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Chapter 18

Human Rights and General Principles: Beyond the EU Charter of Fundamental Rights

Katja S. Ziegler and Aristi Volou

I. Introduction

Fundamental rights have been recognised judicially in the EU legal order as ‘integral part of the general principles of law protected by the Court of Justice’¹ of the EU (CJEU). The doctrine of general principles in the EU legal order (GPEU) as a source of law developed since the late 1950s² and was reinforced by its application to fundamental rights since *Stauder*.³ GPEU allowed the CJEU to construct the entire body of EU fundamental rights. GPEU and human or fundamental rights are, therefore, particularly intertwined with, and relevant for, the discussion of general principles. Only with the entry into force of the Lisbon Treaty in 2009, which gave formally binding force to the EU Charter of Fundamental Rights (EUCFR), the EU became bound by a written instrument of human rights.⁴ The duality of sources of fundamental rights persists.

Fundamental rights provided content for GPEU, turning GPEU from the formal shell of a source of EU law into concrete legally binding norms.⁵ Doctrinal, definitional and methodological as well as legitimacy questions are reflected in comparable and parallel debates

¹ Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR-1125, para 4.

² Case 1/58 *Stork v High Authority* [1959] ECR 17; Cases 36, 37, 38 and 40/59 *Geitling v High Authority* [1960] ECR 423; Case 40/64 *Sgarlata and others v Commission* [1965] ECR 215.

³ Case 29-69 *Erich Stauder v Stadt Ulm* ECLI:EU:C:1969:57, para 7.

⁴ Overview of the evolution of the EU human rights acquis see Sionaidh Douglas-Scott, ‘A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis’ (2006) 43 *Common Market Law Review* 629; Sionaidh Douglas-Scott, ‘The European Union and Human Rights after the Treaty of Lisbon’ (2011) 11 *Human Rights Law Review* 645; Violeta Moreno-Lax, *Accessing Asylum in Europe* (OUP 2017) 203-46.

⁵ Cf Samantha Besson, ‘General Principles and Customary Law in the EU Legal Order’ in Stefan Vogenauer and Stephen Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Hart 2017) 105, 107.

in the context of both fundamental rights and GPEU, for example their respective horizontal application.⁶ Fundamental rights are of methodological interest for GPEU because of their mutually reinforcing relationship in the construction and constitutionalisation of the EU domestic legal order.

The combination of GPEU and human rights to construct the EU legal order internally is a powerful one to justify judicial law development, reinforcing the general principles doctrine and EU fundamental rights at the same time. The symbiosis of GPEU and fundamental rights adds weight and fundamental nature of the judicially created norms, and may even bear connotations of universality. The claim to generality inherent in general principles and their justification by reference to external material sources suggests both scope and spread of the norms and adds an extra-systemic dimension to the justification of the construction of new norms. All this serves to justify and build the legitimacy and acceptance of the new norms in the internal legal order.⁷

There is also an external dimension to GPEU that is inherent in the concept. GPEU share the quality as a formal unwritten source of EU law with customary international law and general principles in international law,⁸ including customary international human rights that are directly applicable in the EU legal order.⁹ But, unlike general principles in international law, GPEU have been used much more widely as a domesticated, autonomous construct and category of norms of the EU legal order which ranks at the level of primary (Treaty) law.¹⁰ GPEU are a valve to open or close the EU legal order to other legal orders and exogenous sources that are controlled by the CJEU. Inward facing, GPEU not only served the construction of the EU legal order, but can also be used to enhance coherence and evolution of the EU with external legal orders.¹¹ Outward facing, the reference to GPEU may signal the potential for

⁶ For the EUCFR, see Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co KG* ECLI:EU:C:2010:21. For general principles, see C-144/04 *Werner Mangold v Rüdiger Helm* ECLI:EU:C:2005:709. In detail Lazzarini, Ch 10 in this volume.

⁷ See further Moreno-Lax (n 4), 229-40.

⁸ For the different methodologies in identifying each source see Special Rapporteur Marcelo Vázquez-Bermúdez, First Report on General Principles of Law, International Law Commission, A/CN.4/732, 5 April 2019, paras 107-111.

⁹ See also Alexander Orakhelashvili, 'The Use of Substantive International Law by the EU Judiciary', Ch 4.

¹⁰ Art 6(1)(3) TEU.

