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Who Has the Last Word on the Protection of Human Rights in Europe?

Nobody today questions the importance of, and the need for, high standards in the protection of human rights. Political power and its activities in the democratic states of Europe are obliged to respect and observe fundamental rights and freedoms.

With respect to the question ‘Who has the last word on the protection of human rights in Europe?’, it is possible to look, on one hand, at international, supranational, and national interaction in jurisprudence and, on the other, at the legislative, executive, and judicial, and to a certain degree the actions of the media. In this article, I address the former aspects, while drawing forth some other possible angles.

The question is topical for several reasons: discussion has again emerged in Estonia on the constitutionality of the relationship between the European Union (EU) and Estonia, and the Supreme Court has recently rendered its judgment on the constitutionality of the treaty establishing the European Stability Mechanism (Supreme Court judgment of 12 July 2012); the member states of the Council of Europe on 20 April 2012 approved the Brighton Declaration, on the future of the European Court of Human Rights (ECtHR, or ‘the Court’), which, among other things, addresses the relationships between the Council of Europe member states’ courts and that of the ECtHR; and at the end of May and beginning of June 2012, hundreds of well-known jurists from Europe and beyond gathered in Tallinn to discuss at the XXV Congress of the International Federation of European Law (FIDE) various pertinent topics. These included protection of fundamental rights after the Lisbon Treaty’s entry into force; the interaction among the Charter of Fundamental Rights of the European Union (EU Charter), the European Convention on Human Rights (ECHR, or ‘the Convention’), and the national constitutions; and topics in the areas of freedom, security, and justice, including information society issues.

¹ All views expressed are those of the author alone.

1. Examples of international, supranational, and national legal sources' interaction in the protection of human rights in Europe, from court cases

1.1. Hungary's red five-pointed star in the human rights triangle

Hungary's criminal code prohibits the distribution and exhibition of the swastika, SS symbols, the hammer and sickle, and the red five-pointed star, except for educational, scientific, and artistic purposes.^{*2} Hungary's Constitutional Court stated in 2000 that the named article in the criminal code is in compliance with the Constitution, referring also to the state's discretionary authority in the Council of Europe and to Hungary's historical experience.^{*3}

The deputy chairman of Hungary's Workers' Party, Attila Vajnai, was penalised by the first-tier court for wearing an approx. 5 cm large red five-pointed star—a totalitarian symbol—on a garment at a demonstration that took place on 2 February 2003, in Budapest. Vajnai appealed the decision to the second-tier court, which made Hungary the first among the states that had joined the EU in 2004 to ask the Court of Justice of the EU (CJEU) for a preliminary ruling. The Hungarian court wanted to know whether Hungary's statute is discriminatory in comparison to the other EU member states' laws, and it asked the CJEU to rule on whether the prohibition in Hungary's legislation is contrary to the principles of freedom of expression and equal treatment. The CJEU replied that making a ruling on this matter is not within its competence and did not explain its decision.^{*4} At that time, the EU Charter was not in force, nor did the question pertain to the free movement of persons and goods across EU borders.

Budapest's second-tier court then agreed with the first-tier court's ruling and Vajnai's sentence remained in force.

Vajnai took his case to the ECtHR. The latter handed down its decision on 8 June 2008, stating that, according to Article 10 of the ECHR, Vajnai's right to freedom of expression had been violated. The Court stated that, although the prohibition against the five-pointed star was based on law and served a legitimate aim—to guarantee public order and the safety of others—it was unnecessary in a democratic society.^{*5} In his particular case, the red five-pointed star was a multifaceted symbol (that is, a symbol with multiple meanings) that cannot be unequivocally equated only to totalitarian ideas, for it is at the same time the sign for the international labour movement. In addition, a concrete indication was lacking that would have given cause to believe that the wearing of the red five-pointed star on clothing would result in violence. Therefore, a universal prohibition against wearing of the five-pointed star was in conflict with the Convention.

Only a couple of months before the ECtHR rendered the above judgement, a first-tier court in Hungary had found another person—Janos Fratanoló—guilty of wearing a red five-pointed star as an act endangering public order. Later, a higher Hungarian court found that Hungarian justice does not allow the courts to appeal to ECtHR practices, and it let Fratanoló's sentence stand. Finally, Fratanoló's case reached the ECtHR in Strasbourg, which again found that Article 10 of the Convention had been violated.^{*6}

Apparently, the relevant law in Hungary has still not been changed.

The above example reflects all those elements presented in this article: the national level (Hungary), the EU (supranational) level, and the Council of Europe (international/regional) level, and, in addition, the domestic courts, the CJEU, and the ECtHR. Also illustrative are the conflicts between the Hungarian legislators and the pan-European^{*7} judicial authority—even the differences of opinion within the Hungarian judicial authority: the constitutional court's decision that considered Hungary's statute to be legitimate

² Section 269/B of the Criminal Code: 'The use of totalitarian symbols'.

³ Decision no. 14/2000 (V. 12.) of the Constitutional Court, dealing with the constitutionality of Section 269/B of the Criminal Code.

⁴ Order of the CJEU (Fourth Chamber) of 6.10.2005, C-328/04 ('Vajnai'). – European Court Reports (ECR) 2005, I-08577.

⁵ *Vajnai v. Hungary* (Second Section), no. 33629/06, judgement of 8.7.2008.

⁶ *Fratanoló v. Hungary* (Second Section), no. 29459/10, judgement of 3.11.2011, with further references to the above-mentioned national court decisions.

⁷ Hereinafter, 'pan-European' is used as an overall term for the EU Charter and the Convention, as well as for the so-called Luxembourg (CJEU) and Strasbourg (ECtHR) courts.

juxtaposed with the doubts of the so-called regular courts. The question of the five-pointed star went beyond Hungary's borders.*⁸

As a result, the case gives cause to ponder and creates a whole series of questions: Why was the prohibition against wearing the red five-pointed star so important for Hungary? Was the absolute prohibition and the criminalisation of its wearing justified and balanced, and is freedom of expression sufficiently protected in Hungary? Why did the EU not take a position on this matter? Was this due to lack of competence, and would it do so now that the EU Charter has become a legally binding document, or is a cross-border element still missing in this particular case? Did the ECtHR have the authority to go against the position of Hungary's constitutional court, which had found that Hungary has sufficient room to make its own decision, supported by historical background? It has to be borne in mind that for the ECtHR, Article 10 of the Convention, on freedom of expression, represents one of the basics of a democratic society and all forms of restrictions thereof have to be considered very carefully. The restricting of freedom of expression is justified only when necessary and balanced in a democratic society. Why did Hungary's highest court not consider ECtHR practice? And, most importantly, what did the case give to the applicants? One and the same right—freedom of expression—had been understood differently. What would have happened had the applicants not recognised the issues, known their options, or wanted to appeal to the pan-European court(s)?

With respect to judicial proceedings, the matter was definitely demanding of time—in Vajnai's case five years and Fratanoló's almost eight years—and, no doubt, expensive. But who had the last word in the end? With the given concrete matters, it appears that the ECtHR had the last word, but at the same time the Hungarian legislators did not make changes, and the next Vajnai or Fratanoló will be found guilty of wearing a red five-pointed star and will still have to turn to the ECtHR in order to secure his right decisively.

1.2. Asylum-seekers as a ball tossed between the European Court of Human Rights and the Court of Justice of the European Union: Trust but verify

For case law and jurisprudence, it should be a priority to see everything through the prism of human rights protection, because, as the human being is most valuable, the protection of his or her rights should not be compromised. That includes assessing the EU law, although at first glance it may appear that the application of EU law in the Member State court somewhat presumes automatic acceptance.

One of the problems is connected with the principle, noble in itself, that the EU should to a certain extent be constructed on trust among the Member States. In reality, such trust may not be sufficient, as is evident in, for example, times of economic crisis. The EU seems to foster trust, as is apparent in the reciprocity of court decisions under the Dublin II Regulation on the right of asylum*⁹ and also in relation to matters such as marriage and parental responsibility.*¹⁰ But experience has shown, and ECtHR practice has confirmed, that even in these cases it is necessary to approach each incident individually.

On 21 January 2011, the Grand Chamber of the ECtHR rendered a judgement regarding the implementation of the EU Dublin II Regulation (on examination of an asylum application).^{*11} The applicant was an Afghan citizen who left Kabul in 2008 and entered the EU via Greece. He moved on to Belgium, where he applied for asylum. Belgium did not examine the application and, citing the Dublin II Regulation, sent the applicant back to Greece. The Dublin II Regulation, issued in 2003 by the EU, includes the principle that an asylum-seeker's application can be examined in only one member state of the European Union. When it becomes clear that the applicant has entered the EU via another Member State or has already applied for asylum in another state, the applicant is returned to that state and the process is handled by that state's authorities. The applicant argued that Belgium, by sending him back to Greece, had violated Articles 3 (on prohibition of torture and of inhumane or degrading treatment), 2 (on the right to life), and 13 (on the right

⁸ See, for example, Á. Domahidi. Politische Symbole und Meinungsäußerungsfreiheit – Der Weg des roten Sterns als politisches Symbol im gesamteuropäischen Grundrechtsschutz. – *Europarecht* 2009, pp. 410–422.

