising such a list. As the EU direct and general human

63. See Report of the International Law Commission, 61st session (2009), A/64/10.  
64. See e.g. Hoffmeister, F., "Litigating against the European Union and Its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?", 21:3 *European Journal of International Law* (2010), pp. 723–747.

65. See De Schutter, O., "L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme", p. 545 et seq.

rights competence is subsidiary at the most and its indirect human rights competences pertain to implied or subsidiary competences, such a list would not help in any case. Another solution, which is more in line with the theoretical considerations presented before, may be to develop an EU regime of joint and several liability and internal recursive claims. Such a regime does not yet exist in EU law (see Art. 340(2) EUFT), however, and this promises to become a complex question in EU law. Applying the international regime of joint liability for international organizations developed by the ILC (Draft Arts. 13–18) may be an option, but it is still controversial in the EU due to the latter's *lex specialis* in the area (Draft Art. 63) and is not yet binding internationally. So far, the ECtHR has developed its own approach<sup>66</sup> to the attribution and scope of responsibility of Member States under the ECHR when they implement or transpose EU law.<sup>67</sup> Now that the EU is also becoming a full member of the Convention, however, those criteria of attribution are bound to change. Due to the autonomy of EU law, however, it is not for the ECtHR but only for the ECJ to settle conflicts over competences in the EU. The prospect of ECHR violations is likely therefore to give rise to important case law of the ECJ on the allocation of competences and attribution of liability within the EU.

The second practical difficulty pertains to the allocation of liability with respect to the implementation of the ECtHR's decisions. The difficulty here is for the ECtHR to identify which of the EU or the Member States should remedy a violation of the ECHR, given that Member States are in principle responsible for the implementation of EU law.

Whatever solution is chosen here, the ECJ will again turn into an allocator of competences in disputes triggered by the implementation of the ECtHR's case law. Besides overloading a court that does not currently have the resources to take care of those new cases, this increase in judicial litigation over competences would no doubt lead to the very increase of competences in the human rights context Member States sought to avoid. In this respect, the analogy with the original resistance to the Bill of Rights in the United States is telling: in the end, Alexander Hamilton's fears regarding the centralizing effect of human rights in a confederation of states and the threat this posed for the states' competences came true, not so much

66. See e.g. ECtHR, *Bosphorus*, Paras. 149–158.

67. On their specificity, see Hoffmeister, F., "Litigating against the European Union and Its Member States", p. 739.

through an explicit competence in the Bill of Rights but through the US Supreme Court's case law.

1.5. Conclusion

This chapter has provided an overview of the state of the human rights competence in the EU. It should have clarified the reasons behind the alleged lack of such a competence or at least its alleged limits. A theoretical and practical critique of this piecemeal regime was then provided both generally and by reference to the future accession of the EU to the ECHR.

In a nutshell, my argument has been that the Lisbon Treaty constitutes a new phase in the development of the EU fundamental rights regime: from transnational it is about to become truly municipal. These transformations sit uneasily, however, with the renewed and this time explicit rejection of a human rights competence of the EU in the Treaties. The more federal the EU becomes in this context, the more Member States deny this is the case. The reasons lie in the political implications of the human rights competence and the mutual relationship between human rights and democracy and political legitimacy and hence the consequences the EU human rights competence has for Member States' popular sovereignty. The difficulty is that by denying the existence of the problem, it is left to resurface before the judiciary, which has been called to clarify the issue more and more often and which will become the allocator of competences in the EU. This difficulty will only be magnified by the prospect of the accession to the ECHR as the role of the ECJ on questions of competences will certainly increase in the context of the allocation of liability for violations of the ECHR and for the implementation of the ECtHR's decisions.

Of course, the question is whether it should be left to the ECJ to take the unilateral step of recognizing a direct general human rights competence of the EU (even a subsidiary one). Of course, this would at last put the competence question in line with the political and legal reality in the area of EU fundamental rights. Letting the Court do so, however, would be analogous to allowing it to do what the US Supreme Court did when it used the incorporation doctrine to apply constitutional rights to areas pertaining to exclusive state jurisdiction.<sup>68</sup> Such a federalization of EU fundamental

68. See supra note 2.

rights and hence of the EU polity and EU law would require Member States' agreement and that agreement was implicitly denied by the standard clauses in the Lisbon Treaty. As suggested, the current negotiations on the EU accession to the ECHR provide a unique opportunity to discuss the question openly, even though neither Member States nor the EU seem to want to escape their denial.