¹¹ Katja S Ziegler, 'Beyond Pluralism and Autonomy: Systemic Harmonisation as a Paradigm for the Interaction of EU Law and International Law' (2016) 35 *Yearbook of European Law* 667 (n 21), 694-706 for an example how coherence may be facilitated in practice; see also Xavier Groussot, Jörgen Hettne and Gunnar Thor Petursson, 'General Principles and the Many Faces of Coherence: Between Law and Ideology in the European Union' in Stefan Vogenauer and Stephen Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Hart 2017) 77.

judicial (or wider legal) dialogue. This may lead to genuine cross-fertilisation of legal orders in both directions and informal influence of the EU legal order towards other legal orders. Thus, reasoning based on general principles can also contribute to ‘constructing’ the international legal order.

Interaction of legal orders in the area of fundamental and human rights appears to occur more actively, both in binding and non-binding situations, than in other contexts. It is facilitated by the relative comparability of human rights and by the comparable values underpinning human rights in different legal orders. There is also a need for human rights to evolve continuously to respond to changing societies and social norms, which provides incentives to look beyond the own legal order. Thus, there are both overlaps and similarities between human rights and general principles. The human rights context may help to clarify the actual or potential role of general principles as ‘bridge’ or conduit between jurisdictions and legal orders and as tools for managing the interaction of legal orders more generally. This is because of the more widespread interaction taking place through human rights, which, by virtue of their subject matter, are referred to across legal orders more than other areas of law. Through such references, the extent of recognition and hence an element of external validation is incorporated into reasoning which develops human rights in a legal order. General principles also facilitate comparative law perspectives across legal orders – or even their instrumental transformative use.

The chapter will first ‘zoom-in’ on selected issues concerning the construction of the EU legal order as an autonomous legal order through GPEU in the context of fundamental rights (II). It will then ‘zoom-out’ on the external effect of general principles in the area of human rights law as a mechanism for openness, interaction, coherence, cross-fertilisation and judicial dialogue – as well as potential outward-facing soft power influence of the EU (III). It concludes with reflections on the continued relevance of GPEU in the UK after Brexit (IV).

II. The internal construction of the EU legal order through GPEU in the context of fundamental rights

The CJEU used GPEU to progressively construct a body of fundamental rights in EU law. A pluralism of definitions, characteristics and functions of GPEU emerged incrementally¹² in CJEU jurisprudence and literature.¹³ GPEU in the field of fundamental rights are characterised by being fundamental legal rules stemming from an independent source of law, recognised primarily by an evaluative inductive method and constituting individual rights which are enforceable by individuals.¹⁴ The CJEU developed the main (inductive) method of how GPEU are recognised in the context of fundamental rights, referring to combination of both internal and external (international and comparative) sources. Among the external material sources are ‘international conventions’, most prominently the ECHR, and the ‘constitutional traditions common to the Member States’.¹⁵ Since the Treaty of Maastricht in 1992, GPEU had a treaty basis in what is today Article 6(3) TEU. Beyond that, there is no general abstract definition of a general principle. In practice, reasoning tends to focus less on establishing abstract definitional or empirical criteria of GPEU, but on an overall assessment whether a rule can be established because it has the quality of a GPEU,¹⁶ whether it applies to particular facts, and what the content and limits of a particular GPEU are.¹⁷ But the definition of GPEU and material sources to establish them in the human rights context has shaped the approach in other areas. Functionally, GPEU can guide interpretation, act as standard for legality/validity, as a gap-filler and as a dynamic tool to update the EU legal order in the field of human rights.

The internal construction of the EU legal order through GPEU in the area of fundamental rights reflects two overarching trends: the constitutionalisation as autonomous body of law and the expansion of EU competence over its Member States.

¹² See further above Ch 1 by Neuvonen and Ziegler, in this volume, p 12, with references to relevant literature.

¹³ See, Hans-Josef Rüter, *Der Gerichtshof der Europäischen Gemeinschaften und die Konkretisierung der Allgemeinen Rechtsgrundsätze* (Köln 1970) 25-33, citing around 20 authors with 20 different definitions.

¹⁴ See Neuvonen and Ziegler, Ch 1, p 6.

¹⁵ Article 52(3) and (4) EUCFR now partially (reference only to the ECHR) codify the previous case law.