⁹ Council Regulation (EC) No. 343/2003 of 18.2.2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. – *OJ L* 222, 5.9.2003, pp. 3–23.

¹⁰ Council Regulation (EC) No. 2201/2003 of 27.11.2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. – *OJ L* 338, 23.12.2003, pp. 1–29.

¹¹ *M.S.S. v. Belgium and Greece* (Grand Chamber), no. 30696/09, judgement of 21.1.2011.

to an effective remedy) of the Convention, in view of the humiliating and inhuman conditions in the detention facilities and the living conditions in Greece, and that in Greece it was not possible for him to have an effective remedy in respect of his complaints under Articles 2 and 3 of the ECHR. The applicant alleged that it was not possible to have his rights protected in Belgium either.

The ECtHR found that Greece had violated the Convention by maintaining detention and living conditions that offend a person's dignity. Also, the ECtHR noted that the processing of asylum applications was inadequate. In addition, it found that Belgium had violated the Convention as well, by sending the applicant back to Greece and causing him to endure inhuman detention and living conditions there. Likewise, the ECtHR decided that the applicant lacked in Belgium an adequate right to effective remedy in order to protect his rights.

The above-mentioned judgement was very important for many EU states, such as the Netherlands, Denmark, Sweden, Finland, and Austria, since they encounter daily the implementation of Dublin II Regulation terms. It is interesting to note that some Member States' courts—Austria's, for example—had already criticised the Greek asylum system and asylum-seekers' living conditions in Greece.^{*12}

With its decision *M.S.S. v. Belgium and Greece*, the ECtHR pointed a finger at the EU.

The CJEU replied on 21 December 2011 in the case of *NS v. United Kingdom*. The CJEU considered the right to asylum so important that its Grand Chamber deliberated it, and, in addition, 13 EU member states, Switzerland, the UN High Commissioner for Refugees, Amnesty International, and the Centre for Advice on Individual Rights in Europe submitted their observations on the matter.^{*13} All of them agreed that in 2010 Greece was the point of entry to the European Union of almost 90% of illegal immigrants, resulting in a disproportionate burden being borne by that state as compared to other Member States and the inability of the Greek authorities to cope with the situation in practice. The CJEU noted that the EU common asylum system (Dublin II Regulation) was created in a context that considered it possible for all Member States to respect human rights. The aim of the Dublin II Regulation was to expedite the examination of asylum-seekers' applications in the interest of both the asylum applicant and the respective Member States. It was considered important to prevent a situation wherein multiple Member States process applications by one and the same applicant. The aim was to increase that regulation that determines the single Member State responsible for examining the asylum application. However, Member States may not transfer an asylum-seeker to a 'responsible Member State' if they know that in said state an asylum-seeker could face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the EU Charter. The CJEU found that the Member States have at their disposal sufficient instruments to allow them to assess compliance with fundamental rights and, thereby, should be aware of the real dangers to which an asylum-seeker would be subjected in the event that he or she is sent to the country in question. Additionally, the CJEU found that the matter belongs to the domain of EU rights application, that Member States must apply the EU Charter's principles, and that the application of the EU Charter in the United Kingdom (UK) is not questioned—regardless of the protocol referring to the UK.^{*14} In its ruling, the CJEU references the ECtHR decision in *M.S.S. v. Greece and Belgium*.

The above-mentioned decisions recognise the attempts made by the ECtHR and CJEU to harmonise their relations. Heretofore, most essential to ECtHR and CJEU relations had been the so-called *Bosphorus* judgement of the ECtHR, which states that the EU offers human rights protection equivalent to that of the Convention.^{*15}

¹² For example, in its judgement of 7.10.2010 (judgement U694/10, available in the Legal Information System of the Republic of Austria (<http://www.ris.bka.gv.at/>)), the Austrian *Verfassungsgerichtshof* (Constitutional court) found, in connection with a review of the constitutionality of the transfer to Greece under Regulation no. 343/2003 of an Afghan single woman with three children, that whilst there is, in principle, the possibility of state provision where vulnerable persons are returned to Greece for implementation of the asylum procedure, this cannot be automatically assumed without a specific individual assurance on the part of the competent authorities. See §103 of the Opinion of Advocate General Trstenjak delivered on 22.9.2011, C-411/10 (*N.S. v. Secretary of State for the Home Department*).

¹³ Judgement of the CJEU (Grand Chamber) of 21.12.2012, joined cases C-411/10 (*N.S. v. Secretary of State for the Home Department*) and C-493/10 (*M.E. and Others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*).

¹⁴ Protocol (No. 30) on the application of the Charter to Poland and to the United Kingdom. – OJ 2010 C 83, p. 313.

¹⁵ *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi (Bosphorus Airways) v. Ireland* (Grand Chamber), no. 45036/98, judgement of 30.6.2005. – ECtHR 2005-VI.

1.3. Protecting the right to privacy v. freedom of expression: The *Bundesverfassungsgericht* passing an exam on the second try before the European Court of Human Rights

The *Von Hannover v. Germany* case¹⁶ before the ECtHR pertained to freedom of expression: the right to publish photos of Monaco's Princess Caroline. The ECtHR asked the following questions in its 2004 decision, addressing the topic for the first time: Does a public figure have the right to privacy, and to what extent? Does the publication of photos contribute to debate in the public interest, and to the formation and discussion of opinion in society, or does it purely satisfy yellow journalism's curiosity? The ECtHR found that protection of privacy prevails (likewise, in the case of *Tammer v. Estonia*¹⁷ it was found that freedom of expression had not been violated), while at the same time the Federal Constitutional Court of Germany, the *Bundesverfassungsgericht* (BVerfG), had decided in the same case that the **word** has priority; i.e., there is press freedom to publish photos of the princess even though this is discretionary (many photos of her love life, children, shopping, etc.).

After the ECtHR's decision, the BVerfG changed its position and then started to analyse whether the publication of certain photos did, in fact, contribute to the development of public debate or simply satisfy curiosity. In the later case *Von Hannover v. Germany No. 2*¹⁸, the BVerfG found, on the basis of such analysis, that the publication of photos was justified, so when this case too reached the ECtHR, the latter this time agreed with the BVerfG. In the *Von Hannover No. 2* case, in 2012, the contested photos showing Monaco's Princess Caroline and her husband skiing were accompanied with a story about the health of her father, Prince Rainier, and how his children take turns caring for their elderly and ill father. The ECtHR decided that the question of the health of Prince Rainier III of Monaco as the head of the principality was, without doubt, a matter of interest to the general public. The inclusion of the photo of the family skiing holiday in that context added value to the information. The applicants were public figures and had to consider heightened interest in their personal lives. The photos in question had not been taken in secret or by harassment. As a result, the Court found that the right to privacy had not been violated. The ECtHR emphasised that the BVerfG had analysed the case in detail and in the context of ECtHR judicial practice.

The Princess Caroline of Monaco court cases are good examples of dialogue between the constitutional court of a Member State and the European Court of Human Rights.

1.4. National identity's controversial success story before the Court of Justice of the European Union

Returning to the CJEU, let us look at the relations between the EU and Member States' laws. A new and interesting topic in itself is Article 4 (2) of the Treaty on European Union ('the EU Treaty') (in Article 4 (2) EU), which refers to the EU's respect for its member states' national identity. This could, in concrete court cases, come into conflict with EU basic freedoms (the free movement of goods, capital, services, and people—the EU's 'four freedoms') and even with fundamental rights. In its 22 December 2010 decision in the case *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*¹⁹, the CJEU found for the first time that it is in harmony with Article 4 (2) of the EU Treaty to permit or justify a Member State's reliance on constitutional identity when restricting an EU citizen's freedom to move. Thereby, the EU's obligation to respect a Member State's constitutional identity was recognised. According to Austria's constitutional court (*Verfassungsgerichtshof*), the use of a title of nobility in one's surname is in conflict with the Constitution, under the principle of equality and written into the law on the abolition of the nobility, which is of Constitutional status and implements the principle of equal treatment in this field. In Germany, Austrian citizen Ilonka Sayn-Wittgenstein, who worked in the luxury real-estate sector, could use the title 'Fürstin von Sayn-Wittgenstein', but this was not permissible in Austria. However, a person's name is part of his or her identity and private life (see Article 7 of the EU Charter and Article 8 of the ECHR). In addition, the

¹⁶ *Von Hannover v. Germany* (Third Section), no. 59320/00, judgement of 24.6.2004. – ECtHR 2004-VI.

