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# *A Tale of Two Cities: Fundamental Rights Protection in Strasbourg and Luxembourg*

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**Abstract**
This article tackles questions relating to the interrelationship between the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union, as well as the roles of the two European courts charged with their interpretation and application, by way of two case studies. The cases chosen address two very different issues—surrogacy and the right to privacy and family life on the one hand, and religious freedom and the wearing of religious symbols in the workplace on the other. On the surrogacy issue the article refers to an Irish Supreme Court case as well as case law from the Strasbourg and Luxembourg courts to illustrate how limits to the jurisdiction of the two European courts is, or is not, clearly articulated and the legal tools used when addressing sensitive legal questions of this nature. As regards the wearing of religious symbols in the workplace, the article concentrates on cases originating in the United Kingdom and France which have been examined by the Strasbourg court and highlights the similarities and differences between that case law and recent judgments of the Luxembourg court, called on, for the first time, to tackle questions of discrimination on grounds of religion with reference to EU anti-discrimination directives and the provisions of the Charter on both equality and religious freedom.

**Keywords:** fundamental rights, ECHR, Charter, surrogacy, discrimination, religious freedom

## I. INTRODUCTION

The ground-breaking decision of what is now the Court of Justice of the European Union ('CJEU') in *Stauder v Stadt Ulm*, in which for the first time it committed EU institutions to respect fundamental rights as general principles of EU law, was handed down almost half a century ago.[1] The sources of those general principles

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[1] C-29/69, EU:C:1969:57. For the sake of simplicity, reference is made throughout to the EU and related concepts and institutions, regardless of whether the EEC, EC, or EU was in existence at the relevant time.

were subsequently identified in the 1970s as being constitutional traditions common to the Member States and international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories.[2] As regards this second category, the European Convention of Human Rights ('ECHR') was quickly recognised by the Luxembourg court as having special significance,[3] a status recently elevated by the CJEU's President to "'very special significance'".[4] The first Treaty reference to fundamental rights in the preamble to the 1986 Single European was transformed radically in just over twenty years, with the threefold recognition following the Treaty of Lisbon of the binding nature of the Charter; the creation of an obligation on the EU to accede to the ECHR, albeit subject to certain conditions; and the continued recognition of fundamental rights as general principles of EU law, based on the primary sources just referred to.[5] As the scope of EU law has developed, and these substantial changes in the EU's commitment to fundamental rights within that scope have taken shape, the role of the CJEU and its remit have also undergone quite fundamental changes. Cases in an ever-wider variety of fields confront it with the task of engaging in core human rights analysis, weighing the competing rights of two individuals or of an individual or group of individuals and general societal interests.

Prior to the CJEU's decision to commit the EU and its institutions to respect for fundamental rights, the Strasbourg court—with reference to the provisions of the Convention and additional Protocols—was already in the process of building up a significant body of fundamental rights case law, some of it ground-breaking. Until fairly recently, this case law concerned, more often than not, areas of the law falling outside the scope of EU law and therefore outside the fundamental rights remit of the CJEU. Yet as that scope has gradually expanded, so too have the points of contact between the ECHR and the EU Treaties and secondary legislation and with that, the potential for, if not conflict, divergence.

One reason for this divergence can be found in the very terms of the historic *Internationale Handelsgesellschaft* judgment where the CJEU insisted that "'the protection of [fundamental] rights, whilst inspired by the constitutional traditions common to the Member States, *must be ensured within the framework of the structure and objectives of the Community*'". This need not to jeopardise the objectives of EU law has, over time, been joined by the need not to compromise the efficacy of EU legislation.[6] No justification as broad as that found in Article 52 § 1 of the Charter

[2] *Internationale Handelsgesellschaft v Einfuhr* C-11/70, EU:C:1970:114, § 4 (common constitutional traditions provided inspiration), and *Nold v Commission* C-4/73, EU:C:1974:51 (international human rights treaties supplied guidelines).

[3] *ERT v Pliroforissis* C-260/89, EU:C:1991:254, § 41.

[4] See the address by the President of the CJEU, Koen Lenaerts, on the occasion of the opening of the judicial year, 'The ECHR and the CJEU: Creating Synergies in the Field of Fundamental Rights Protection', Strasbourg, 26 January 2018, https://www.echr.coe.int/Documents/Speech_20180126_Lenaerts_JY_ENG.pdf.

[5] Article 6 TEU.

[6] See, eg, *Melloni* C-399/11, EU:C:2013:107, § 63.

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—'objectives of general interest recognised by the Union'—can be found in the ECHR. Regardless of these differences, from an early stage, the European Court of Human Rights ('ECtHR') sought to accommodate the international obligations to which EU Member States had subscribed while seeking, nevertheless, to ensure compliance with their Convention obligations.[7] This culminated in the cementing in the *Bosphorous* case of the presumption of equivalent protection of fundamental rights by EU Member States, a presumption only applicable in certain circumstances but only displaced, once applicable, by proof of manifest deficiency.[8] As explained below, the ECtHR often stresses that it is not its task to interpret EU law. Rather, it is for the national authorities, most notably the domestic courts, to interpret and apply domestic law, if necessary in conformity with EU law, and the Strasbourg court limits its role to ascertaining, subject to the *Bosphorous* presumption, whether the effects of such interpretation and application are Convention compatible.[9]

With almost ten years of interpreting and applying the Charter under its belt, the CJEU is increasingly—perhaps even daily—called on to address questions relating to fundamental rights. It is estimated that one out of every ten cases before the CJEU now reference the Charter. Many of its most significant judgments in recent years have had an important fundamental rights dimension. I am thinking of course of cases like *NS*, an Irish/UK joined preliminary reference, and a follow-up to a previous decision of the Strasbourg court in *MSS v Belgium and Greece*. In that case, the Luxembourg court examined the need to respect fundamental rights in the operation of the Dublin asylum system and circumscribed the operation of the principle of mutual recognition in that context.[10] *Åkerberg Fransson*, in which the Court sought to clarify the scope of application of the EU Charter and the operation of the principle of *ne bis in idem*, is another example.[11] Or one could equally mention recent cases on mass surveillance, privacy, and data protection—*Digital Rights* and *Schrems*, later followed by *Tele2 Sverige and Watson*—case law heavily referenced at the oral hearing in Strasbourg in November 2017 in the case of *Big Brother Watch v the*

[7] See, eg, *M and Co v Germany* (Application no 13258/87) Decision of the Commission of 9 January 1990.

[8] See *Bosphorous Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* (Application no 45036/98) 2005-VI ECHR 107; recently confirmed, following the entry into force of the Treaty of Lisbon and therefore the legal recognition of the Charter of Fundamental Rights of the EU, in *Avotiņš v Latvia* (Application no 17502/07) 23 May 2016.

[9] See, eg, *Jeunesse v the Netherlands* (Application no 12738/10) 3 October 2014, § 110.

[10] See *NS* C-411/10; C-493/10, EU:C:2011:865, and *MSS v Belgium and Greece* (Application no 30696/09) 2011-I ECHR 255.

[11] See *Åklargen v Åkerberg Fransson* C- 617/10, EU:C:2013:280. Two subsequent ECtHR Grand Chamber judgments—*Zolothukin v Russia* (Application no 14939/03) 2009-I ECHR 291, and *A and B v Norway* (Application no 24130/11 and 29758/11) 15 November 2016—and a recent Luxembourg Grand Chamber judgment—*Menci* C-524/15, EU:C:2018:197—are further steps in this ongoing judicial dialogue.

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*United Kingdom*.[12] Two reasons for this increased engagement have already been touched on: the Charter and the ever-expanding scope of EU law itself, a phenomenon entirely independent of the Charter, described famously by Lord Denning in terms of an unstoppable incoming tide.[13]

That famous unstoppable tide leads to an important preliminary point. It is impossible to address the subject of this article without recognising that it is addressing the question of the protection of fundamental rights by two European courts during a time when that tide is turning and when its movements have been declared by a majority of the United Kingdom electorate as no longer relevant—or considerably less relevant—to the coastal waters and estuaries of the United Kingdom. This article approaches the law as it stands at present, well aware that the future role of the Charter in the United Kingdom remains an open and contested issue.[14]

Returning to the central theme, the Treaty of Lisbon and the ever-changing scope of EU law mean that EU courts have been increasingly called on to engage with fundamental rights questions previously the remit of, first, domestic constitutional and supreme courts and, in the last resort, the Strasbourg court. For lawyers of recent generations, this overlap may seem quite natural. However, even for those versed, since undergraduate level, in EU law and the Convention, how to square a written or unwritten Constitution, a Human Rights Act, the Convention, and EU Charter rights is likely to remain something of a challenge in practice. For those trained in the law at a time when the EEC Treaties contained no mention of fundamental rights, and when preliminary references from Member States concerned questions relating to things like agriculture and fisheries, this is a seismic change. It affects not only the relationship between national courts and the Luxembourg court, but also the role of the two European courts as regards the protection of fundamental rights and their relationship. What has struck me on almost every occasion I have spoken on European legal issues, but particularly since the 2009 Treaty of Lisbon, was the difficulty that many legal practitioners and students encounter reconciling the three texts I have referred to above—the [national] constitution, the Convention, and the Charter. They give rise to important questions:

- How do they fit together?
- Why do we need all three?
- Why does one case go to Strasbourg and another to Luxembourg?
- What happens when a case goes to both?

[12] See *Digital Rights Ireland v Minister for Communications, Marine and Natural Resources* C-293/12; C-594/12, EU:C:2014:238; *Schrems v Data Protection Commissioner* C-362/14, EU:C:2015:650; *Tele2 Sverige and Watson* C-203/15; C-698/15, EU:C:2016:970; and *Big Brother Watch v UK* (Application nos 58170/13; 62322/14; 24960/15) (the oral hearing in this case was held in Strasbourg on 7 November 2017).

[13] See *Bulmer (HP) Ltd v J Bollinger SA* (1974) Ch 401 at 418–19.