¹⁶ See, for example: Case C-101/08 *Audiolux SA e.a v Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others* EU:C:2009:626, examining extensively whether secondary law in the area may evidence the existence of GPEU. See also the debate whether the prohibition of abuse of law or of discrimination on grounds of obesity amount to general principles: C-251/16 *Edward Cussens and Others v T. G. Brosman* [2017] EU:C:2017:881, paras 25 ff.; C-354/13 *Fag og Arbejde (FOA), acting on behalf of Karsten Kaltoft, v Kommunernes Landsforening (KL), acting on behalf of the Municipality of Billund* ECLI:EU:C:2014:2463.

¹⁷ See, for example: Case C-298/16 *Teodor Ispas and Anduța Ispas v Direcția Generală a Finanțelor Publice Cluj* [2017] EU:C:2017:843, paras 25 ff. 35; and AG Bobek, paras 86 ff, 89, 112.

The process of recognising fundamental rights as GPEU evolved from an initial embeddedness of the EU legal order's fundamental rights in international law to an increasingly distinctive, separate and autonomous construction of a domestic body of EU fundamental rights with the EUCFR¹⁸ and their formalization with the Lisbon Treaty.¹⁹ The autonomy of the EU's domestic fundamental rights was even prioritised over international human rights in *Opinion 2/13*²⁰ and in the CJEU's approach to other international human rights instruments.²¹ Focusing on autonomy may not just impact on the international relations of the EU, but also affect the protection of rights in the EU negatively,²² unless it is reversed in a more nuanced approach with the maturing and increasing 'self-confidence' of the EU legal order, and reflecting the need to cooperate internationally.²³

The use of fundamental rights to expand the reach of EU law even prior to the EUCFR is well known.²⁴ Fundamental rights primarily have the function to bind the EU institutions and were created to defuse the challenge to supremacy of EU law that resulted from the absence of fundamental rights limits in the EU legal order.²⁵ They have been used for reviewing the compatibility and proportionality of EU legislation with fundamental rights on occasions,²⁶ but the CJEU has shown restraint in annulling measures because the EU lacked competence. In contrast, the CJEU used GPEU in the area of fundamental rights specifically to progressively expand the reach of EU law in relation to its Member States by applying human rights to

¹⁸ Joined Cases C-402&415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission of the European Union* [2008] ECR I-6351, ECLI:EU:C:2008:46.

¹⁹ In more detail Katja S Ziegler, 'Autonomy: From Myth to Reality – or Hubris on a Tightrope? EU Law, Human Rights and International Law' in Sionaidh Douglas-Scott and Nicholas Hatzis (eds), *Research Handbook on EU Human Rights Law* (Edward Elgar 2017) 267, 270-98. For the risks of detaching the EUCFR from international human rights law see Gráinne 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. More generally on the relationship of EU and international law Katja S Ziegler, 'The Relationship between EU Law and International Law' in Dennis Patterson and Anna Södersten (eds), *A Companion to EU Law and International Law* (John Wiley & Sons 2016) 42.

²⁰ *Opinion 2/13* ECLI:EU:C:2014:2454.

²¹ See critically Ziegler (n 19) 287 f.; Ziegler, 'Beyond Pluralism', 679-84; Violeta Moreno-Lax, 'The Axiological Emancipation of a (Non-)Principle: Autonomy, International Law and the EU Legal Order' in Inge Govaere and Sacha Garben (eds), *The Interface Between EU and International Law* (Hart 2019) 45, 68 f.

²² On autonomy and *Opinion 2/13* more generally Moreno-Lax and Ziegler, Ch 13.

²³ See e.g. *Opinion 1/17* ECLI:EU:C:2019:341; Katja S Ziegler, 'The Second Attempt at EU Accession to the ECHR: Opinion 2/13' in Graham Butler and Ramses A Wessel (eds), *EU External Relations Law: The Cases in Context* (Hart Publishing 2021 forthcoming), p 15 (nr fn 90).

²⁴ Paul Craig and Gráinne de Búrca, *EU Law* (7th edn, Oxford University Press 2020), 457-70.

²⁵ Case 44/79 *Liselotte Hauer v Land Rheinland-Pfalz* ECLI:EU:C:1979:290.