¹⁷ *Tammer v. Estonia*, no. 41205/98, judgement of 6.2.2001. – ECtHR 2001-I.

¹⁸ *Von Hannover v. Germany (No. 2)* (Grand Chamber), no. 40660/08 and 60641/08, judgement of 7.2.2010.

¹⁹ Judgement of the CJEU (Second Chamber) of 22.12. 2010, C-208/09 (*Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*).

CJEU had previously found that if one Member State does not recognise a person's legal name from another Member State, causing that person to have different names in those two Member States, that person's right to free movement belonging to all EU citizens is violated. Also in the case of Sayn-Wittgenstein it was found that a restriction was present and that a 15-year span existed between the person starting to use the name and the correction of the name in the registry by the authorities. Nevertheless, the CJEU arrived at the decision that the violation was justified in order to protect the principle of equal treatment, which is a general principle of law in the EU (Article 20 of the EU Charter) and also an essential fundamental right. Hence, the case demonstrates a potential collision of EU law and an EU member state's law on the one hand—the principle of equal treatment v. a fundamental freedom of the EU: free movement of the individual (not to be confused with fundamental rights)—and on the other hand the collision of the principle of equality with the protection of identity and private life.

The judgement of the Court of Justice of the EU is an important indication that in certain cases the EU is obliged to respect national identity.

In this context, many questions emerge, such as what national identity is (constitutional identity being part of the national identity).

The XXV FIDE Congress general report on the topic of fundamental rights cites examples of national identity, such as core fundamental rights in general and human dignity (Germany and Estonia); language rights (Belgium); cultural and national heritage protection (Slovenia and Hungary); and elimination and prohibition of titles of nobility (Austria, Ireland, and Italy).^{*20} France's secularism principle, *laïcité*, would fit well among these.

And who decides what constitutes a Member State's national/constitutional identity?

According to Article 4 (3) of the EU Treaty, the EU and its member states accord each other full mutual respect and assistance in carrying out the tasks that flow from the founding treaties of the EU. The principle of sincere co-operation (loyal co-operation principle) applies also in the case of constitutional rights. This has been emphasised by Estonia's Supreme Court decisions, such as the judgement deciding about the constitutionality of the prohibition of outdoor parliamentary campaign advertisements.^{*21} Member States' courts may not make decisions independently on Article 4 (2) of the EU Treaty; the CJEU has to interpret it, though, at the same time, the interpretation may supply only the structure for the national identity concept and must leave sufficient room for the Member States' courts to fill in the framework. For best results, that should occur procedurally via the preliminary references and rulings system, whereas it is open to the Member States' constitutional/supreme courts to present their own views to the CJEU when asking for a preliminary ruling from the same.^{*22}

The practice described above points to a development according to which the CJEU no longer needs to fight for its role in the Member States' legal space and, instead, can place emphasis on the distribution of competencies in the delivery of justice. CJEU Advocate General Sharpston has even suggested that for certain matters the proportionality test can be left to the competence of domestic courts.^{*23} It appears that national identity is the border for EU actions. The protection of fundamental rights should be included in each Member State's constitutional order. Article 4 (2) of the EU Treaty helps to overcome the absolute supremacy of the EU's law over the constitutions of its member states.

Can it be said on the basis of the above example that the question of who is the highest constitutional court in Europe yields to the tendency of increasingly less hierarchy? Perhaps, but only to a certain extent. The case law of the CJEU is not completely consistent in this respect. Although the Member States' constitutional courts try to be the watchdogs of national identity, they often make decisions only when dramatic instances arise and on matters of core principles of the relevant national system. Likewise, the CJEU keeps watch to see that when attempts are made to bring Member States' constitutional norms into EU juris-

²⁰ L.F.M. Besselink. General report—the protection of fundamental rights post-Lisbon: The interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions. – J. Laffranque (ed.). XXV FIDE Congress Tallinn 2012 proceedings, Volume 1. Tallinn: Tartu Ülikooli Kirjastus 2012, p. 71.

²¹ Supreme Court of Estonia *en banc* decision of 1.7.2010, 3-4-1-33-09. Available at <http://www.nc.ee/?id=1157> (most recently accessed on 26.5.2012).

²² See also L.F.M. Besselink. Respecting Constitutional identity in the EU. Case Law A. Court of Justice Case C-208/09; *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, judgement of the Court (Second Chamber) of 22.12.2010. – Common Market Law Review 2012 (49), pp. 1–22.

²³ Opinion of Advocate General Sharpston delivered on 14.10.2010, C-208/09 (*Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*), reference for a preliminary ruling: Verwaltungsgerichtshof, Austria.

prudence, the national identity does not become abused. Examples in contrast to the *Ilonka Sayn-Wittgenstein* judgement can be found also in CJEU practice: Member States' national identity protection arguments were not considered convincing—e.g., in Greece's attempts to combat media magnates' domination of the public procurement sector (the *Michaniki* case^{*24}) through amendments to the Constitution. The CJEU did not accept the constitutional identity argument and recognised the measure (amendment of the Greek Constitution) as being contrary to the EU's secondary law and, also, disproportionate.

It should be noted here that whenever one considers the relationship between a Member State and the EU from the angle of protection of human rights, what may be in an EU state's interest need not always be in the interest of all inhabitants of that state. The right of a Member State's national identity need not be understood necessarily and rigorously as affecting a fundamental right, and, therefore, referring and appealing to national identity need not always take place in the interest of human rights. Unfortunately, a state could sometimes use a universal fundamental right as a shield in order to justify the violation of other fundamental rights, by pleading difficulty in defining/justifying public interest.^{*25}

Let us now move from the practical examples to the theoretical and fundamental aspects of the triangle of fundamental rights' protection in Europe.

2. Human rights, fundamental rights, and freedoms on three levels: The European Convention on Human Rights, Charter of Fundamental Rights of the European Union, and Constitution of Estonia—and the courts that interpret them

The three most important levels of human rights protection in respect of Estonia are the following: the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union, and the Constitution of the Republic of Estonia.

2.1. The European Convention on Human Rights and the European Court of Human Rights

The European Convention on Human Rights^{*26}, signed in 1950 and in force since 1953, became effective in Estonia in 1996.^{*27} Of primary importance in the Convention are the right to life, human dignity, prohibition of torture and slavery, and a fair trial, along with the inviolability of private life and freedom of expression, religion, and assembly. The European Court of Human Rights (because of its seat, also called the Strasbourg court) interprets the European Convention on Human Rights and on 30 April 2012 had approx. 150,000 pending applications.^{*28}

²⁴ Judgement of the CJEU (Grand Chamber) of 16.12.2008, C-213/07 (*Michaniki AE v. Ethniko Simvoulío Radiotileorasis and Ipourgós Epikratias*). – ECR 2008, I-9999.

²⁵ Besselink (see Note 22), p. 89.

²⁶ Council of Europe Treaty Series (CETS), No. 5, latest amendments by the provisions of Protocol 14 (CETS, No. 194).

²⁷ Ratification by Estonia of the European Convention on Human Rights on 16.4.1996.

²⁸ See the statistics on pending applications allocated to a judicial formation, available on the Web site of the ECtHR at http://www.echr.coe.int/NR/rdonlyres/D552E6AD-4FCF-4A77-BB70-CBA53567AD16/o/CHART_30042012.pdf (most recently accessed on 26.5.2012).

2.2. The Charter of Fundamental Rights of the European Union and the Court of Justice of the European Union

The EU Charter originally proclaimed at the European Council meeting in Nice on 7 December 2000 became legally binding in 2009, when the Lisbon Treaty came into force, on 1 December.^{*29} The most significant chapters of the EU Charter address dignity, freedom, equality, solidarity, a citizen's rights, and administration of justice. The charter is interpreted by the Court of Justice of the European Union (because of its seat, also called the Luxembourg court), which consists of the Court of Justice, the General Court, and the Civil Service Tribunal. Of critical importance is Article 47 of the EU Charter—on the right to effective remedy and to a fair trial.

2.3. The Constitution of Estonia and the Estonian Supreme Court

The Constitution of Estonia, adopted by the Estonian people on 28 June 1992^{*30}, contains a special Chapter II on fundamental rights, which is influenced largely by the ECHR.

In addition to the catalogue of fundamental rights, freedoms, and duties, §10 of the Estonian Constitution stipulates that the rights, freedoms, and duties set out in the Constitution shall not preclude other rights, freedoms, and duties that arise from the spirit of the Constitution or are in accordance therewith and that conform to the principles of human dignity and of a state based on social justice, democracy, and the rule of law.