[14] See further D Grieve, 'What Price Sovereignty? Brexit and Human Rights', 2018 Mackenzie-Stuart Lecture, Centre for European Legal Studies, Faculty of Law, University of Cambridge, 1 March 2018.

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- Is there not a risk that the two European courts, called on increasingly to deal with the same or similar fundamental rights questions, will reach different conclusions or, if their conclusions are essentially the same, reach them via a different legal route?

The answers to these questions are not easy ones. And indeed, even if I attempt to provide some answers it is likely that different readers—depending on whether their professional, legal focus is constitutional law, the Human Rights Act and the Convention, or the EU Charter—may disagree on the correct responses.

When trying to tackle questions on the interrelationship between the Convention and the EU Charter, different approaches can be adopted. One, more abstract approach, would be to look at the Convention and the EU Charter as two systems of law and to explain, in abstract terms, how those two different systems work, interact, converge, and possibly diverge from each other. The general principles in Articles 51 to 53 of the EU Charter focus on these questions. Another approach is to try to explain the systems and tease out their points of divergence and convergence through a form of legal or judicial story-telling. The story-teller, or *seanachaí*, having been a figure of considerable historical and social importance in Gaelic parts, I will follow the judicial story-telling route. The cases I have chosen address two very different issues—surrogacy and the right to private or family life on the one hand,[15] and religious freedom and the wearing of religious symbols on the other.[16] On the surrogacy issue I will refer to a relatively recent Irish Supreme Court case as well as case law from Strasbourg and Luxembourg to illustrate how limits to the jurisdiction of the two European courts is, or is not, clearly articulated. On the issue of religious symbols, I will concentrate on British and French cases before the Strasbourg court and highlight how the Luxembourg court has recently, for the first time, tackled questions of religious discrimination.

## II. THE TWO SYSTEMS

A brief reminder is necessary of what distinguishes the two European courts: the systems of which they form a part; the nature of their dialogue with national judges; their methods and their case law.

[15] See Article 8 ECHR and Article 7 of the Charter. See also Article 52(3) of the Charter which provides that 'in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, their meaning and scope are to be the same as those laid down by the ECHR'. It is accepted, both in the explanations accompanying the Charter and in the case law of the CJEU that 'Article 7 contains rights corresponding to those guaranteed by Article 8(1) of the ECHR. Article 7 of the Charter must therefore be given the same meaning and the same scope as Article 8(1) of the ECHR, as interpreted by the case law of the European Court of Human Rights' (*McB v LE* C-400/10, EU:C:2010:582).

[16] See Articles 9 ECHR and 10 (freedom of thought, conscience and religion) and 21 (non-discrimination) of the Charter. The explanations accompanying the Charter indicate that 'the right guaranteed in [Article 10] paragraph 1 corresponds to the right guaranteed in Article 9 of the ECHR' and, in accordance with Article 52(3) of the Charter, has the same meaning and scope. Limitations must therefore respect Article 9(2) ECHR. Article 21 of the Charter is said to 'draw on' 14 ECHR and, in so far as it relates to Article 14 ECHR, it applies in compliance with it.

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## A. The ECHR and the Strasbourg Court

### 1. Mission

The Strasbourg court's judicial mission is, in accordance with Article 53 ECHR, to set the minimum level of human rights protection throughout Europe. The Convention is, in the words of the Strasbourg court in cases like *Bosphorous*, 'a constitutional instrument of European public order in the field of human rights'.[17] It is a rights-based court whose sole task is to interpret the Convention.

### 2. Effects of case law

The judgments of the Strasbourg court impose on respondent states a legal obligation to adopt general and/or individual measures to put an end to any violation found. Execution of those judgments may be slow or indeed highly problematic. In a British or Scottish context, a reference to the prisoners' voting rights cases—*Hirst* or *Greens and MT*, a Scottish case concerning elections to the European Parliament—should suffice to make the point.[18] On a more general level, in 2017, in *Burmych v Ukraine*, the Grand Chamber struck out over 12,000 applications from Ukraine relating to non-enforcement of domestic judgments in breach of Article 6.[19] The Court considered that it had already discharged its functions under Article 19 of the Convention by handing down a pilot judgment which had largely been ignored and that it was now for the Committee of Ministers of the Council of Europe to supervise the effective execution of that pilot judgment.[20]

As authoritative statements on the interpretation and application of Convention rights, Member States are meant to give consideration to the general principles that are developed in the case law as a whole (the principle of *res interpretata*). Whether and to what extent they do so is a more complex matter. Much depends on the domestic instrument of incorporation—on how the Convention forms part of

[17] *Bosphorous*, see note 8 above, § 156, citing *Loizidou v Turkey* (App. No. 15318/89) March 1995, pp. 27–28, § 75.

[18] See *Hirst v the United Kingdom* (Application no 74025/01) 2005-IX ECHR 187, and Joint Committee on Human Rights, *Enhancing Parliament's Role in Relation to Human Rights Judgments*, Fifteenth Report of Session 2009–10, 26 March 2010, pp 32–37. See also, *Greens and MT v the United Kingdom* (Application nos 60041/08 and 60054/08) 2010-VI ECHR 57. See also *Moohan v the United Kingdom* (dec.) and *Gillon v the United Kingdom* (Application nos 22962/15 and 23345/15) 13 June 2017, which concerned prisoners' voting rights in the Scottish independence referendum. The applications were deemed inadmissible as Article 3 of Protocol No 1 is not considered to apply to referenda. In November 2017 the Lord Chancellor indicated in a speech to Parliament that administrative changes to address the points raised in the Court's 2005 judgment were envisaged, allowing those on temporary licence to vote while maintaining the bar on convicted prisoners in custody from voting. See the proposal as submitted to the Committee of Ministers (https://rm.coe.int/1680763233) and approved in December 2017 by that body.

[19] (Application nos 46852/13 and others) 12 October 2017.

[20] See the pilot judgment in *Ivanov and others v Ukraine* (Application no 40450/04) 15 October 2009.

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domestic law—and on the openness of national courts to Strasbourg case law.[21] The role the Convention plays in the Irish superior courts, which will first refer to the Constitution, is quite different to that played by the same text in the United Kingdom Supreme Court, although the terms of the instrument of incorporation are very similar.[22]

### *3. Exhaustion*

The principle of exhaustion means the ECtHR should intervene only when a case has been finally decided at national level and after the relevant courts and, where appropriate, the constitutional court, have engaged with the fundamental rights questions before it. The importance of this principle has been emphasised in several recent Strasbourg cases concerning the United Kingdom, where the Court stressed that the Supreme Court, as the most senior court in most matters in the United Kingdom, holds a position of some responsibility in ensuring the application of the Convention in the respondent State. Allowing an applicant to proceed to Strasbourg without exhausting an effective domestic remedy would render the Supreme Court legally irrelevant to the functioning of the Convention system.[23]

### *4. Nature of supervision*

Supervision by the Strasbourg court is subsidiary in character, a fact reflected in that same principle of exhaustion and in the margin of appreciation afforded domestic authorities; a margin to which I will return. The concern is not that the *autonomy* of the ECHR or Strasbourg case law is preserved—language which we see recurring in Luxembourg case law, not least *Melloni*, *Åkerberg Fransson*, and Opinion 2/13 on accession[24]—but rather that, to the extent possible, national courts retain responsibility for ensuring compliance with the minimum floor provided by the Convention and the Strasbourg court's case law. If, in EU law terms, the principle of subsidiarity goes to the question of competence and has largely been considered a concept of political and legislative relevance,[25] in Convention terms it is a principle of

[21] See, for a comparative survey, P Popelier et al (eds), *Criticism of the European Court of Human Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level* (Intersentia, 2016).

[22] See, for a brief explanation of some fundamental differences, the Supreme Court judgment in *YY v Minister for Justice and Equality* [2017] IESC 61, § 31.

[23] See, for example, *Roberts v the United Kingdom* (Application no 59703/13) 5 January 2016, §§ 40–43; *Peacock v the United Kingdom* (Application no 52335/12) 5 January 2016, §§ 32–38; *Bahmanzadeh v the United Kingdom* (Application no 35752/13) 5 January 2016, §§ 49–55; and *Gadd v the United Kingdom* (dec.) (Application no 181/14) 5 September 2017.

[24] *Melloni*, see note 6 above; *Åkerberg Fransson*, see note 11 above; and Opinion 2/13, EU: C:2014:2454, §§ 179–200.

[25] See, in particular, Articles 5 and 12 TEU and Protocols Nos 1 and 2, and one of the first judicial reactions to the then newly introduced principle in *United Kingdom v Council* C-84/94 EU:C:1996:431, §§ 47, 55–56.

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fundamental importance characterising the Court's external supervisory jurisdiction and the manner it exercises it.

The twin philosophies of subsidiarity and shared responsibility for the protection of fundamental rights are to some extent illustrated in the statistics concerning the United Kingdom and Ireland. Of the 399 applications from the United Kingdom decided in 2016, 324 were disposed of by a single judge and 36 were declared inadmissible by a Committee or Chamber. The 16 applications originating in Ireland in the same period were treated by the single judge. Those who rail against the protection of fundamental rights and courts being out of touch with what is fair and proportionate rarely refer to these figures.[26] The important point is of course not the quantity of cases which the Strasbourg court is disposing of summarily or by way of inadmissibility decisions but rather the quality of the judicial dialogue between domestic courts and its Strasbourg counterpart and the depth of protection at domestic level that lie behind these figures.

### *5. Dialogue with national judges and other Member States*

The dialogue Strasbourg conducts with national courts in this context is *indirect*. Applications under Article 34 are lodged by individual applicants and, when communicated, are defended by respondent States. The Strasbourg court may have at its disposal a series of national judgments—the result of effective domestic remedies being exhausted—but at no point does it have direct contact with domestic jurisdictions.