²⁶ E.g. Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others* ECLI:EU:C:2014:238; *Kadi I* (n 18).

situations where Member States derogated from EU law, merely acted in the scope of EU law,²⁷ and between individuals (horizontally).²⁸ In addition, the link with EU law (and hence EU competence) may, perhaps at times, have been rather tenuous.²⁹ This shows both the significance of ‘Europeanised’ fundamental rights as GPEU, which intersect with virtually all other areas of law, for the construction of the EU legal order and the need for a clear methodology.

This section will focus on two further specific aspects of GPEU in the context of fundamental rights relevant for the internal construction of the EU legal order: the conceptual and definitional, and the relational dimensions. First, from a conceptual and definitional perspective, the overlap and intersection of GPEU and fundamental rights with regard to other concepts and ‘principles’, requires clarification (subsection 1.). Second, from a relational perspective, the progressive internal construction of fundamental rights in the EU through multiple sources raises the question how GPEU relate to codified fundamental rights in the EUCFR (subsection 2.), and how fundamental rights relate to free movement rights under the Treaty (subsection 3.).

1. General principles and other ‘principles’

How can GPEU be situated with regard to, first, ‘principles’ under Article 52 EUCFR and, second, constitutional principles? As will be seen, while it is useful to think about the relationship between general and constitutional principles, the autonomous coinage of ‘principles’ by the EUCFR does not clarify GPEU in a meaningful way.

a. General principles and constitutional principles

Thinking about the relationship between GPEU and constitutional principles of the EU requires to clarify what is meant by ‘constitutional’. For EU law, ‘constitutional’ may refer to all norms

²⁷ Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* ECLI:EU:C:2013:105.

²⁸ *Mangold* (n 6); *Kücükdeveci* (n 6); Case C-414/16 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung* ECLI:EU:C:2018:257. See Lazzerini, Ch 10.

²⁹ E.g. Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* ECLI:EU:C:2002:434; C-34/09 *Gerardo Ruiz Zambrano v Office national de l’emploi (ONEm)* ECLI:EU:C:2011:124.

at Treaty level (that is, having constitutional status as part of primary law³⁰) or only to a subset of those norms that are characterised by a constituting function because of their content and/or hierarchical position *within* the primary law of the Treaties.³¹ Whether this is the case may evolve with the process of constitutionalisation. Because GPEU rank at the level of primary law, they will always be constitutional in the wider, but not necessarily in the narrower sense. Fundamental rights are recognised in the Treaties as general principles and referred to as constitutional founding values in Article 2 and 6(3) TEU.³² Therefore, they are also constitutional in both the narrower and wider sense by virtue of their subject matter and potentially hierarchical status among EU primary law, as recognised in *Audiolux*.³³ This means that different GPEU may have different hierarchical rank depending on their content. In other words, the substance of each specific GPEU may determine the hierarchical status.

Both general principles³⁴ and constitutional principles are fundamental, binding norms of a legal order,³⁵ which may be written or unwritten. They express an ‘overarching normative frame of reference’ for the whole legal order,³⁶ whether national or supranational. Despite the current wording of Article 2 TEU, which refers to values, it lists binding legal norms to which legal consequences attach. Replacing the terminology of ‘principles’ in its predecessor, Article 6(1) TEU in the Amsterdam version, has created an unfortunate ambivalence.³⁷ The values of Article 2 TEU must be distinguished from values as mere ethical convictions underpinning norms;³⁸ the terminology of constitutional principles would be more appropriate.

³⁰ AG Trstenjak, Case C-101/08 *Audiolux SA e.a v Groupe Bruxelles Lambert SA (GBL) and Others and Bertelsmann AG and Others* ECLI:EU:C:2009:410 AG Trstenjak, para 87.

³¹ Cf *Kadi I* (n 18), para 303; Katja S Ziegler, ‘Strengthening the Rule of Law, but Fragmenting International Law: The Kadi Decision of the ECJ from the Perspective of Human Rights’ (2009) 9 *Human Rights Law Review* 288, 297.

³² Art 2 TEU refers to ‘human dignity, freedom, democracy, equality, the rule of law and respect for human rights’.

³³ *Audiolux* (n 16), para 63.

³⁴ Besson (n 5) 110, citing R Guastini, ‘Les principes de droit en tant que source de perplexité théorique’ in S Caudal (ed), *Les principes en droit* (Economica 2008).