Prior to accession to the EU, the Constitution was supplemented with the Constitution of the Republic of Estonia Amendment Act, which is annexed to the Constitution as a separate act having the same value as the main text of the Constitution.^{*31} Section 1 of said act states that Estonia may belong to the European Union, provided that the fundamental principles of the Constitution of the Republic of Estonia are respected.

The Constitution and its amendment act are interpreted by Estonian courts, the Supreme Court being the leading one. The Supreme Court includes, along with its Chamber of Administrative Law, criminal law chamber, and civil law chamber, also a separate Chamber for Constitutional Review and therefore acts not only as the highest court but also as the Constitutional court of the country. The Constitutional Review Chamber of the Supreme Court or the Supreme Court deciding *en banc* can declare legislation of general application that has entered into force or a provision thereof to be in conflict with the Constitution and repeal it.^{*32}

There are also rights that are not written into such documents, found in the charter and documents on minority rights. Some rights belong to neither international agreements nor in Member States' rights but are protected nevertheless in the EU, as developed by the case law of the Court of Justice of the European Union. Examples are the *Hoechst* judgement^{*33}, from 1989, in which the then Court of Justice of the European Communities protected, next to the right to respect for one's home, the inviolability of business premises, and the judgement in 2005's *Mangold* case, wherein the Court of Justice developed the prohibition of discrimination based on age, which is not cited as prohibited either in the ECHR or explicitly in the Estonian Constitution.^{*34}

²⁹ OJ C 83, 30.3.2010, pp. 389–403.

³⁰ Passed by a referendum held on 28.6.1992 (RT 1992, 26, 349), which entered into force on 3.7.1992 and was amended by acts on the following dates: 5.10.2003, entering into force on 6.1.2004 (RT I 2003, 64, 429); 25.2.2003, with entry into force on 17.10.2005 (RT I 2003, 29, 174); 12.4.2007, with entry into force on 21.7.2007 (RT I 2007, 33, 210), 13.4.2011, with entry into force on 22.7.2011 (RT I, 27.4.2011, 1).

³¹ Passed by the referendum of 14.9.2003 (RT I 2003, 64, 429), with entry into force on 6.1.2004. See J. Laffranque. A glance at the Estonian legal landscape in view of the Constitution Amendment Act. – *Juridica International* 2007 (XIV), pp. 55–66; J. Laffranque, R. Laffranque. Les modifications apportées à la Constitution estonienne du fait de l'adhésion à l'Union Européenne et leur mise en oeuvre par la Cour d'Etat. – *Revue d'études politiques et constitutionnelles est-européennes* 2008/1, pp. 91–103.

³² See Constitutional Review Court Procedure Act, passed 13.3.2002 (RT I 2002, 29, 174; in Estonian), which entered into force on 1.7.2002 and was later amended by several acts —§15, about the authority of the Supreme Court.

³³ Judgement of the Court of Justice of the European Communities of 21.9.1989, joined cases 46/87 and 227/88 (*Hoechst AG v. Commission of the European Communities*). – ECR 1989, 2859.

³⁴ Judgement of the CJEU (Grand Chamber) of 22.11.2005, C-144/04 (*Werner Mangold v. Rüdiger Helm*). – ECR 2005, I-9981.

2.4. Increase in the importance of the European Union's fundamental rights charter in connection with acquisition of a legal status

According to Article 6 (1) Treaty of EU, the European Union recognises the rights, freedoms, and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted in Strasbourg, on 12 December 2007. The Court of Justice of the European Union confirmed on 19 January 2010, in its judgement in the *Küçükdeveci* case, that the EU Charter has the same legal standing as the EU's founding treaties.^{*35}

Although the charter of fundamental rights of the EU rose to a leading position, acquiring legally binding status in the EU when the Lisbon Treaty came into effect, the EU Charter does not create new competencies for the EU. Also, the EU Charter cannot be viewed in isolation either from the ECHR or from the common constitutional values derived from fundamental rights of the Member States, to which the EU Treaty also makes a reference.

It is important to keep in mind that the EU Charter is no substitute for a Member State's catalogue of fundamental rights and that the EU Charter is binding on the Member States only when European Union law is applied—although one must admit that for the most part the Member States do implement EU law and the line between the application of a purely national law and law with EU influence is very thin. In general terms, it seems that 'implementation of EU law' is given a rather broad definition in the practice of the Court of Justice of the EU.^{*36}

The relevant practical question to study in the future is this: What has the EU Charter changed for the daily life of the individuals living in the EU? The latest information about the EU Charter's influence on the general fundamental rights culture in the EU is to be found in the European Commission's Annual Report 2011 on the application of the EU Charter of Fundamental Rights.^{*37} This report, in turn, refers to a recent Eurobarometer survey (Eurobarometer 340: The Charter of Fundamental Rights of the European Union), which revealed that 64% of all Europeans knew in 2011 that such an EU charter exists, whereas in 2007 the general awareness about the EU Charter reached only 48%. However, knowledge about the content of the EU Charter is not as great. The greatest confusion surrounds whether the EU Charter is to be applied to all actions of Member States, including matters of national competence. The majority of EU inhabitants think that the EU Charter is applicable to the activities of Member States, including those that are clearly within domestic competence and are not subject to EU law's application (in 2011, citizens' letters to the European Commission on fundamental rights in 55% of cases fell outside the remit of EU competencies).

3. Issues related to the hierarchy of fundamental rights documents in Europe and collisions between pan-European courts

3.1. Logical distribution of competence in theory

At first glance, everything appears logical between the three layers of human rights protection analysed above: international, supranational, and national. Should problems emerge, the ECtHR is engaged with the European Convention on Human Rights; the CJEU is engaged with the EU Charter; and Estonia's courts, with the Supreme Court being the leading one, are engaged with the Constitution. All of them are so-called pan-European courts: the ECtHR; the CJEU; and, without a doubt, the Member States' courts, as they are irreplaceable on account of the assignments they carry out.

³⁵ Judgement of the CJEU (Grand Chamber) of 19.1.2010, C-555/07 (*Seda Küçükdeveci v. Swedex GmbH & Co. KG*). – ECR 2010, I-365.

³⁶ See also A. Rosas, H. Kaila. L'application de la Charte des droits fondamentaux de l'Union européenne par la Cour de justice: un premier bilan. – *Il Diritto dell'Unione Europea* 2011 (16)/1, p. 15.

³⁷ Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions. 2011 Report on the Application of the EU Charter of Fundamental Rights, Brussels, 16.4.2012, COM(2012) 169 final. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0169:FIN:EN:PDF> or http://ec.europa.eu/justice/fundamental-rights/files/2011-report-fundamental-rights_en.pdf (most recently accessed on 26.5.2012).

Certain rules have been worked out for helping one find one's way, at least in part, in the triangle of ECHR, EU Charter, and Constitution. The ECtHR has adopted the concept of subsidiarity—human rights protection must be guaranteed initially on the Member State level; if that has failed, only then does the ECtHR come to assist.^{*38} Likewise, in certain instances, the ECtHR applies the concept of a degree of Member States' room for assessment/discretion—e., 'margin of appreciation'—which is applicable to some cases wherein the common minimum standard is not very certain.^{*39} In such cases, it is considered whether, and to what degree, pan-European consensus is present. In ECtHR practice, counterbalancing references to the Convention as a living instrument exist.^{*40}

Both the ECtHR and the CJEU use autonomous concepts, displaying rather evolutionary and dynamic court practices.

The EU Charter applies only when the Member States implement EU law. Only the CJEU can decide questions of the application and the final interpretation of EU law. The Estonian court must first check the compliance of Estonia's laws with the European law, and then, and only in certain instances, Estonian law's compliance with the Estonian Constitution must be checked.^{*41} The latter is checked, of course, when no connection exists with EU law.

Distribution of the workload among courts is essential. For example, the ECtHR says in its constant case law that the primary assignment for domestic courts is the evaluation of facts (factual material).^{*42} The same is true for application and interpretation of national laws; in general, neither the ECtHR nor the CJEU performs this function, and both leave that assignment to Member States' courts. Certain exceptions do exist, however; for example, the ECtHR is to check, according to Article 5 (1) of the ECHR, a Member State's law's compliance with the European Convention on Human Rights.

As the above examples show, the borders between EU law and national laws are sometimes vague. Hence, although each court has its own competence, courts in general do not always stick to them in practice, since many incidents take place at the boundaries and those can contribute to the confusion. As a result, we are confronted with a justified question: should one norm be preferred to another; i.e., does a hierarchy of documents on human rights protection exist? How are we to avoid collisions and to resolve them?