When it enters into force on 1 August 2018, Protocol No 16 to the Convention will allow the designated highest domestic courts and tribunals of the ten States which have thus far ratified it to request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the Convention. It will therefore establish a *direct* form of judicial dialogue between the Strasbourg court and domestic courts and tribunals.[27] It will be for the latter to decide on the effects of the advisory opinion in the domestic proceedings. But when requesting an advisory opinion, it will also be for the domestic courts to reflect upon the necessity and utility of an advisory opinion and to set out, in detail, the relevant legal and factual background to the case. Having worked for many years in Luxembourg, where judges interact directly with their national judicial counterparts via the preliminary reference procedure, I would suggest that it is difficult to fault the Protocol No 16 mechanism in principle. A different question is whether, given the Strasbourg court's docket, resources, and working methods, it can work in practice.[28]

As regards other Convention States, while the Convention and Rules of Court provide for the possibility of third party intervention in all chamber and Grand

[26] Only 1.8% of applications against the United Kingdom in the first decade of this century have resulted in a judgment finding at least one violation. See Equality and Human Rights Commission, *The United Kingdom and the European Court of Human Rights* (Research Report 83, 2012) pp 42-43.

[27] See further the explanatory memorandum on Protocol No 16.

[28] See further S O'Leary and T Eicke, 'Some Reflections on Protocol n° 16' (2018) *EHR Law Review* 220.

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Chamber cases—in the interest of the proper administration of justice[29]—most interveners are non-governmental organisations. Regrettably, in my view, Convention States intervene too infrequently in cases, even at Grand Chamber level, brought against another Convention State.[30] The recent declaration issued at the High Level Conference meeting in Copenhagen emphasised that 'An important way for the States Parties to engage in a dialogue with the Court is through third-party interventions'.[31] However, it remains to be seen whether the Member States will avail of this possibility.

### *6. Nature of judgment*

A Strasbourg judgment is binary—violation or no violation—and, at present, with Protocol No 16 a new and untested procedure, nothing can be referred back to the national judge for a final decision since, the very nature of the Strasbourg decision means he or she should already have pronounced.

## *B. EU Law, the EU Charter, and the Luxembourg Court*

### *1. Mission*

The Luxembourg court, in contrast, is not, by origin, experience, natural disposition or design, purely a fundamental rights court.[32] Its broader judicial mission is, in accordance with Article 19(1) Treaty on European Union ('TEU'), to ensure that, in the interpretation and application of the Treaties, the law is observed. Although it is

[29] See Article 36 ECHR and Rule 44 of the Rules of Court.

[30] Twenty-seven judgments were handed down by the Grand Chamber in 2016. In seven cases—(*Karácsony and others v Hungary* (Application nos 42461/13 and 44357/13) 17 May 2016; *Avotiņš v Latvia*, see note 8 above; *Al Dulimi et Montana Management Inc v Switzerland* (Application no 5809/08) 21 June 2016; *Magyar Helsinki Bizottság v Hungary* (Application no 18030/11) 8 November 2016; *Dubska et Krejzova v Czech Republic* (Application nos 28859/11 and 28473/12) 15 November 2016; *A and B v Norway* (Application nos 24130/11 and 29758/11) 15 November 2016; *VM and others v Belgium* (striking out) (Application no 60125/11) 17 November 2016—governments other than those parties to the case were authorised to intervene on the basis of Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court. In one other case, *Paposhvili v Belgium* (Application no 41738/10) 13 December 2016, Georgia (which was the State whose nationality the applicant possessed) exercised its right to intervene under Article 36 § 1 of the Convention and Rule 44 § 1 a. In 2017, only six States intervened in cases decided by the Grand Chamber (see *Chiragov and others v Armenia* (just satisfaction) (Application no 13216/05) 12 December 2017; *Sargsyan v Azerbaijan* (just satisfaction) (Application no 40167/06) 12 December 2017; *Naït-Liman v Switzerland* (Application no 51357/07) 15 March 2018; *Bărbulescu v Romania* (Application no 61496/08) 5 September 2017; *Regner v the Czech Republic* (Application no 35289/11) 19 September 2017; and *Lopes de Sousa Fernandes v Portugal* (Application no 56080/13) 19 December 2017.

[31] See the declaration of the High Level Conference meeting in Copenhagen on 12 and 13 April 2018 at the initiative of the Danish Chairmanship of the Committee of Ministers of the Council of Europe, § 34.

[32] The former President of the CJEU, V Skouris, was often quoted as emphasising this. See recently the suggestion by D Sarmiento in 'A Court that Dare Not Speak its Name: Human Rights at the Court of Justice' (*EJIL: Talk!*, 7 May 2018) that it is high time the CJEU stopped disavowing its fundamental rights jurisdiction and mandate.

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explicitly tasked with protecting fundamental rights, it approaches this task as part of its broader duty to interpret EU law as a whole.[33]

As indicated previously, this broader mission is well-illustrated by the terms of, amongst others, Article 52(1) of the EU Charter which provides

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made *only if they are necessary and genuinely meet objectives of general interest recognised by the Union* or the need to protect the rights and freedoms of others.

A good example of how pursuit of this mission operates in practice is provided in the CJEU's seminal *Melloni* judgment on the European Arrest Warrant ('EAW'). The Luxembourg Court had to examine whether domestic courts could, in the light of national constitutional principles and with reference to Article 53 of the Charter, go beyond the level of protection afforded by the Charter and EU legislation on the EAW in the context of a conviction rendered *in absentia*.[34] The language of the *Melloni* judgment—which links the manner and extent of EU fundamental rights protection with the aim of protecting 'the primacy, unity and effectiveness of EU law'—reminds us that the protection of fundamental rights in EU law has generally been viewed with reference to the attainment of EU Treaty objectives.[35]

### *2. Effects of CJEU judgments*

The EU's constitutional structure is defined by the principle of conferral—EU law powers are limited, defined by the Treaties.[36] The EU's judicial system with, as its keystone, the preliminary ruling procedure, was developed in order to ensure that the specific characteristics and the autonomy of the EU legal order are preserved.[37] That procedure transforms the national judge into a judge of EU law and the principles of

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[33] See further G de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator' (2013) 20 *Maastricht Journal of European and Comparative Law* 168, 171.

[34] *Melloni*, see note 6 above.

[35] See *Internationale Handelsgesellschaft*, see note 2 above, § 4. Examples of the CJEU adopting Strasbourg type language and reasoning (as distinct from simply referring to Strasbourg case law or extracting principles therefrom) are rare but perhaps increasingly frequent. See, for example, *P and S v Cornwall County Council* C-13/94. EU:C:1996:178; *MP* C-353/16, EU:C:2018:276; or the Opinion in *Comans* C-673/16, EU:C:2018:2. In his Mitchell Lecture in 2014, Judge Vajda spoke of the need for the Luxembourg court 'to seek to maintain the appropriate balance between the role of the Union and the role of the Member States in keeping watch over the integrity of fundamental rights', C Vajda, 'The Application of the EU Charter: Neither Reckless nor Timid?' (University of Edinburgh, 2014) Europa Working Paper No 2014/09.

[36] See further Articles 4 to 6 TEU, outlining the principle of conferral and delimiting both the scope and effects of the Charter. See also Article 51(1) and (2) of the Charter itself.

[37] See Opinion 2/13, note 24 above, §§ 174–76.

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supremacy and direct effect give him or her the power to interpret domestic law in conformity with EU law and overturn national legislation at odds with it.[38] EU law and the Charter unfold their full potential as Tobias Lock has so well explained in the Brexit context, when it comes to remedies.[39]

### *3. Dialogue between the CJEU and national judges*

Dialogue between the CJEU and national judges is, by virtue of the preliminary reference procedure, *direct*. The Luxembourg court, when operating within the context of that procedure, receives a statement of fact and law by the referring court, can ask additional questions of that Court as the case is pending before it and when it hands down its preliminary ruling on the interpretation of EU law it directs the national court to apply that ruling to the facts of the case, stressing in certain cases that it is for that court and not the EU court to make the specific finding central to the case.[40]

Furthermore, intervention by third parties is rare, whereas intervention by other Member States is frequent, both at chamber and Grand Chamber level.[41] Different, powerful remedies, different scope and different mechanisms for the judicial interpretation and application of EU fundamental rights thus characterise the EU system and distinguish it from its ECHR counterpart.

## *C. Preliminary Conclusions*

In short, while one court seeks to ensure respect for a minimum floor of fundamental rights throughout 47 Council of Europe Member States, the other seeks to protect fundamental rights within the confines of a supranational organisation whose principal objective is to harmonise and subject to the principle of conferral. Moreover, one court—the Strasbourg court—assesses whether what the national courts *have done* passes muster, while the other, in the interests of the uniformity and effectiveness of EU law, can control what those courts are doing while the national case is still pending. The approaches are individualised on the one hand and sufficiently abstract and general to apply beyond the facts of the individual case on the other.

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[38] See, for a recent and powerful expression of this interaction between EU and national judges, *Associacão Sindical dos Juizes Portugueses* C-64/16 EU:C:2018:117.

[39] See T Lock, 'What Future for the Charter of Fundamental Rights in the UK' (European Futures, 6 October 2017).

[40] See, for example, the directions to the national judge in *Aranyosi and Căldăraru* C-404/15 and C-659/15 PPU, EU:C:2016:198, §§ 80, 89, 92, 94–96, 98, 100–03 on respect for fundamental rights and the principle of mutual recognition when executing an EAW, or further the two religious discrimination judgments of the CJEU discussed in detail below.

[41] Article 23 of the Statute of the CJEU provides for the possibility for Member States to intervene as of right in preliminary references originating in other Member States.

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## III. A JUDICIAL TALE OF TWO CITIES

As indicated previously, my preference is, with reference to concrete cases and concrete rights, to contrast and compare the manner and means by which the two European courts develop their fundamental rights case law.