³⁵ Armin von Bogdandy, ‘Founding Principles’ in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart 2009) 11, 22. Laurent Pech, ‘“A Union Founded on the Rule of Law”: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law’ (2010) 6 *European Constitutional Law Review* 359, 376.

³⁶ von Bogdandy (n 35) 21.

³⁷ A possible reason was to avoid the connotation of statehood that reference to the rule of law has in other language versions (*Rechtsstaat*, *l'état de droit*). Cf von Bogdandy (n 35), 28; Laurent Pech, ‘The Rule of Law’ in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (3rd edn, OUP 2021 forthcoming), **text at fn 36 (p 11 of Reconnect WP)**. Critical of this shift Pech, ‘Union’ (n 35), 366 f.; von Bogdandy (n 35), 22.

³⁸ von Bogdandy (n 35), 22.

Constitutional principles function in a comparable way to GPEU in many respects. They inform the interpretation of norms³⁹ and can also be used to fill gaps. For example, the constitutional principle of the rule of law has been concretized to require judicial protection of the individual and has been used for a dynamic interpretation of Treaty provisions that restrict judicial review by the CJEU.⁴⁰

However, while it may seem that GPEU and constitutional principles fully overlap in the area of fundamental rights, this may not always be the case. GPEU may not be fundamental or constitutional; that is, constitutive, foundational or structural in the way constitutional principles are.⁴¹ An example is the technical rule ‘that a written declaration of intent becomes effective as soon as it arrives in due course within the control of the addressee’, which the CJEU recognised as a general principle common to the laws of the EU Member States.⁴² In contrast, constitutional principles may be decisionist and posited in the specific constitutional organisation, structures or procedures of a state/international organisation. They may, therefore not be ‘transferable’ because they then lack generality or independent normative content for the construction of a general principle.

Constitutional principles and general principles may differ in regard to their self-standing nature; that is, whether they can be directly relied upon,⁴³ for example, to annul acts of EU institutions,⁴⁴ which is characteristic of GPEU. Constitutional principles that are considered as constitutional aims or ‘optimization requirements’⁴⁵ may not be self-standing norms because of their inherent vagueness, indeterminacy and, hence, need for concretion. Whether a specific constitutional principle is a directly enforceable norm (and capable of being a general principle) or ‘only’ a constitutional optimization requirement can be controversial. For the rule of law, for example, it is uncontroversial that it can inform interpretation as a constitutional principle. The CJEU referred to sub-principles of the rule of law, such as judicial review and the right to good administration ‘as general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the member

³⁹ Takis Tridimas, ‘Fundamental Rights, General Principles of EU Law, and the Charter’ (2014) 16 *Cambridge Yearbook of European Legal Studies* 361, 378, 380.

⁴⁰ Case C-72/15 *Rosneft Oil Company v Her Majesty's Treasury and Others* ECLI:EU:C:2017:236, paras 62, 66, 72 f.; Pech, ‘Union’ (n 35), 370 f., 377.

⁴¹ von Bogdandy (n 35), 22.

⁴² *ibid*, citing Case 8/56 *Alma* [1957] ECR-98.

⁴³ For the GPEU as self-standing rights, see Tridimas (n 39) 378-379.

⁴⁴ Pech, ‘Union’ (n 35) 376.

⁴⁵ Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, OUP 2009) 47 f.

states.⁴⁶ Similarly, it linked the rule of law and effective judicial protection and fundamental rights as general principles.⁴⁷ The precise status of the rule of law itself is left unclear in this case law. Some consider the rule of law as a meta-principle with normative effect on interpretation but directly enforceable only through its more concrete sub-principles⁴⁸ (which may also be general principles). Against this, it may be argued that identifying the components of the rule of law is part of its interpretation, which would mean that the principle itself, and not just its components, is justiciable,⁴⁹ which in turn could make the rule of law itself a general principle.⁵⁰ This is the case for the principle of equality, which is both a constitutional principle in Article 2 TEU⁵¹ and a justiciable general principle.⁵² Similarly, human dignity is recognised as a GPEU⁵³ despite being widely considered as a value or meta-principle. Both examples show that vagueness, the need to interpret, and a character as a meta-rule and the question whether a norm is enforceable are characteristics and contentious debates shared by GPEU and constitutional principles. This means that it is not precluded that a constitutional principle is also a general principle, but also that it does not automatically follow. Whether a principle is considered to be directly enforceable as constitutional and general principles is not necessarily aligned (and there is room for variations in the precise content and normative effect between the categories of principles). Rather, it needs to be assessed for each constitutional principle whether it meets the criteria of a GPEU, in particular, reflecting an independent source of law,

⁴⁶ Pech, 'Union' (n 35), 377, referring to Case T-54/99 *Max.mobil Telekommunikation* [2002] ECR II-313, paras 48, 57.