³⁸ See, for example, the contribution to the Conference on the Principle of Subsidiarity (Skopje, 1.–2.10.2010) 'Strengthening subsidiarity: Integrating the Strasbourg court's case law into national law and judicial practice', a presentation by Christos Pourgourides, Chairperson of the Committee on Legal Affairs and Human Rights, Parliamentary Assembly of the Council of Europe, and compilation of background materials on the interpretive authority (*res interpretata*) of the Strasbourg court's judgements. Available at http://assembly.coe.int/CommitteeDocs/2010/20101125_skopje.pdf (most recently accessed on 26.5.2012). Also relevant is a guest lecture given by former President of the European Court of Human Rights Jean-Paul Costa on 10.12.2011 (International Human Rights Day) at the Leiden Law School, in which Costa delivered the first Raymond and Beverly Sackler Distinguished Lecture on Human Rights. His lecture, entitled 'The current challenges facing the European Court of Human Rights', stated that there is deep misunderstanding of the principle of subsidiarity; while it is primarily for the national authorities to apply the Convention, this does not mean that the Court plays no role at all. Available at <http://law.leiden.edu/news/guest-lecture-by-former-president-of-the-european-court-of-human-rights.html> (most recently accessed on 26.5.2012).

³⁹ One extensive recent publication on the margin of appreciation can be found in the Centre for European Legal Studies Working Paper Series, University of Cambridge, Faculty of Law, February 2012, by Section President of the ECtHR Dean Spielmann. *Allowing the Right Margin, the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review*. Available at <http://www.law.cam.ac.uk/press/news/2012/03/judge-dean-spielmann-allowing-the-right-margin-the-european-court-of-human-rights-and-the-national-margin-of-appreciation-doctrine-waiver-or-subsidiarity-of-european-review/1821> (most recently accessed on 26.5.2012).

⁴⁰ About the ECHR as a living instrument concept in ECtHR case law, see G. Letsas. *The ECHR As a Living Instrument: Its Meaning and Its Legitimacy*, a University College London working paper, 14.3.2012. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2021836 (most recently accessed on 26.5.2012).

⁴¹ See the case law of the Supreme Court of Estonia—in particular, the Supreme Court Constitutional Review Chamber decision of 26.6.2008 in the so-called *Aspen* case, no. 3-4-1-5-08, wherein the chamber concurs with the opinion of the Supreme Court Administrative Law Chamber expressed in the latter's decision of 7.5.2008 in case 3-3-1-85-07. English text available on the Web site of the Estonian Supreme Court in English at <http://www.nc.ee/?id=927&print=1> (most recently accessed on 26.5.2012).

⁴² E.g., in *Varnava and Others v. Turkey* (Grand Chamber), no. 16064/90, a judgement of 18.9.2009, the Court stated the following: '164. [...] [I]n line with the principle of subsidiarity, it is best for the facts of cases to be investigated and issues to be resolved in so far as possible at the domestic level. It is in the interests of the applicant, and the efficacy of the Convention system, that the domestic authorities, who are best placed to do so, act to put right any alleged breaches of the Convention.'

3.2. Does a hierarchy of documents on human rights protection exist?

The European Court of Justice (now part of the CJEU) deliberated the question of hierarchy of norms in EU and international laws in the *Kadi* case, which could be instructive here.^{*43} The *Kadi* case had to do with a UN Security Council resolution. The Court of Justice referred to the autonomy of the Community (EU) legal order but also to the fact that the Court of Justice in its observance of fundamental rights leans on international and Member States' laws. The CJEU found that respect for responsibilities taken on by the UN is obligatory for the preservation of international peace and security but also noted that responsibilities established by international agreements cannot lead to violation of the EU's general principles. Thus the CJEU gallantly avoided a problem by specifying that the given case affects CJEU legal control over EU law with which an international agreement is implemented but not the agreement itself, and that complete review of the lawfulness of the implementation act is permitted from the perspective of fundamental rights (compare Member States' tactic of analysing laws on ratification of treaty amendments and not changes in EU founding treaties themselves). The CJEU made reference to ECtHR practice pertaining to similar questions. As a result, the CJEU annulled Council of the European Union Regulation (EC) No. 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaeda network, and the Taliban, insofar as it concerns Mr. Kadi and the Al Barakaat International Foundation.

Wolfgang Weiss asks, quite rightly, what the relationship is between different sources of human rights in the EU: the fundamental rights, as they result from the constitutional traditions common to the Member States; the fundamental rights defined by the EU Charter; and those that are guaranteed by the ECHR?^{*44} Furthermore, Article 6 (3) of the EU Treaty stipulates that the fundamental rights as guaranteed by the ECHR and as proceeding from the constitutional traditions common to the Member States shall constitute general principles of EU law.

An answer might be that these diverse sources of rights co-exist and complement each other. The ECHR influences EU law in three ways: it is the minimum standard, the source of general principles of EU law, and a source of protection for international fundamental rights (an international treaty to which the EU will accede). The ECHR serves as a minimum standard for EU law. The general principles of EU law and the EU Charter take precedence over the Convention only in instances wherein they present a higher standard of fundamental rights protection. Also, EU law has to take into account ECtHR practice. Hence, all of the above are interconnected.

If a certain right is regulated in only one of these three sources, fewer problems result. However, if in all three, it would be correct to use all three—the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union, and Member States' constitutions—in parallel with the respective courts' relevant practices. If the right is protected similarly in all of these documents, the parallel role of the use of the documents would only enhance the legitimacy of the court judgement. However, the CJEU appears to favour the EU Charter and uses the Convention in a subsidiary manner when the issue does not involve the EU.^{*45} Likewise, the Member States' courts are not obliged to refer to the EU Charter in purely domestic cases; in the latter situations, the Constitution suffices.

⁴³ Judgement of the Court of Justice of 3.9.2008, joined cases C-402/05 P and C-415/05 P (*Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*). – ECR 2008, I-6351.

⁴⁴ W. Weiss. Human rights in the EU: Rethinking the role of the European Convention on Human Rights after Lisbon. – *European Constitutional Law Review* 2011 (7)/1, pp. 64–95.

⁴⁵ See, for example, the judgement of the CJEU (Grand Chamber) of 15.11.2011, C-256/11 (*Murat Dereci, Vishaka Heiml, Alban Kokollari, Izunna Emmanuel Maduïke, Dragica Stevic v. Bundesministerium für Inneres*), which states in its paragraph 72: 'Thus, in the present case, if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. On the other hand, if it takes the view that that situation is not covered by European Union law, it must undertake that examination in the light of Article 8 (1) of the ECHR.'

3.3. How to overcome conflict in the protection of fundamental rights?

Collisions can occur when fundamental rights are protected differently. Conflicts can occur between the CJEU and ECtHR, between the ECtHR and Member States' courts, between the CJEU and Member States' courts, and also between the superior courts of different Member States (provided that inter-court arguments between tiers are resolved adequately within the state in accordance with uniform court practice). ECtHR practice has been attempting to resolve recent conflicts by applying, *de facto*, the right of precedence to decisions made against a particular state also beyond cases concerning this state, to other states, with similar problems.^{*46} Some of the possible and actual conflict situations were described and analysed with the aid of examples at the beginning of this piece. Now I wish to present a possible recipe for overcoming conflicts.

When potential conflicts emerge, one cannot avoid trying to overcome them with the aid of legal techniques. But finding a balance requires sensitivity too. Even within one state, the collision of two fundamental rights is complicated; now imagine the case of that happening Europe-wide. It is not possible to approach written rules in a black-and-white manner when so much depends on concrete situations. In a conflict situation, one right is protected more than another, in view of prior weighing of the situation. This is not a matter of protecting one right and not the other, as in the case cited above of protection of privacy set opposite freedom of expression.

The main techniques for resolving different level conflicts are

- 1) recognition of European rights' supremacy and precedence over national law (certain national/constitutional identities as a limit) and
- 2) the less painful version (which could be demanded by the Member State's constitution: national law to be interpreted in harmony with European principles and law).

In their study, Mads Andenas and Eirik Bjorge notice a development among the Member States' courts that points to their not only falling in line behind the Strasbourg court but often taking the initiative to advance the rights set forth in the Convention.^{*47} In the case of *Cadder v. Her Majesty's Advocate*^{*48}, the UK Supreme Court had to overturn a long-standing case in Scottish case law addressing whether a person detained by the police on suspicion of having committed an offence has, before being interviewed, the right of access to a solicitor.^{*49} That decision had potential to affect 76,000 court cases. The UK Supreme Court had the courage in 2010 to agree unanimously on ending that practice putting an end to that practice regardless of the consequences, because the UK may not violate the ECHR and be different from the other Member States in this respect. In its interpretation of the Convention, the ECtHR has relied on universally applicable principles, with the aim of achieving harmonious protection of human rights in all of Europe—i.e., not the protection that would be dictated by national choices and preferences. It cannot be that one set of rules applies to Eastern Europe and to Turkey, and another set to Western Europe and to Scotland. Lord Hope, who authored the UK court's unanimous opinion, concluded that pride in one's legal system is one thing but isolation is quite another.^{*50}

Member States' courts often give legitimacy to their decisions by citing Strasbourg. Alec Stone Sweet and Helen Keller have noted correctly that Member States' courts have taken the lead in incorporating the Convention into their domestic legal systems.^{*51}

⁴⁶ To that extent, see also the Action Plan of the Interlaken Declaration for reforming the European Court of Human Rights, from 19.2.2010, Section B.4. c), which calls the states to commit themselves to taking into account the Court's developing case law, also with a view to considering the conclusions to be drawn from a judgement finding a violation of the Convention by another state, where the same problem of principle exists within their own legal system. Available at <http://afsj.wordpress.com/2010/02/21/interlaken-declaration-and-action-plan-to-reform-the-european-court-of-human-rights/> (most recently accessed on 27.5.2012).