### A. *Rights to Privacy and Family Life and the Question of Surrogacy*

In recent years, courts at national and European level have had to struggle with cases which reveal, in the words of the late Irish Supreme Court Judge, Adrian Hardiman: '[A] serious disconnect between what developments in science and medicine have rendered possible on the one hand, and the state of the law on the other.'[42] Medical research has allowed those wishing to procreate but who are unable to do so biologically to have children.[43] But how has the law responded?

#### 1. *Domestic courts and surrogacy*

In Scotland and the United Kingdom, Parliament has provided a legislative framework for recognising a child born of a surrogacy arrangement. In addition, legal questions relating to motherhood and the rights of commissioning parents are addressed in the Human Fertilisation and Embryology Act 2008. The latter provides that the woman who carries the child, the gestational mother, is the legal mother and that commissioning parents become legal parents via parental orders or adoption.

In the absence of legislation in Ireland, the question of who constitutes the mother in the eyes of the law came before the Supreme Court in 2014 in the case of *MR and DR* v *An t-Ard-Chlaraitheoir*. The central issue was who should be registered as the mother of twins under the Civil Registration Act 2004: the *genetic* mother whose donated ova had resulted in twins born of a surrogacy arrangement, or the woman who had actually given birth to the children, the *gestational* mother? Had the law kept abreast of reproductive technology and scientific knowledge relating to epigenetics and chromosomal DNA? And if it had not (a failure one of the judges likened to the Road Traffic Act failing to reflect the advent of the car) what, if anything, could the courts do about it?

By a majority of 6 to 1, the Supreme Court found that the civil registration legislation could not be interpreted as allowing a woman other than the gestational mother to be registered as the mother of the child.[44] Under the legislative framework then in force, it was not considered possible to address issues relating to the rights of

[42] *MR and DR & ors v An t-Ard-Chláraitheoir* [2014] 3 IR 533.

[43] See further M Finck, *Case Comment:* CD v ST *and* Z v A Government Department & Ors *(C-167/12 and C-363/12*), March 2014, available at eutopialaw.com/2014/03/21/case-comment-cd-v-st-and-z-v-a-government-department-ors-c-16712-and-c-36312/#more-2433.

[44] See *MR and DR*, note 42 above. The High Court had granted a declaration that the genetic and not the gestational mother was the mother of the twins and that her name should be entered on the Certificate of Birth. See *MR & Anor v An t-Ard-Chlaraitheoir & Ors* (2013) IEHC 91. The judge had found that questions relating to surrogacy were unregulated in this jurisdiction and what he considered a common law maxim—*mater semper certa est*—was also a rebuttable one.

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genetic and gestational mothers arising out of surrogacy. Surrogacy affects the status and rights of the persons involved, especially those of children, creates complex relationships, and has deep social content. As such, the legislative lacuna identified —and unanimously regretted—by the Supreme Court in the case was considered a matter quintessentially for the Irish Parliament (Oireachtas) to address by way of legislation and could not be filled by the courts. At the time of writing, it is understood the legislative lacuna identified by the Supreme Court has not yet been filled in Ireland.[45] Only one of the seven Supreme Court judges responded to the invitation by the Irish Human Rights Commission and referred to Strasbourg case law on surrogacy and civil status despite its direct relevance to the issues before the Court.[46]

## 2. *ECtHR and surrogacy*

Surrogacy and related legal issues are no strangers to Strasbourg judges. Neither are the highly sensitive social and ethical questions that accompany such cases. More often than not, applicants before the Strasbourg court have been commissioning parents, sometimes joined in their applications by the children born of such arrangements, sometimes with a genetic link to the children, sometimes not. The respondent states against whom they bring their complaints have typically refused to recognise the applicants as the parents of the children or refused to recognise or provide for the nationality and civil status of those children.[47] In some cases, on public policy grounds and where surrogacy is considered unlawful in the state in question, the authorities have gone further and have removed the children from the custody of the commissioning parents. An example of this can be seen in the case of *Paradiso and Campanelli v Italy* which came before the Grand Chamber.[48] In all cases, the practice of surrogacy is either unlawful or unregulated in the respondent state and the impugned surrogacy arrangements have taken place in another state.

In *Mennesson v France*, the applicants were French nationals and the commissioning parents of twins, of American nationality, born in the US. The applicant couples had entered into surrogacy arrangements in the US as a result of the infertility of the commissioning mothers. The applicant children had a biological link

[45] Following the ruling of the Supreme Court in *MR and DR*, the competent Minister gave a commitment that he would bring a memorandum to Government seeking approval to draft legislation on assisted human reproduction, including surrogacy. The Department of Foreign Affairs has issued guidelines which are not legally binding (see https://www.dfa.ie/media/dfa/.../passportcitizenship/Surrogacy-Guidelines.pdf). The Children and Family Relationships Act 2015 introduced significant changes to Irish law in the areas of guardianship, custody, access, and adoption and regulated the area of donor assisted human reproduction for the first time. Surrogacy remained unregulated. See para 243 of the judgment of Judge O'Donnell in *MR and DR,* note 42 above, regarding the difficulties to which such a lacuna could give rise.

[46] See §§ 583–84 of the judgment of McMenamin J in *MR and DR*, note 42 above.

[47] See variously *Mennesson v France* (Application no 65192/11) 2014-III ECHR 255; *Labassee v France* (Application no 65941/11) 26 June 2014; *Foulon and Bouvet v France* (Application nos 9063/14 and 10410/14) 21 July 2016; and *Laborie v France* (Application no 44024/13) 19 January 2017.

[48] *Paradiso and Campanelli v Italy* (Application no 25358/12) 24 January 2017.

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with their commissioning fathers. After Californian courts held that the French commissioning couple were the children's parents, they returned to France where they sought to register their birth certificates. The French authorities refused on the ground that such registration would give effect to a surrogacy agreement that was null and void on public policy grounds under French law. The refusal to register the children did not, according to the French authorities, deprive them of the legal relationship recognised by US courts. Neither did it prevent them from living in France with the applicant parents.

The Strasbourg Court accepted that France's refusal to recognise a legal relationship stemmed from a wish to discourage French nationals from having recourse outside France to a reproductive technique that was prohibited within the country with the aim of protecting the children and the surrogate mother. This was a legitimate aim. As regards whether the interference was necessary in a democratic society, the Court had recourse to two notions or legal tools central to and recurrent in its legal reasoning in cases like this. First it examined whether or not there was a *European consensus* on either the lawfulness of surrogacy arrangements or the legal recognition of the relationship between commissioning parents and children lawfully conceived abroad as a result of such arrangements.[49] It found that no such consensus existed. It then relied on the *margin of appreciation* afforded Member States in making surrogacy-related decisions.[50] Given that recourse to surrogacy raised difficult issues, addressed differently, in different States, the margin was wide.

As regards the Article 8 rights of the commissioning parents, the Court recognised that they faced significant obstacles. US civil-status documents accompanied by a sworn translation in French had to be produced whenever access to a right or a service required proof of parentage. The children did not have French nationality, which created travel and potential residency problems. The death of their biological

[49] On reliance by the ECtHR on the European consensus in its case law on Article 8, see, variously, K Dzehtsiarou, 'Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights' (2011) *Public Law* 541–48; L Helfer, 'Consensus, Coherence and the European Convention on Human Rights' (1993) 23 *Cornell International Law Journal* 133; JL Murray, 'Consensus: Concordance, or Hegemony of Majority' in *Dialogues Between Judges* (Council of Europe, 2008). See also *MR and DR*, note 42 above, for references to the issue of consensus (Macmenamin J § 44 and O'Donnell J § 13). On the consensus in a surrogacy context, see the article by Lady Justice Arden, 'Surrogacy Cases Throw Light on the Role of the Court' in J Casadevall et al (eds), *Liber Amicorum for Dean Spielmann* (Wolf Publishing, 2016), where she notes that the consensus is a powerful but not determinative factor in the development of jurisprudence in the social field.

[50] On the margin of appreciation in the case law of the ECtHR, see, variously, D Spielmann, 'Allowing the Right Margin. The European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (2012) 14 *Cambridge Yearbook of European Legal Studies* 381; J Kratochvil, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights' (2011) 29 *Netherlands Quarterly of Human Rights* 324; Y Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, 2002); H Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Martinus Nijhoff, 1996); G Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 *Oxford Journal of Legal Studies* 705.

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father or the separation of the couple would also entail problems, not least in terms of inheritance. But those obstacles were not considered insurmountable, nor had it been demonstrated that their inability to secure recognition in French law of a legal parent-child relationship had prevented them from exercising their right to family life in France. Given the margin of appreciation and the fair balance struck by the domestic courts between the interests of the applicant parents and those of the State, the Court found no violation of Article 8.

In contrast, the Strasbourg Court found, unanimously, that the French authorities had violated the Article 8 rights of the children. Although aware that they had been identified elsewhere as the children of the commissioning parents, they had nevertheless been denied that status in the French legal system and this undermined their identity within French society. Furthermore, although Article 8 of the Convention does not guarantee a right to obtain a particular nationality, the applicant children faced worrying uncertainty as to the possibility of obtaining French nationality, even though their biological father was French. This situation was also liable to have negative repercussions on the definition of their own identity. In short, the refusal to recognise the parent-child relationship in French law did not simply affect the parents, who alone had chosen the reproductive techniques complained of, but also the children, whose best interests must guide any decision concerning them.

### *3. CJEU and surrogacy*

Turning to the Luxembourg court, as is well-known, in accordance with Article 51(1) of the EU Charter the latter applies primarily to EU institutions and bodies and to Member States only when they implement EU law. In addition, both Article 6(1) TEU and Article 51(2) of the Charter expressly state that the Charter shall not extend in any way the competence of the EU as defined in the EU Treaties and shall not extend the field of application of EU law beyond the powers of the Union.[51] Since the EU clearly has no power to regulate surrogacy and surrogacy, as such, does not fall within the scope of application of EU law and, therefore, the EU Charter, it can legitimately be asked how legal questions relating to surrogacy could ever make it to the CJEU, with or without an additional reference to the Charter.