⁴⁷ C-50/00P *Unión de Pequeños Agricultores v Council of the European Union* ECLI:EU:C:2002:462, paras 38-39; C-354/04 P *Gestoras Pro Amnistía and Others v Council* ECLI:EU:C:2007:115, para 51; *Kadi I* (n 18), paras 281-284, 316; C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* EU:C:2018:117, para 36.

⁴⁸ Pech, 'Union' (n 35) 376-377.

⁴⁹ See eg. *Kadi I* (n 18), paras 281, 316; Christophe Hillion, 'Overseeing the Rule of Law in the EU: Legal Mandate and Means' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016) 59, 67-70; Kim Lane Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions' in Carlos Closa and Dimitry Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (CUP 2016) 105, 114-22; Armin von Bogdandy and Luke Dimitrios Spieker, 'Protecting Fundamental Rights Beyond the Charter: Repositioning the Reverse Solange Doctrine in Light of the CJEU's Article 2 TEU Case-Law' in Michal Bobek and Jeremias Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart 2020) 525, 532-7.

⁵⁰ Thus AG Trstenjak in *Audiolux* (n 30), para 70.

⁵¹ Equality forms part of the constitutional/founding principles, see already Joined Cases 117/76 and 16/77 *Albert Ruckdeschel & Co. and Hansa-Lagerhaus Ströh & Co. v Hauptzollamt Hamburg-St. Annen; Diamalt AG v Hauptzollamt Itzehoe* ECLI:EU:C:1977:160, para 7.

⁵² *Ibid* (n 51), para 7; Case C-442/00 *Ángel Rodríguez Caballero v Fondo de Garantía Salarial (Fogasa)* ECLI:EU:C:2002:752, para 32; Explanations Relating to the Charter of Fundamental Rights (2007) OJ 303/17, 35. See also Dagmar Schiek, 'Article 23: Equality between Women and Men' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 579, paras 23.35 and 23.20.

⁵³ Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* ECLI:EU:C:2004:614, para. 34.

generality, a usually inductive method of recognition, and laying down rights that are enforceable also by individuals.

b. GPEU and ‘principles’ under the Charter

The EUCFR refers in Article 52(5) to ‘principles’ as opposed to rights. This raises two questions: first, how ‘principles’ in the sense of the EUCFR relate to rights in the EUCFR, and second, how they relate to GPEU, which contain rights.

First, Article 52(5) EUCFR defines principles under the Charter as requiring further legislative or executive implementation; they are said to be non-justiciable.⁵⁴ The distinction reflects concerns and disagreement of the Member States, in particular, about the provisions of the Solidarity Chapter of the EUCFR, containing economic and social rights.⁵⁵ The result was a complex unfortunate autonomous terminology of ‘principles’ and ‘rights’ in the EUCFR which is not conclusive of the nature and effect of a norm. Some provisions are referred to as both a right and a principle.⁵⁶ Others are called principles but may in fact be rights – and vice versa,⁵⁷ so that a reference to further implementation does not conclusively distinguish rights and principles: the Charter refers to the need for further implementation both with regard to non-justiciable principles in the Solidarity Chapter,⁵⁸ and other Charter provisions conferring rights, such as the Freedoms Chapter.⁵⁹ Thus, whether a provision is a right or a principle under the Charter needs to be established through interpretation, guided by the Explanations to the Charter.⁶⁰

⁵⁴ Art 52(5) EUCFR and Explanations (n 52) 35.

⁵⁵ Explanations (n 52) 35. The EU was considered not to have the competence or budgetary resources to take positive action to realise rights; for detail: Lord Goldsmith QC, ‘A Charter of Rights, Freedoms and Principles’ (2001) 38 *Common Market Law Review* 1201, 1212-1213; Steve Peers and Sacha Prechal, ‘Article 52: Scope and Interpretation of Rights and Principles’ in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 1455, para. 52.159.