⁴⁷ M. Andenas, E. Bjorge. National implementation of ECHR rights: Kant's categorical imperative and the Convention. – University of Oslo Faculty of Law Legal Studies Research Paper Series 2011/15. Electronic copy available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1818845 (most recently accessed on 27.5.2012).

⁴⁸ 2010 Scots Law Times 1125.

⁴⁹ Andenas, Bjorge (see Note 47), p. 3.

⁵⁰ Lord Hope's speech entitled 'Scots law seen from south of the border', before the Scottish Young Lawyers' Association – 11.4.2011, p. 27. Available at http://www.supremecourt.gov.uk/docs/speech_110401.pdf (most recently accessed on 27.5.2012).

⁵¹ A. Stone Sweet, H. Keller. Assessing the impact of the ECHR on national legal systems. – A. Stone Sweet, H. Keller (eds). *A Europe of Rights: The Impact of the ECHR on National Legal Systems*. Oxford University Press 2008, p. 687.

Collision can occur not so much from differences of opinion among the courts as also because of legislators failing to attend to their work. The Council of Europe, therefore, recommends to its member states that their legislators pay more attention to the Convention and its interpretations.^{*52} On the other hand, the European Commission emphasises the EU's pan-European legislative role, which includes national legislators in its decision-making process.^{*53}

The UK's court practice can also be cited for an example of harmonious interpretation with European law: The House of Lords interpreted domestic law in conformity with the Convention in such a way that a surviving spouse is treated the same as a surviving (homosexual) partner.^{*54}

Also important are the means used to reach a goal. If they are identical across the different courts, the result could also be the same; for instance, France's *Conseil Constitutionnel* has adopted the ECtHR proportionality test.^{*55}

3.4. How do the hierarchy of fundamental rights and the question of conflicts affect Estonia?

Estonia has adopted the European Convention on Human Rights and has been a member of the EU since 2004. Consequently, we are subject to the Convention, the Charter of Fundamental Rights of the European Union, and the Estonian Constitution. Thereby, the Constitution of the Republic of Estonia Amendment Act, allowing Estonia's accession to the EU in accordance with the rule of law, can be seen as a bridge between Estonia's law and EU law. Article 6 (3) of the EU Treaty, on the other hand, can be seen as a door and a bridge by which national constitutional rights enter EU law. This should be a two-way street. Unfortunately, professional literature recognises that the EU does not get sufficient inspiration from Member States' constitutional customs; i.e., the EU is too reserved in this area.^{*56} However, some essential procedural rights have come into EU law thanks to the beneficial influence of Member States: the right to be heard in administrative procedure, the principle of good administration, and the right to transparency outside the classical fundamental rights classification.^{*57}

According to the 10 Commandments, we know that one should have only one god. I apologise for using such a metaphor, but most Estonian judges have received their education through metaphors according to which Estonian judges' god is the Constitution of the Republic of Estonia. Now the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union must be added. In adjudication, a judge cannot use only hierarchical norms in a case and has to see which of the documents best protects fundamental rights. Already 10 years before accession to the EU, Estonia's Supreme Court cited the fundamental principles of the EU and the European Council, as well as the general principles in Estonia's law.^{*58}

⁵² Brighton Declaration. High Level Conference on the Future of the European Court of Human Rights of April 19–20, 2012, Part A. Available at <http://www.coe.int/en/20120419-brighton-declaration> (most recently accessed on 27.5.2012).

⁵³ See also C. Ladenburger. European Union institutional report – The protection of fundamental rights post-Lisbon: The interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions (see Note 20), pp. 214–215.

⁵⁴ See the House of Lords (UKHL) in the case of *Ghaidan v. Godin-Mendoza* (2004), UKHL 30.

⁵⁵ Olivier Dutheillet de Lamothe, Constitutional Court Judges' Roundtable, 2005, 4 I-CON 550; V. Goesel-Le Bihan. Le contrôle de proportionnalité dans la jurisprudence du Conseil constitutionnel: figures Récentes. – *Revue française de droit constitutionnel* 2007, pp. 284–285.

⁵⁶ Besselink (see Note 22), p. 65.

⁵⁷ *Ibid.*, p. 81.

⁵⁸ Supreme Court Constitutional Review Chamber decision of 30.9.1994, III-4/1-5/94. – RT I 1994, 80, 1159 (in Estonian). English text available in English on the Supreme Court's Web site, at <http://www.nc.ee/?id=482> (most recently accessed on 27.5.2012).

3.4.1. Estonia's constitution and the European Convention on Human Rights

Formally the Convention is a ratified international agreement and is positioned between Estonia's constitution and the Estonian laws. In practice, it is the standard together with the Constitution by which violation of human rights is ascertained by the Supreme Court.^{*59}

By accessing the Supreme Court's Web site, one can become familiar with the analysis of ECtHR practice in the decisions of the Supreme Court.^{*60} Most of the references made to ECtHR judgements in Supreme Court decisions pertain to criminal cases and, in particular, reasonable time of proceedings, admissibility of statements as evidence given in preliminary investigation, and the guarantee of the right of defence in criminal proceedings. As for constitutional review, the Convention's practices are applied chiefly in cases to do with the right to appeal a decision, individual constitutional complaint proceedings (which are not known in the Estonian legal order *de lege lata*), and excessive state fees. For administrative matters, the main subject of references to the case law of the ECtHR has been the treatment of imprisoned persons with human dignity. In some instances, some Supreme Court decisions contain comprehensive references to the Convention, especially to ECtHR practice—e.g., a constitutional analysis of preventive detention (detention after service of the sentence).^{*61} Given that an abundance of ECtHR practice exists and is constantly developing, and, in addition, often depends on concrete situations, it is not easy for the Supreme Court to compile such analyses, even more so in court decisions. Citizens have also raised questions about availability in Estonia of the ECtHR practices referred to in Supreme Court decisions.^{*62} Summaries of essential ECHR practices have, by now, become included in *Riigi Teataja* (The State Gazette) and on the Foreign Ministry's Web site.^{*63}

Estonia has recognised the importance of the Strasbourg court's broad reach, starting with the Supreme Court decision in the *Giga* case, in 2004^{*64}, in which the Supreme Court recognised the reopening of court cases when the ECtHR finds a violation, and now the possibility of reopening is also part of Estonia's procedural codes.^{*65} In general, entering the Strasbourg court's jurisdiction is considered less painful than becoming a member of the EU. Estonia's constitution is justifiably inspired by the ECHR, and very little opposition exists. Reform is still needed for remedying the unreasonably long court procedures; it is too early for assessment of the practical improvements made via the recently established mechanism to expedite the process^{*66}, and no legal basis for compensation exists in current legislation.

From examination of the situation in Estonia, it can be said that most of the decisions wherein the ECtHR has recently found violations had not reached the Supreme Court of Estonia (they were rejected at the leave-to-appeal level). Those were cases in which the Supreme Court had ruled the lower courts' decisions to be correct. Fewer disagreements with the Supreme Court's own decisions were seen, and in a couple of the latest cases the ECtHR^{*67} has made positive references to the Supreme Court's rulings—e.g., the

⁵⁹ See also R. Maruste. *Konstitutsionalism ning põhiõiguste ja -vabaduste kaitse* (Constitutionalism and Protection of Fundamental Rights and Freedoms). Tallinn: Juura 2004, p. 238 (in Estonian).

⁶⁰ E. Rohtmetts. *Euroopa Inimõiguste Kohtu praktika Riigikohtu lahendites. Kohtupraktika analüüs. Riigikohtu õigusteabe osakond* (Case-law of the European Court of Human Rights in the Supreme Court Decisions. Analysis of Court Practice. Department of Legal Information of the Supreme Court). January 2012. Available at http://www.riigikohus.ee/vfs/1285/EIK%20praktika%20RK%20lahendites_analuus_jaan2012_E_Rohtmetts.pdf (most recently accessed on 27.5.2012) (in Estonian).