The answer to this question can be found in preliminary references from the Irish Equality Tribunal and the Employment Tribunal of Newcastle upon Tyne.[52] In the *Z* and *CD* cases, decided by the Luxembourg court in 2014, commissioning mothers sought to establish that EU employment equality legislation should be interpreted in such a way as to grant them paid leave equivalent to maternity or adoptive leave following the birth of their babies, born of surrogacy arrangements, whom they had breastfed for months after the birth. If they could not be interpreted in that way, even in the light of the relevant provisions of the EU Charter and the UN Convention on the Rights of Persons with Disabilities, the Irish applicant argued further that those

[51] For a recent application of Articles 51(1) and (2) of the Charter, see *Demarchi Gino SAS* C-177/17, EU:C:2017:656.

[52] See *Z* C-363/12, EU:C:2014:159, and *CD v ST* C-167/12, EU:C:2014:169.

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Directives should be declared invalid and the Irish Equality Tribunal referred a question in this regard.

In *Z* and *CD*, the Luxembourg Grand Chamber established that, as a matter of EU law, a commissioning mother refused paid leave of absence in order to care for her child, could not establish a right to such leave under existing EU Directives on Pregnant Workers,[53] Sex Discrimination,[54] or under the more general Framework Equality Directive.[55] Leaving aside the interpretation of those directives, the Court's approach to indirect discrimination or how it relied on the UN Convention, of particular interest in the judgment are the reasons provided for not examining the validity of the relevant EU Directives in the light of the Charter. Firstly, the Court indicated that it may decide not to give a preliminary ruling where the provision whose validity is questioned manifestly has no bearing on the outcome of proceedings.[56] Secondly, the situation of a commissioning mother as regards the grant of maternity or adoptive leave was found not to come within the scope of those Directives as they then stood. For these reasons, the Luxembourg court held in *Z* that there was no need to examine the validity of the Directives in light of the EU Charter.[57]

The latter is, it should be remembered, both an interpretative tool and the basis for judicial review in the context of which EU acts can be declared invalid.[58] We know from cases in the data protection field—*Digital Rights* and *Schrems*—that the CJEU will not hesitate to don a 'constitutional' mantle and strike down EU regulations and directives which are in conflict with the rights laid down in the EU Charter. The essence of the applicant's argument in *Z* was that the legal problem with the validity of the Directive lay in the fact that a situation such as hers—a breast-feeding mother, albeit a commissioning one, absent from work in order to take care of her child—is not covered by the Directives. The validity of those Directives was challenged not because of what came within their scope but because of what did not. In such circumstances, one might ask whether it was sufficient for the CJEU to dispose of the questions addressing validity and referring to the EU Charter in that context by

[53] See *CD*, note 52 above, paras 37–40, and Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, [1992] OJ L348/1.

[54] See Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), [2006] OJ L204/23.

[55] See *Z*, note 52 above, paras 52–57, 78–82, and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, [2000] OJ L303/16.

[56] See *Z*, note 52 above, § 64.

[57] Ibid, §§ 66, 83.

[58] See generally on the EU Charter, S Iglesias Sanchez, 'The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights' (2012) 49 *Common Market Law Review* 1565, and P Craig, 'The ECJ and Ultra Vires Action: A Conceptual Analysis' (2011) 48 *Common Market Law Review* 395.

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simply saying your right to the equivalent of maternity leave in such circumstances is not within the scope of the Directives?

Let me be clear. I am not calling into question the interpretation of secondary EU law provided by the CJEU. The Directives in question did not cover the right to leave for commissioning mothers in the post-birth period. To interpret them, in the light of the EU Charter, in order to cover such leave would have gone beyond the terms of the Directives and contradicted the limiting terms of Article 6(1) TEU and 51(2) of the Charter.

However, when it came to the question of the validity of the Directives—were they valid despite the exclusion of leave for parents whose children were not born as nature intended—would the Luxembourg court, given its assumption post-Lisbon of the role of a fundamental rights court, not have been wiser to declare the limits to its jurisdiction more clearly or somewhat differently? Like the Irish Supreme Court, it could have stated explicitly that questions arising out of surrogacy, even to the extent that they affect employment relationships which might otherwise fall within the scope of certain provisions of EU law, are essentially for the legislature. Given their nature and implications, they could not be determined in the first instance by the courts and perhaps least of all by a supranational court.

The Luxembourg court has, it must be stressed, been in a similar position previously, when it held that, barring a change to the Treaties and the adoption of appropriate secondary legislation, sex equality legislation could not be interpreted in such a way as to bring within its scope discrimination on grounds of sexual orientation.[59] I am of course referring to the *Grant* case. To ignore the nature of a validity question such as that posed in *Z* is possibly to underestimate or undermine the legal value of the Charter in EU law. While I would agree with Judge Vajda, that the CJEU in its approach to the Charter cannot be charged with recklessness,[60] whether it displays an excessive degree of timidity in the language it uses or the reasoning employed is a more open question in some areas of EU law where fundamental rights questions arise than others.[61] *Z* is not the first and will not be the last case in which a litigant or national court seeks to push the boundaries of EU law by relying on the EU Charter. That being so, the CJEU might usefully develop more robust, transparent, and ultimately persuasive language when, in legal terms, it decides to 'just say no'. How and when it delimits its own jurisdiction also reflects on its credibility as an adjudicator of human rights.

### *4. Preliminary conclusions from this trilogy of national and European surrogacy cases*

Firstly, although it is commonplace, it is worth repeating: national judges, practitioners, and scholars are faced with a complex multi-level system for the protection

[59] See *Grant* C-249/96, EU:C:1998:63, §§ 43–50.

[60] See Vajda, note 35 above.

[61] See, for example, in the social field, the two cases he refers to: *AMS* C-176/12, EU:C:2014/2, and *Dominguez* C-282/10, EU:C:2012:33.

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of fundamental rights. On top of the rights recognised in national constitutions are those enshrined in the ECHR and now, in Member States of the EU, those proclaimed by the EU Charter. The fact of this complexity is commonly recognised. Its consequences were, in my view, particularly well-explained in the following terms by the President of the Spanish Constitutional Court at the opening of the Strasbourg judicial year in 2015, weeks after Opinion 2/13. His message is worth reproducing in full:

> [T]here is one thing which characterises this so-called 'multi-level' protection model, it is the fact that it is complex and sophisticated. […] On top of the rights recognised in national constitutions are those enshrined in the ECHR and, additionally today, in the Member States of the EU, those proclaimed by the EU Charter […]. These are superimposing declarations of rights, each relying on the jurisdiction of a court which purports to be its ultimate interpreter.
>
> […]
>
> Added to this diversity and relative substantive heterogeneity, the procedural issues are complex: during a single set of proceedings, issues of unconstitutionality may be raised before the Constitutional Court, requests for preliminary rulings may be made before the Court of Justice of the EU and, in the near future, we hope, requests for preliminary rulings of a discretionary non-binding nature may be submitted to the European Court of Human Rights. These are all courts which should, as part of the same system, interact with each other, but which, above all—of course—naturally tend to defend their own jurisdiction.
>
> It is therefore hardly surprising that all this may generate a sense of confusion, or sometimes unease, among our fellow citizens, who fully understand the essential nature and universal vocation of human rights but who find it hard to accept that the content and level of protection vary depending on the court which is responsible for dealing with the case, and that there is no certainty as to which one will adjudicate on that case or when, nor, once the judgment is handed down, as to whether it will be appropriately executed.
>
> This unease of citizens is also, quite often, shared by judges in the ordinary courts. […] What supervisory organ should the judge call upon when he finds that there are different levels of protection in the case law of his own constitutional court, in the European Court of Human Rights and in the Court of Justice of the European Union?[62]

Secondly, the scope of EU law is determinative of when and how the Luxembourg court will engage with fundamental rights. Where the scope of EU law begins and ends is, however, the 'sixty-four-thousand-dollar question'. Where the Luxembourg court can resolve a preliminary reference within the confines of the more technical terms of the Treaties and EU secondary legislation, it may often prefer to do so. The

[62] Speech of President Perez de los Cobos at the 2015 opening of the judicial year at the ECtHR, available at www.echr.coe.int/Documents/Speech_20150130_Perez_Cobos_Orihuel_ENG.pdf.

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innovative nature of some of its rulings in, say, the field of data protection, is not equally reflected in other fields involving, for example, EU social law.[63] However, as the surrogacy cases reveal, it is important to explain in clear and convincing terms when and why the CJEU lacks jurisdiction.

Thirdly, while there are clear differences between the *Mennesson* case in Strasbourg and the *Z* case in Luxembourg (the former concentrates on broad questions of civil status while the latter is more narrowly focused on employment rights), a tiny alteration of the facts of one case may transform it from being, in essence, a Strasbourg case, to being, equally, a Luxembourg case. Had the French couple in *Mennesson* been working in an EU institution in Brussels, for example, the difficulty in establishing the civil status and nationality of their children under French law might have led to a preliminary reference on Union citizenship rights and Article 7 of the Charter.[64] Equally, a *Z* type case might be repackaged as a Convention case under both Articles 8 and 14. Depending on how the case is framed, one or other European judicial forum appears more appropriate. This point is of relevance to one of the CJEU's critiques of the draft accession agreement in Opinion 2/13. There it stated that:

> Since the ECHR would form an integral part of EU law, the mechanism established by […] protocol [No 16] could—notably where the issue concerns rights guaranteed by the Charter corresponding to those secured by the ECHR—affect the autonomy and effectiveness of the preliminary ruling procedure provided for in Article 267 TFEU.
>
> In particular, it cannot be ruled out that a request for an advisory opinion made pursuant to Protocol No 16 by a court or tribunal of a Member State that has acceded to that protocol could trigger the procedure for the prior involvement of the Court of Justice, thus creating a risk that the preliminary ruling procedure provided for in Article 267 TFEU might be circumvented, a procedure which, as has been noted in paragraph 176 of this Opinion, is the keystone of the judicial system established by the Treaties.[65]

EU lawyers are best placed to address the question whether any failure of an EU Member State to avail of Article 267 TFEU is an ECHR problem or rather a question in relation to which EU law could provide an answer. Protocol No 16 was, quite clearly, not intended as a mechanism to promote forum shopping or to incite EU domestic courts to ignore their obligations pursuant to EU law.[66] Suffice it to say, however, that as the surrogacy cases above and the religious freedom cases below demonstrate, drawing a clear-cut line between which case should go to Luxembourg and which to Strasbourg may be increasingly difficult.

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[63] Compare also the approach in *Z* to the scope of application of EU law and the EU Charter and that in *Åkerberg Fransson*, see note 11 above, *Sturgeon* C-402/07 and C-432/07, EU:C:2009:716, or *Test Achats* C-236/09, EU:C:2011:100.

[64] See, for a variation on this theme, *García Avello* C-148/02, EU:C:2003:539.

[65] Opinion 2/13, see note 24 above, §§ 196–98.

[66] See further O'Leary and Eicke, note 28 above.

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Fourthly, there are advantages and disadvantages to each judicial forum. While I have referred previously to the principle of *res interpretata*, the effects of a Strasbourg ruling like *Mennesson* can be read as being case and country specific. This may appear to be a weakness when compared with the primacy and direct effect tools at the disposal of the CJEU. However, when it comes to sensitive social and ethical questions, the *erga omnes* effect of a Luxembourg ruling may perhaps be problematic.[67] Such rulings would be applicable equally in all EU Member States regardless of the status of surrogacy arrangements—regulated, unregulated, tolerated, or expressly prohibited—in the States in question. Harmonising legislation presents the world in black and white when, as regards fundamental rights protection, there may be many shades of grey. A judgment like *Mennesson* is carefully limited to the paramount importance of the rights of the children and the specific circumstances of that case. It interferes to a limited extent with the respondent State's public policy position on surrogacy. The reasoning and outcome of that case can be compared to those in *Paradiso and Campanelli* where the Strasbourg Court found no violation of Article 8 as regards commissioning parents from whom a child born of a surrogacy arrangement was removed. The margin of appreciation and European consensus thus operate in an accordion-like manner to afford the State as much room as required, but no more than is necessary in the circumstances of a given case. When the Luxembourg court reverts to the Charter when interpreting EU secondary legislation, it is sometimes difficult to see similarly flexible tools at its disposal.[68] Both this, and the more limited, albeit expanding scope of application of EU law, may provide explanations for why the EU Charter is deemed irrelevant or not referred to in certain cases. Not all CJEU cases are fundamental rights cases and many, if not most, can be disposed of without reference to the EU Charter.

Finally, while Luxembourg can and on occasion does sidestep the hot potatoes, Strasbourg cannot. We have seen this before in an Irish context in cases like *Open Door Counselling* and *Grogan* where both courts were confronted with the same issue of access to abortion information.[69] Whether scholars and practitioners find certain instruments used by the Strasbourg court to be convincing—the margin of

[67] Although addressed to the referring Court, the interpretation in a preliminary ruling such as *Z* would have provided a conclusive interpretation of EU law applicable equally in all EU Member States. See *Wünsche v Germany* C-69/85, EU:C:1986:104, § 13. Similarly, as regards a question of validity of an EU act, although a CJEU judgment is directly addressed only to the national court which brought the matter before the Court, it is sufficient reason for any other national court to regard that act as void for the purposes of a judgment which it has to give (see *Bela-Mühle* C-114/76, EU:C:1977:116, *Granaria BV* C-116/76, EU:C:1977:117, and *Ölmühle Hamburg* C-119/76 and C-120/76, EU:C:1977:118, or *International Chemical Corporation* C-66/80, EU:C:1981:102).

[68] See, however, *Omega* C-36/02, EU:C:2004:614, on the free provision of services and a ban on certain forms of computer games simulating violence, the CJEU held that it was not indispensable for measures adopted by Member States to correspond to a conception shared by all Member States as regards the precise way in which a fundamental right or legitimate interest is to be protected.

[69] See *Open Door and Dublin Well Woman v Ireland* (Application no 64/1991/316/387-388) 29 October 1992, and *Society for the Protection of Unborn Children Ireland* C-159/90, EU:C:1991:378.

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appreciation and the European consensus to name but two—it is important to understand and recognise their role and purpose.

### *B. Religious Freedom and the Right Not to Be Discriminated on Grounds of Religion*

My second 'judicial tale of two cities' relates to religious freedom under Article 9 of the Convention and 10 of the EU Charter and the right not to be discriminated on grounds of religion provided in Article 21 of the latter, as well as in detailed EU secondary legislation prohibiting certain forms of discrimination, particularly in the employment field.[70]

#### *1. ECtHR and religious freedom*

Strasbourg case law on Article 9 and the right to religious freedom is extensive, well-established as regards certain basic precepts and, like questions relating to religion itself, not uncontroversial. Article 9 § 1 of the Convention provides that everyone has the right to freedom of thought, conscience, and religion and that this right includes freedom to manifest his or her religion or belief. This freedom shall be subject only to the legitimate aims enumerated exhaustively in Article 9 § 2 and defined in a necessarily restrictive manner.[71] Article 9 § 1 contains two strands: the right to hold a belief and the right to manifest one's beliefs. The former—the *fornum internum*—is an absolute and unconditional right; the right to manifest one's beliefs—the *fornum externum*—is not absolute, as the manifestation by one person of his or her religious belief may have an impact on others.[72]

In *SAS v France*, decided in 2014, the Court had to determine whether a legislative ban on wearing, in public places, clothing designed to conceal one's face raised issues with regard to Articles 8 and 9. According to Strasbourg case law, a healthy democratic society needs to tolerate and sustain pluralism and diversity in the religious sphere. The Court has referred to: 'The pluralism indissociable from a democratic society, which has been dearly won over the centuries'.[73] The Court accepted in *SAS* that the ban on a full-face veil had to a certain extent restricted the reach of pluralism. However, the respondent State was seeking to protect the principle of 'living together' which in its view was essential for the expression not only of pluralism, but also of tolerance and broadmindedness. Given the absence of a European consensus as to the wearing of a full-face veil in public, France's wide margin of appreciation when it came to legislating to give effect to such a social

[70] See Directive 2000/78, note 55 above, in relation with the *Z* case.

[71] See also Article 2 of Protocol No 1 to the Convention which concerns one specific aspect of freedom of religion, namely the right of parents to ensure the education of their children in accordance with their religious convictions.

[72] See *Ivanova and Cherkezov v Bulgaria* (Application no 46577/15) 21 April 2016, § 79, and *Eweida and others v the United Kingdom* (Application nos 48420/10 and three others) 2013-I ECHR 215 (extracts), §§ 80, 94.

[73] See *SAS v France* (Application no 43835/11) 2014-III ECHR 341 (extracts), § 124.

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choice meant the ban was found not to violate Article 9.[74] As regards the legitimate aim relied on by the respondent State—the right of others to live in a space of socialisation which makes living together easier—the Court uttered words of caution: '[…] in view of the flexibility of the notion of "living together" and the resulting risk of abuse, the Court must engage in a careful examination of the necessity of the impugned limitation'.[75]

Much of the Strasbourg court's case law on the wearing of religious symbols developed in the educational sphere and originated in France and Turkey where principles of secularism and state neutrality are constitutionally enshrined.[76] A more limited number of Strasbourg cases have focused on the wearing of religious symbols in public places[77] and at one's place of employment. In *Eweida and others v the United Kingdom*, the Court found a violation of Article 9 in a case where British airways had suspended an air hostess for refusing to conceal the Christian cross which she wore.[78] The aim of the company's uniform code—namely to communicate and promote a certain company image and brand—was deemed legitimate. However, the applicant's rights under Article 9 of the Convention had been breached because the company and the domestic courts had accorded that aim too much weight. The cross worn by the applicant was discreet. In addition, there was no evidence that the wearing of other previously authorised items of religious clothing, such as turbans and hijabs, by other employees, had had any negative impact on the brand or image. In contrast, the Court found no violation of Article 9 in the related case of *Chaplin*, decided on the same day, as regards an NHS nurse working in a

[74] Ibid, §§ 153–57.

[75] Ibid, § 122. The principles established in *SAS* were subsequently confirmed and applied in *Belcacemi v Belgium* (Application no 37798/13) and *Dakir v Belgium* (Application no 4619/12), Judgments of 11 July 2017, in which the Strasbourg court found that Belgium's 2011 ban on wearing the full-face veil did not violate Article 9 ECHR.

[76] The Strasbourg court's reasoning when finding that bans on the wearing of religious symbols by teachers and students did not violate Article 9 of the Convention has been intimately linked to the neutrality of state education, the role of education and teachers in society, the relative vulnerability of pupils, and the impact or influence which religious symbols might have on the latter. See, variously, for teachers, *Dahlab v Switzerland* (dec.) (Application no 42393/98) 2001-V ECHR 447; *Kurtulmuş v Turkey* (dec.) (Application no 65500/01) 2006-II ECHR 297, or *Karaduman v Turkey* (dec.) (Application no 41296/04) 3 April 2007. In only one of these cases, *Kurtulmuş v Turkey*, the Court expressed itself in broader terms, not apparently limited to the specificities of the educational sector, when it found that the applicant teacher had chosen to become a civil servant and the dress code with which she did not wish to comply applied equally to all public servants, irrespective of their functions or religious beliefs. See variously, for school pupils and university students, *Köse and others v Turkey* (dec.) (Application no 26625/02) 2006-II ECHR 339; *Dogru v France* (Application no 27058/05) 4 December 2008; *Kervanci v France* (Application no 31645/04) 4 December 2008; *Gamaleddyn v France* (dec.) (Application no 18527/08) 30 June 2009; *Aktas v France* (dec.) (Application no 43563/08) 30 June 2009; *Ranjit Singh v France* (dec.) (Application no 27561/08) 30 June 2009; *Jasvir Singh v France* (dec.) (Application no 25463/08) 30 June 2009; *Leyla Şahin v Turkey* (Application no 44774/98) 2005-XI ECHR 173, and *Osmanoğlu and Kocabaş v Switzerland* (Application no 29086/12) 10 January 2017.