⁶¹ See Supreme Court *en banc* decision of 21.6.2011, 3-4-1-16-10 (in Estonian). English text available at <http://www.riigikohus.ee/?id=1302> (most recently accessed on 27.6.2012).

⁶² T. Raatsin: *Tõlkes röövitud inimõigused ehk miks kohtunik pimedust kardab?* (Human Rights Lost in Translation or Why is the Judge Afraid of Darkness?). – *Eesti Ekspress*, 29.6.2011. Available at <http://www.ekspress.ee/news/arvamus/arvamus/teet-raatsin-tolkes-roovitud-inimoigused-ehk-miks-kohtunik-pimedust-kardab.d?id=48502157> (most recently accessed on 27.5.2012).

⁶³ Respectively, https://www.riigiteataja.ee/oigusudised/kohtuudiste_nimekiri.html and <http://www.vm.ee/?q=taxonomy/term/229> (most recently accessed on 27.5.2012).

⁶⁴ Supreme Court *en banc* decision of 6.1.2004, 3-1-3-13-03 (in Estonian). English text available at <http://www.nc.ee/?id=410> (most recently accessed on 27.5.2012) (in Estonian).

⁶⁵ Clause 240 (2) 8) of the Code of Administrative Court Procedure (RT I, 23.2.2011, 3; 28.12.2011, 7); §702 (2) 8) of the Code of Civil Court Procedure (RT I 2005, 26, 197; RT I, 28.12.2011, 44); Code of Misdemeanour Procedure, §180 (4¹) (RT 2002, 50, 313; RT I, 29.12.2011, 1); Code of Criminal Procedure, §366 (7) (RT I, 2003, 27, 166; RT I, 17.4.2012, 6).

⁶⁶ See §333¹ of the Code of Civil Court Procedure; §274¹ of the Code of Criminal Procedure, in force since 1.9.2011; §100 of the Code of Administrative Procedure, in force since 1.1.2012.

⁶⁷ See *Raudsepp v. Estonia*, no. 54191/07, judgement of 8.11.2011.

latter's ruling in the *Osmjorkin*⁶⁸ case, addressing the compensation for unreasonably lengthy court procedure, and the rulings that have taken into account the unreasonably long criminal proceedings by reducing the sentence.⁶⁹ These developments give witness to the fact that the ECtHR and the Supreme Court's practice have entered constructive dialogue. However, some substantiated violations that the ECtHR has found to be committed by other Member States, as in the finding that the absolute ban on a detainee exercising his or her voting right violates the Convention⁷⁰, have not been taken into consideration by the Estonian legislature (in Estonia, a similar absolute ban exists).

3.4.2. The Estonian Constitution and EU law

Matters are somewhat more complicated where the relationship between Estonian law and EU law is concerned. At this point, the previous considerations are not repeated (in-depth examination of the references to the case law of the CJEU in the Supreme Court's practice even before it came into force and before Estonia joined the EU, and, also, the application of EU law in the Supreme Court's case law, as well as references of the Estonian courts for preliminary rulings).⁷¹ In the realm of the most recent developments in EU law and its influence on Estonian legislation, the Anti-Counterfeiting Trade Agreement (called ACTA) has been an object of discussion of late, and so has the Treaty on the European Stability Mechanism (ESM).

It can be deduced from the examples that were presented at the beginning of this article that some EU member states find certain principles and values not recognised by EU law to be so unique and essential to their statehood and laws that they must be protected at all costs. An amendment to the Estonian Constitution (Republic of Estonia Amendment Act, Article 1) contains a protection clause according to which Estonia may belong to the European Union with the proviso that the fundamental principles of the Estonian Constitution are respected. However, the Supreme Court has not explained to date what these fundamental principles are. The Supreme Court was not asked for its opinion before Estonia joined the EU, before the failed Treaty establishing a Constitution for Europe, or at the ratification of the Lisbon Treaty by the Estonian parliament. At the same time, the parliament has since 2006 had the possibility of seeking the Supreme Court's opinion in certain instances, but it has done so only once. In the latter case, the Supreme Court's opinion was positive and pragmatic as to EU law.⁷² Regrettably, many questions remained unresolved, especially the question of where the limits to EU law lie.

How far can EU activities reach in accordance with Estonia's constitution? The Supreme Court itself has, in essence, stated (in 2008) that it is not to be ruled out that the treaties amending the founding treaties of the EU and such stipulations of EU law as delegate to the EU new competencies will be scrutinised (reviewed) by the Supreme Court in view of their concordance with the fundamental Constitutional principles inherent to Estonia.⁷³

It is good to recognise that, thanks to the Chancellor of Justice questioning the ESM treaty, the Supreme Court could state its position (Supreme Court judgment of 12 July 2012). But, of course, a separate issue is that the ESM treaty has been drafted and agreed upon outside the classical autonomous EU law system and thus has the character of an international agreement. Therefore, it would be difficult to deal with the question of the extent to which the ESM treaty gives the EU additional competencies at all and/or creates the new international financial office as an independent international organ. In any event, the agreement

⁶⁸ Supreme Court *en banc* decision of 22.3.2011, 3-3-1-85-09. Available at <http://www.riigikohus.ee/?id=1257> (most recently accessed on 27.5.2012).

⁶⁹ *Malkov v. Estonia*, no. 31407/07, judgement of 4.2.2010.

⁷⁰ *Hirst v. the United Kingdom* (no. 2), no. 74025/01, judgement of 30.3.2004.

⁷¹ See, for example, J. Laffranque, Rose D'Sa. Getting to know you: The developing relationship between national courts of the 'newer' Member States and the European Court of Justice with particular reference to Estonia. – *European Business Law Review* 2008 (19), pp. 311–320; J. Laffranque. A glance at the Estonian legal landscape in view of the Constitution Amendment Act. – *Juridica International* 2007 (IV), pp. 55–66; J. Laffranque. 'Community, identity, stability': Ideals and practice in building a bridge between the legal systems of the European Union and one of the smallest of the 'Brave New World'. – A. Lazowski (ed.). *The Application of EU Law in the New Member States—Brave New World*. The Hague: T.M.C. Asser Press 2010, pp. 157–207.

⁷² Supreme Court Constitutional Review Chamber opinion of 11.5.2006 on the interpretation of the Constitution, 3-4-1-3-06. – RT III 2006, 19, 176 (in Estonian). English text available at <http://www.nc.ee/?id=663> (most recently accessed on 27.5.2012).

⁷³ Supreme Court Administrative Law Chamber ruling of 7.5.2008, 3-3-1-85-07 (*OÜ Aiva Baltic*), paragraph 39. Available at <http://www.nc.ee/?id=11&tekst=RK%2F3-3-1-85-07&print=1> (most recently accessed on 27.5.2012) (in Estonian).

can enter force even without Estonia's consent, because it does not, as is the case with changes made to the EU's founding treaties, require all signatory states to agree upon it.

Personally, I find it regrettable that the only time that attempts were made by the Supreme Court to examine the ties between EU law and Estonia's constitution more thoroughly—i.e., in 2006, the preparations for adopting the euro, along with the present work in relation to the ESM treaty—the issue was division of competencies in the area of money and materialism. It would have been of greater relevance to question whether values such as Estonian language and culture, and also human dignity and justice, are under the same protection in the EU as they are in Estonia. Many matters in the functioning of the European Union are based on solidarity: if the richer countries did not help the poorer, the EU as we know it today would not exist. Regrettably, the concept of solidarity has hardly spread in Estonia.

4. Conclusions and the future: Accession of the European Union to the European Convention on Human Rights

In conclusion, it can be stated that conflicts among the three gods (ECHR, EU Charter, and Estonian Constitution) do not exist in Estonia, because Estonia's constitution and court practice have taken into consideration the European Convention on Human Rights and the EU Charter.

Under these circumstances, the question of a hierarchy is eliminated. The Estonian judge has one god that is simultaneously a trinity: Father, Son, and Holy Ghost co-existing in harmony. Which of the three has each of these roles—among the European Convention on Human Rights, Charter of Fundamental Rights of the European Union, or Estonian Constitution—remains for anybody to decide for him- or herself. However, they have to be seen in harmony. The trinity does not consist only of the above-mentioned entities, for the European Court of Human Rights, Court of Justice of the European Union, and Estonian Supreme Court's practice are included. There is no need for petty talk about subjugation to EU law, or the flag-waving of populist sovereignty. The principal element and value that all persons of the trinity have to consider is the protection of human rights.

Legal bases and their multiple interpretations can cause conflicts, but these could be prevented through co-operation. Extremely necessary and important in this context are a competent body of jurists, training of judges and lawyers, raising people's awareness of justice, centres for analysis of European law at Member States' courts, an EU law competence centre at the Strasbourg court, and a centre focusing on the ECHR (as well as ECtHR jurisprudence) at the Luxembourg court.