[77] See, for example, *Ahmet Arslan and others v Turkey* (Application no 41135/98) 23 February 2010.

[78] *Eweida*, see note 72 above, §§ 94–95.

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geriatric ward who was transferred for refusing to remove the cross she wore on a chain round her neck. Given that the request to remove the cross or wear it differently was for health and safety reasons and thus was related to and justified by her specific employment functions, there was no disproportionate interference with the applicant's Article 9 rights.[79]

In the more recent case of *Ebrahimian v France*, the applicant, of the Muslim faith, was employed as a social assistant in the psychiatric department of a public hospital. The authorities did not renew her contract when she refused, after a warning, to remove her headscarf. In the Convention proceedings, the Court found the impugned interference legitimate and proportionate. The decision not to renew the applicant's contract was motivated by the need to give concrete effect to the applicant's duty of neutrality in the hospital. Patients had to be assured that they, as users of a public service, would be treated equally by the State regardless of their own religious convictions. In the applicant's case, the Court could accept that the State could require her, given the nature of her functions in the public service, to refrain from making known her religious beliefs.[80]

The Strasbourg Court's Article 9 case law, in both the educational and employment context, is not, however, without its difficulties and inner tensions. In *Lautsi v Italy*, the Grand Chamber held that in the absence of any European consensus on the subject, the decision whether crucifixes should be present in State-school classrooms was, in principle, a matter falling within the margin of appreciation of the respondent State. A crucifix on a classroom wall was regarded as an 'essentially passive symbol' that could not be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities.[81] More recently, probably the most commented article of clothing of 2016—the burkini—formed part of a Swiss case in which the Court found no violation of Article 9 as a result of schoolgirls of the Muslim faith being obliged to participate in mixed swimming classes which were part of the compulsory curriculum.[82] The State was found not to have overstepped its margin of appreciation when it gave priority to the full integration of the children in school over the private concern of the applicant parents not to see their daughters taught swimming in a mixed class. In finding no violation of Article 9 in that case, the Court attached importance, amongst other things, to the possibility for the girls to wear a burkini during their swimming classes.

In short, according to Convention case law, visible religious symbols can, at one and the same time, be regarded as:

- a necessary manifestation of pluralism and a vehicle for integration and therefore worthy of protection (take the burkini in *Osmanoğlu and Kocabaş*), or

[79] Ibid, §§ 98–100.

[80] *Ebrahimian v France* (Application no 64846/11) 26 November 2015.

[81] *Lautsi v Italy* (Application no 30814/06) 3 November 2009, §§ 70–73.

[82] See *Osmanoğlu and Kocabaş v Switzerland* (Application no 29086/12) 10 January 2017, §§ 105–06.

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- as an obstacle to integration and a form of self-exclusion (the full-face veil in *SAS*, *Belcacemi*, and *Dakir*) or as a challenge to state principles of neutrality and secularism and open to legitimate restrictions (the Islamic headscarf in *Ebrahimian*), or again
- as a discrete symbol (the cross in *Eweida*, where differential treatment of religious symbols was also crucial) or as a mere passive symbol which forms an integral part of a state's heritage (the cross in *Lautsi*).

In addition, an interference with an individual's right to wear such symbols may be deemed legitimate in part by the professional or social function that the person is performing (see *Chaplin* or *Ebrahimian*) or regardless of that function (see again, to the contrary, *Ebrahimian*). In all of these cases, however, the Strasbourg court is assessing legitimate *State choices* regarding how to regulate religious expression. It does not seek to set down recommended ways to so regulate.

### 2. *CJEU and the prohibition of discrimination on grounds of religion*

While religion is not a total stranger to the Luxembourg courts, its relevance until recently could have been described as both limited and sporadic.[83] Yet, as indicated previously, the expanding scope of EU law means the expanding remit of cases coming before the Luxembourg courts and further encroachment—a word chosen with no critical intent—on territory previously considered exclusive, in the last resort, to the Convention court. Since 2000, the EU has had in place a comprehensive anti-discrimination legislative framework, prohibiting direct and indirect discrimination in the public and private sectors not only on grounds of sex and nationality but also on grounds of race, religion or belief, disability, age or sexual orientation.[84]

The question of the dismissal of employees as a result of wearing religious symbols came square before the Court of Justice in the cases of *Achbita* and *Bougnaoui*, in which judgments were handed down in March 2017.[85] The applicants

[83] See *Prais v Council* C-130/75, EU:C:1976:142, where the question of the organization of entry competitions for EU officials so as not to prevent candidates of a particular religious persuasion from participating arose. *UK v Council* C-84/94, EU:C:1996:431, § 37, is an oft-forgotten CJEU foray into questions relating to religion. In that case the Court invalidated a provision of the original Working Time Directive designating Sunday as a day of rest. See also *Y and Z* C-71/11, EU:C:2012:518, where the Court examined the question of persecution on grounds of religion in the context of asylum.

[84] Directive 2000/78, see note 55 above. Article 2(1) of the Directive prohibits direct or indirect discrimination on grounds of religion. In language reminiscent of the Convention, Article 2(5) provides that the Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary, *inter alia*, for the maintenance of public order and for the protection of the rights and freedoms of others. Article 4(1) states further that Member States may provide that a difference of treatment which is based on a prohibited characteristic, such as religious belief, shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement.

[85] *Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* C-157/15, EU:C:2017:203, and *Asma Bougnaoui, Association de défense des droits de l'homme v Micropole SA* C-188/15, EU:C:2016:553.

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were Muslims working for private companies, both wore the hijab at work and both, after warnings from their respective companies, were dismissed for refusing to remove them. In the *Achbita* case, the company's neutrality policy was expressed first in an unwritten rule and subsequently formalised. In *Bougnaoui*, the applicant had been warned that wearing the headscarf when dealing with customers might be problematic. In *Achbita*, the Belgian court asked whether the employer's neutrality rule amounted to direct discrimination. In *Bougnaoui*, the French referring court asked whether the neutrality requirement could amount to a genuine occupational requirement within the meaning of Article 4(1) of Directive 2000/78 if it was imposed at the request of clients. The question as posed and the derogation relied on presumed the discrimination to be direct.

The CJEU ruled that there could be no question of direct discrimination where an employer has adopted a general ban on employees displaying symbols of religious or political belief. As regards indirect discrimination—a question not asked by the referring court but which the Court considered it must address for its answer to be useful—it held that an employer's neutrality policy was legitimate and a manifestation of its freedom to conduct a business under Article 16 of the EU Charter.[86] However, any such policy, which had to be general and undifferentiated, must also be genuinely pursued in a consistent and systematic manner to be considered appropriate. This was for the national court to determine. Regarding the strict necessity of the prohibition, it was also for the national court to determine if it was limited to workers interacting with customers and whether, taking into account the burden on the company and the inherent constraints under which it operates, it would have been possible to reassign the employee to a different role without 'visual contact' with customers.[87]

In contrast, in the French case, *Bougnaoui*, the Luxembourg Court held that if the decision to dismiss was not based on a general ban but was specific to the wearing of the headscarf, then it would be necessary to answer the question posed by the national court regarding the justification of such direct discrimination. The Court's answer was emphatic. Compliance with a client request such as that made in this case did not meet the Directive's requirement that a discriminatory rule be justified 'by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out'. Employers could thus not discriminate due to a customer request that employees not wear a headscarf. [88]

[86] Article 16 of the EU Charter provides simply that 'The freedom to conduct a business in accordance with Community law and national laws and practices is recognized'. This freedom has no direct equivalent in the ECHR. It is, according to the explanations accompanying the EU Charter, a freedom derived from EU (economic) law.

[87] *Achbita*, see note 85 above, §§ 40–43.

[88] *Bougnaoui*, see note 85 above, § 40. It is important to note that the CJEU appears to have rejected —implicitly but in quite categoric terms—the interpretation which had been put forward by Advocate General Kokott in that case of what could constitute a genuine and determining occupational requirement in Article 4(1) of Directive 2000/78. See §§ 37–40 of the judgment.

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### 3. *Preliminary conclusions from these European cases on religion*

The Strasbourg and Luxembourg cases on religious freedom and religious discrimination do not reveal divergence between the two courts but they do suggest differences, difficulties and perhaps even some 'dangers' (in the absence of a softer alliteration with proximate meaning).

Firstly, as regards the differences, it is important not to lose sight of the fact that the legal questions before the two courts are somewhat distinct. Strasbourg has to examine, under Article 9, whether an *individual's* right to religious freedom has been unjustifiably and disproportionately interfered with in a set of specific circumstances. In contrast, when directing a national judge to carry out an indirect discrimination assessment, the Luxembourg judges examine *collective or group* disadvantage.[89] Furthermore, the legal tools at the disposal of each court are different. Strasbourg operates, as stated previously, with reference to the margin of appreciation—always broad in this field—and legitimate aims which it has allowed in the field of religious freedom to be both broad and abstract. In contrast, where discrimination is direct, justification under EU law is highly circumscribed and even in cases of indirect discrimination the Luxembourg Court is not on easy ground, as its reference back to the national courts to determine key questions demonstrates.[90] To exclude the wishes of customers as grounds for justifying direct discrimination was to be expected in the Luxembourg cases, not least given existing case law in the field of race discrimination.[91] However, it could be asked whether admitting a company's neutrality policy as a legitimate expression of the right to freedom of enterprise may provide an indirect route to the same controversial destination.[92] As the Strasbourg court emphasized in the *SAS* case, reliance on flexible notions to justify an interference or, in this case, a form of discrimination, leads to a risk of abuse, and requires Courts to engage in careful examinations of the necessity of the impugned limitation. Where the Strasbourg court fails to carefully police flexible notions of this kind its own legal reasoning may suffer.[93] Finally, as indicated previously, there is only a binary answer to a Strasbourg complaint—violation or no violation. Luxembourg can refer the central, and usually most difficult, questions back for resolution by the national judge.