In many respects, prevention of conflicts depends on the approach. In the opinion of German lawyer Armin von Bogdandy, the national judge deciding in a case touching on European law must not lose sight of the decision's *Verallgemeinerungsfähigkeit*, its generalisability, and should remember that the decision could also be used in the courts of other European states.^{*74}

The courts have to be open to dialogue among themselves across Europe, and the various powers of the state as well as media. ECtHR judge Mark Villiger has presented several dialogues that the judges of the Court have: with other ECtHR judges, the Court's registry and lawyers, parties to the case at hand, judges of domestic courts, judges of other European and international courts, European society, and finally themselves.^{*75} Only as a result of the above is it possible to make an informed, objective, and fair decision; therefore, judges have to acknowledge to themselves the need for such dialogues.

ECtHR President Sir Nicolas Bratza has emphasised that dialogue also has to proceed through judgments.^{*76} Permitting Member States' courts to ask for opinions from the ECtHR has been suggested as one

⁷⁴ A. von Bogdandy. Prinzipien der Rechtsfortbildung im europäischen Rechtsraum: Überlegungen zum Lissabon-Urteil des BVerfGE. – *Neue Juristische Wochenzeitung* 2010 (63), pp. 1 ff. See also A. von Bogdandy, S. Schill. Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag. Zur unionsrechtlichen Rolle nationalen Verfassungsrechts und zur Überwindung des absoluten Vorrangs. – *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 2010 (70), pp. 701–734.

⁷⁵ M.E. Villiger. The dialogue of judges. – C. Hohmann-Dennhardt, P. Masuch, M. Villiger (eds). *Festschrift für Renate Jaeger, Grundrechte und Solidarität. Durchsetzung und Verfahren*. Kehl am Rhein: Engel Verlag 2011, pp. 195–209.

⁷⁶ N. Bratza. The relationship between the UK courts and Strasbourg. – *European Human Rights Law Review* 2011/5, p. 511.

of the possibilities for advancing dialogue. A somewhat similar mechanism in the EU is references by Member States' courts to the CJEU for a preliminary decision.

As the above examples have shown, the answer to the question 'Who has the last word on the protection of human rights in Europe?' often depends on the specific court decision. Legal bases have no hierarchy, nor do the courts that interpret those bases.

It is regrettable that the press commented on the recent ECtHR judgement *Leas v. Estonia*^{*77} that the former mayor of the rural municipality in Kihnu whom the Estonian courts had found guilty of accepting a bribe had been acquitted by the ECtHR.^{*78} After all, the ECtHR cannot rule on the guilt or innocence of anybody; the ECtHR decides whether a Member State has violated the European Convention on Human Rights in a concrete case, and it brings attention to certain deficiencies—e.g., regulation and judicial control of the surveillance activities.

In the contemporary world, one does not speak in terms of hierarchical categories. New theories have emerged, such as multilevel constitutionalism, the network of EU and Member States' constitutional rights, constitutional pluralism, judicial dialogue, a common minimum standard, and a polycentric system.^{*79} Advocate General Maduro has said that European democracy also entails achieving a delicate balance between the national and European dimensions of democracy, without either one necessarily prevailing over the other.^{*80} BVerfG Chairman Andreas Voßkuhle maintains that the CJEU and Member States' constitutional courts are parts of one large union of constitutional courts and that internationalisation and europeanisation have given comparative constitutional law a new quantitative and qualitative dimension.^{*81}

The prevalence of EU law has become more relative in nature because of the important role of the above-mentioned Article 4 (2) of the EU Treaty. The fundamental rights should be part of EU constitutional identity *via* Article 2 of said treaty, but regardless of what the EU does, it has to guarantee that fundamental rights are protected.

In conclusion, I would like to mention an essential element in the regulation of a common European legal space: the accession of the European Union to the European Convention on Human Rights. The financial crisis has shown that *ad hoc* solutions, which do not belong in a rule-of-law state, may become a problem in the EU. It would be dangerous for the EU to abandon its own values. The European Union should have an external control mechanism of international standing, and the European Court of Human Rights could fill that role. To prevent hierarchy, the ECtHR should be seen in such instance not as a higher court but as a court specialising in human rights that makes sure that EU activities are in line with fundamental rights.

The greatest benefit of EU linking-up with the Convention would be the availability of better opportunities for the individual to argue against EU arbitrariness, thus enhancing the accountability of EU institutions in the protection of fundamental rights.

Former Finnish Chancellor of Justice Paavo Nikula has said that if the EU itself would want to join the EU, it would not qualify, because it has not signed the European Convention on Human Rights.^{*82} Regrettably, the accession of the EU to the ECHR has stalled. Whilst the draft agreement^{*83} was written last year, it has not been approved. Many questions still remain: those of the EU contribution to the Council of Europe's budget, EU voting rights in the Committee of Ministers of the Council of Europe, and appointment of an EU judge to the ECtHR, to name a few. The key question is that of the preservation of the autonomy of EU law.

⁷⁷ *Leas v. Estonia*, no. 59577/08, judgement of 6.3.2012.

⁷⁸ Euroopa Inimõiguste Kohus mõistis Kihnu endise vallavanema õigeks (The European Court of Human Rights Acquitted the Former Mayor of Kihnu Municipality), news published by Estonian Public Broadcasting (ERR) on 7.3.2012. Available at <http://uudised.err.ee/index.php?06247664> (most recently accessed on 27.5.2012) (in Estonian).

⁷⁹ On the concept of 'new monism', see also A.E. Kellermann. Comparative aspects on constitutions: Theory and practice. – European Journal of Law Reform 2011 (13), pp. 126–127.

⁸⁰ Opinion of Advocate General Poiras Maduro, delivered on 26.3.2009, C-411/06 (*Commission of the European Communities v. European Parliament and Council of the European Union*).

⁸¹ A. Voßkuhle. Der europäische Verfassungsgerichtsverbund. – Neue Zeitschrift für Verwaltungsrecht 2010 (29); A. Voßkuhle. Europa als Gegenstand wissenschaftlicher Reflexion – eine thematische Annäherung in 12 Thesen. – C. Franzius, F.C. Mayer, J. Neyer (eds). Strukturfragen der Europäischen Union. Nomos 2010, pp. 44–45.

⁸² Paavo Nikula's speech 'The human rights within [the] EU – key issue in political integration', in Athens in February 2000, at the conference Towards a Political Unification of Europe?.

⁸³ Final version of the draft legal instruments on the accession of the European Union to the European Convention on Human Rights. Available at http://www.coe.int/t/dghl/standardsetting/hrpolicy/CDDH-UE/CDDH-UE_documents_en.asp (most recently accessed on 27.5.2012).

The most significant judicial nuances of the accession involve the so-called co-respondent institution and the rendering possible of prior involvement for the Court of Justice of the European Union.^{*84}

The longer the accession process takes, the greater are the risks of disagreements surfacing in relation to human rights protection. At least in the Brighton Declaration, the importance of EU accession to the European Convention on Human Rights is emphasised.^{*85}

Finally, it is not so much a matter of who has the power to get in the last word. The answer resides in the protection of human rights themselves—protection that has to be guaranteed identically by Member States, the EU, the Council of Europe, and the courts of the pan-European system of justice, with complementarity and respect for each other in the process.

⁸⁴ See, for example, A. Tizzano. *Les Cours européennes et l'Adhésion de l'Union à la CEDH. – Il Diritto dell'Unione Europea*, no. 1, 201129-57; C. Landenburger. *Vers l'adhésion de l'Union européenne à la Convention européenne des droits de l'homme. – Revue trimestrielle de droit européen (RTD Eur)* 2011 (47)/1 (Jan.–Mar.), pp. 19–26; J.P. Jacque. *The accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms. – Common Market Law Review* 2011 (48), pp. 995–1023; P. Gragl. *Accession revisited: Will fundamental rights protection trump the European Union's legal autonomy? – European Yearbook on Human Rights* 2011, pp. 159–173; T. Lock. *Walking on a tightrope: The draft ECHR accession agreement and the autonomy of the EU legal order. – The Common Market Law Review* 2011 (48)/4, pp. 1025–1054; Robert Schuman Foundation: *Adhésion de l'Union européenne à la Convention européenne des droits de l'homme: analyse juridique du projet d'accord d'adhésion du 14 octobre 2011 (Auteurs: Xavier Groussot, Laurent Pech, Tobias Lock). Françoise Tulkens, Pour et vers une organisation harmonieuse. – RTD Eur* 2011 (47)/1 (Jan.–Mar.).

⁸⁵ High Level Conference... (see Note 52), paragraph 36: 'The accession of the European Union to the Convention will enhance the coherent application of human rights in Europe. The Conference therefore notes with satisfaction progress on the preparation of the draft accession agreement, and calls for a swift and successful conclusion to this work.'