Secondly, as regards possible difficulties—the Luxembourg court has been criticized in recent years for not citing relevant and established Strasbourg case law.[94]

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[89] See further R McCrea 'Singing from the Same Hymn Sheet? What the Differences between the Strasbourg and Luxembourg Courts Tell Us About Religious Freedom, Non-Discrimination and the Secular State' (2016) 5 *Oxford Journal of Law and Religion* 183–210.

[90] See, in particular, *Achbita*, note 85 above, §§ 41–43, for this referencing back technique but also *Bougnaoui*, note 85 above, § 32.

[91] See *Feryn* C-54/07, EU:C:2008:397.

[92] See also JHH Weiler, 'Je Suis Achibita!' (2017) 28(4) *European Journal of International Law* 989.

[93] See, in this regard, my partially dissenting opinion in *Ebrahimian*, note 80 above.

[94] See C McCrudden, 'Using Comparative Reasoning in Human Rights Adjudication: The Court of Justice of the European Union and the European Court of Human Rights Compared' (2013) 15 *Cambridge Yearbook of European Legal Studies* 383, and de Búrca, note 33 above.

Article 52(3) of the Charter is designed to ensure the necessary coherence or consistency between the Charter and the ECHR by establishing the rule that, in so far as the rights in the Charter correspond to rights guaranteed by the ECHR, the meaning and scope of those rights, including authorised limitations, are the same as those laid down by the ECHR. By virtue of Article 52(3) of the Charter and, moreover, the *Bosphorous* principle of equivalent protection, cross-referring, where necessary between EU Charter and ECHR provisions and case law is required, with the Convention providing a minimum floor of protection.[95] Yet the cases on religious symbols shows that cross-referencing can be both selective (*Eweida* is referred to by the Luxembourg court but not *Ebrahimian*) and can mask the fact that, as stated previously, the legal question before both courts is not identical. On a positive note, the recent CJEU decisions in the religious symbols cases demonstrate very clearly, as do many other cases in the fields of the EAW, asylum and immigration, and data protection, that the argument pointing to a dearth of references by Luxembourg to Strasbourg case law is either somewhat overstated or outdated.[96]

Thirdly, as regards potential 'dangers', two are worth highlighting. Firstly, the subject matter of these cases is politically fraught. As Ronan McCrea has pointed out, they lead international courts into very difficult terrain where an already difficult legal question—how to accommodate or restrict religious expression in multi-faith societies—has become bound up with highly combustible political issues (migration, changing norms in relation to gender and sexuality, national identity, national security).[97] The Strasbourg court rules in a fact specific/country specific way. The CJEU's position differs in at least two respects. Firstly, it has to provide general interpretative guidance to courts in, for now, 28 Member States. Its rulings are not case and country specific.[98] Secondly, it may have considerable experience as regards the prohibition of certain forms of discrimination in the employment context but it has little experience of dealing with forms of religious based discrimination

[95] The *Bosphorous* presumption of equivalent protection was developed in *Michaud v France* (Application no 12323/11) 6 December 2012 and confirmed recently in *Avotiņš v Latvia*, see note 8 above. It is based on two pillars—the substantive guarantees offered by the international organisation in question and the procedural mechanisms available for controlling their observance. The EU is considered to benefit from the presumption because, on the one hand, it offers equivalent protection of substantive guarantees, as demonstrated, according to the court in *Bosphorous*, § 159, by its extensive reference to the ECHR and ECtHR case law as well as, according to the court in *Avotiņš*, note 8 above, § 102, the crucial 'pegging' or 'harmonizing' clause in Article 52(3) of the Charter.

[96] See further S O'Leary, 'Courts, Charters and Conventions: Making Sense of Fundamental Rights Protection in the EU' (2016) LVI Irish *Jurist* 4–41 for an explanation as to why, for a period post-Lisbon the CJEU may not have been referring to Strasbourg case law to the extent it has done previously and since.

[97] See R McCrea, 'Faith at Work: The CJEU's Headscarf Rulings' (2017), available at http://eulawanalysis.blogspot.fr/2017/03/faith-at-work-cjeus-headscarf-rulings.html.

[98] Advocate General Kokott in her Opinion in *Achbita*, EU:C:2016:382, § 99, was clearly aware of this difference and the resulting difficulty.

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and still less when it comes to questions of religious freedom.[99] Whether one agrees or disagrees with Strasbourg case law on Article 9 ECHR, it has built up considerable expertise dealing with the difficult legal questions that arise thereunder and exercising its human rights analysis in the context of the highly sensitive issues tied up with Article 9.[100] In some ways, given that the function of its interpretative role in preliminary references is both to clarify and render uniform the application of EU, the CJEU was damned if it did and damned if it did not in the French and Belgian cases. Nevertheless, it is this type of case which will no doubt test the Luxembourg court's fundamental rights pedigree in the eyes of national courts and commentators. What has often been described as the CJEU's 'traditional syllogistic and apodictic reasoning' is regarded by some as no longer sufficient as its fundamental rights docket expands.[101]

The second danger, if you can call it that, brings us back to the Protocol No 16 mechanism. As indicated previously, in Opinion 2/13, the CJEU observed that, after accession, a Member State court might refer an issue which concerns rights guaranteed by the Charter corresponding to those secured by the Convention to the Strasbourg court, which in turn would trigger the procedure for the prior involvement of the Court of Justice. This, according to the CJEU, would create a risk that the preliminary ruling procedure might be circumvented, endangering its autonomy and effectiveness.[102] These cases arguably show that, with or without accession (something which remains a legal obligation under the TEU), this is a risk, indeed a reality, which Strasbourg and Luxembourg now face in any event.

## IV. CONCLUSIONS

These judicial tales reveal a complex web of jurisprudential cross-fertilisation and convergence but also a degree of divergence due to different working methods, different judicial tools and different forms of judicial expression. They are not isolated cases. In the fields of asylum and immigration, the EAW, data protection, voting rights, employment discrimination, defence rights, to name but a few, similar phenomena can be identified or could be expected in future.

Readers will not have missed the reference in the title to Dickens' novel, *A Tale of Two Cities*. In it, the author depicted life in London and Paris during the French

[99] This limited experience is unlikely to remain the case for long, see, for recent CJEU forays into legal questions touching on religion, *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and others* C-426/16, EU:C:2017:926 (EU legislation on the protection of animals in the context of methods of slaughter for an Islamic feast); Opinion of Advocate General Mengozzi in *Jehovan todistajat* C-25/17, EU:C:2018:57 (collection of personal data by Jehovah's Witnesses); or *Egenberger* C-414/16, EU:C:2018:257 (occupational activities within churches and other organisations the ethos of which is based on religion or belief).

[100] See further A Nussberger, 'The European Court of Human Rights and the Freedom of Religion' (Chapter 9) in R Uerpmann-Wittzack, E Lagrange and S Oeter (eds), *Religion and International Law. Living Together* (Brill, 2018), pp 130–56.

[101] See Sarmiento, note 32 above, and de Búrca, note 33 above.

[102] Opinion 2/13, see note 24 above, §§ 196–98.

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Revolution and drew unflattering parallels between the two. The allusion should not be misconstrued as this author's desire to draw similar unflattering parallels between judicial life and judicial activity in Strasbourg and Luxembourg. Nothing could be further from the truth, my intention, or indeed my own personal experience. It is difficult, however, not to think of the opening lines of Dickens' book when one surveys the turbulent times EU and Council of Europe States are presently living:

> It was the best of times, it was the worst of times,
> it was the age of wisdom, it was the age of foolishness,
> it was the epoch of belief, it was the epoch of incredulity,
> it was the season of Light, it was the season of Darkness,
> it was the spring of hope, it was the winter of despair,
> we had everything before us, we had nothing before us,
> we were all going direct to Heaven, we were all going direct the other way

As regards the challenges facing European and EU Member State courts when it comes specifically to the protection of fundamental rights, the CJEU's 2014 opinion on the draft accession agreement was greeted in some quarters with outrage and condemned as being an exceptionally poor judgment. While the tone of the opinion certainly caught many commentators by surprise, it seemed excessive then to depict the CJEU as the arch enemy of fundamental rights protection in the EU given its track record and remains unwise now not to pick carefully through the opinion to understand the legal and constitutional concerns which underpinned it.[103] It is true that the opinion did little to render easier the challenging task that faces national judges and to which I referred at the outset—how to square a written or unwritten national constitution, domestic human rights legislation, the ECHR and the EU Charter. However, Opinion 2/13 was neither the first nor will it be the last word on the subject. The two European courts continue to engage in judicial dialogue which is both direct and indirect. There is a degree of elegance in the reasoning in *Avotiņš v Latvia* on both the *Bosphorous* presumption and the EU principle of mutual recognition which, in my view, is to be welcomed. Not long after Opinion 2/13, the CJEU itself sought in *Aranyosi and Căldăraru* to reassure some of its critics. National judges, through the preliminary reference procedure, continue to refer questions which explicitly question how, in distinct fields, they are to reconcile the requirements of the EU Charter, the ECHR and the relevant provisions of the EU Treaties and secondary legislation. We have come a long way since *Stauder* and *Internationale Handelsgesellschaft*, but this tale of two cities, illustrated in this article with reference to two very different legal questions and how they have been addressed in Strasbourg and Luxembourg, is still very much in the making.

[103] See D Halberstam, 'It's the Autonomy Stupid. A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' (2015) 16 *German Law Journal* 105.

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