⁵⁶ Explanations (n 52) 35. Provisions which include both elements of ‘principles’ and ‘rights’ are: Arts. 23, 33, 34 and 47 EUCFR.

⁵⁷ See Peers and Prechal (n 55) 1507 f., paras 52.168-176. Art. 49 EUCFR refers to principles but clearly confers rights. In the reverse scenario, the CJEU held that the ‘right’ in Art. 27 EUCFR could not be invoked between private parties, suggesting it considered it to be a principle: C-176/12 *Association de médiation sociale (AMS) v Union locale des syndicats CGT and Others* ECLI:EU:C:2014:2, paras 44-49.

⁵⁸ *AMS* (n 57), paras 44-49. See Arts 27, 28, 30, 34-36 EUCFR.

⁵⁹ Arts 9, 10(2), 14(3), 16 and Art 18 EUCFR.

⁶⁰ The Explanations refer to some provisions as ‘principles’, although the EUCFR refers to them as ‘rights’, e.g. Arts. 25, 26 and 35 EUCFR. Conversely, the EUCFR refers to ‘principle’ in Art. 49, but the Explanations to ‘right’; see: Explanations (n 52) 27, 31, 35.

GPEU, as co-existing source of fundamental rights, adds a further layer to the interpretation of the effect of rights and principles under the Charter, but also cuts through the complexities and inconsistencies created by it. The EUCFR neither displaces as *lex specialis* the unwritten general principles, nor is one or the other formally considered as higher-ranking.⁶¹ A fundamental right can exist with a different effect *qua* GPEU and thus ‘correct’ an outcome based on the Charter alone. A non-justiciable ‘principle’ in the sense of Article 52(5) EUCFR can be justiciable as a GPEU if it fulfils the criteria.⁶² This was the case in *Laval* and *Viking Line*, in which the CJEU held that the right to take collective action, which *prima facie* would appear to be a non-justiciable ‘principle’ under Article 28 EUCFR, was a right by virtue of being a GPEU that was widely recognised in international and EU law and in the constitutional law of the EU Member States.⁶³

Thus, the distinction between ‘right’ or ‘principle’ under the Charter, already inconsistent from a Charter-only perspective, has nothing to add to the definitional inquiry into GPEU. However, it shines a light on the relationship between codified rights in the EUCFR and GPEU and the interaction of multiple sources of rights and the powerful effect of GPEU existing in parallel to codified fundamental rights. The relationship between GPEU and the Charter deserves further analysis.

⁶¹ On the consequences for interpretation (e.g. to adopt the higher standards) see Moreno-Lax, *Accessing Asylum in Europe*, 238 f).

⁶² Tridimas (n 39) 380. See, also, in a similar vein: Tobias Lock, ‘Article 6 TEU’ in Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *Commentary on the EU Treaties and the Charter of Fundamental Rights* (OUP 2019) 87; and for the principle of good administration, specifically: Alexander H Türk, ‘Administrative Law and Fundamental Rights’ in Sionaidh Douglas-Scott and Nicholas Hatzis (eds), *Research Handbook on EU Law and Human Rights* (Edward Elgar 2017) 127-128.

⁶³ Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* ECLI:EU:C:2007:809, para 90-92; Case C-438/05 *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line* ECLI:EU:C:2007:772, para 43 f. Although decided before the EUCFR became binding, there is no reason to suggest that this interpretation of Article 28 EUCFR would now be different.

2. The relationship between general principles and the Charter of Fundamental Rights

a. *Co-equal sources linked by interpretation*

The two main sources of EU fundamental rights, the EUCFR and GPEU, overlap in regard to the rights recognised, their status in the hierarchy in EU law, their scope of application, and their effects (including direct effect and horizontal effect). Both the EUCFR and general principles have the status of primary law according to Article 6(1) and (3) TEU and, hence, ‘constitutional status’.⁶⁴ They are bound to one another also by the rules of interpretation of the Charter that refer to the ECHR which is a material source of GPEU.⁶⁵

Neither the EUCFR and Article 6 TEU nor the case law define the relationship between rights in the EUCFR and GPEU exhaustively. But they show that the two sources operate autonomously in parallel, rather than in a hierarchical order – GPEU are not subsidiary to the codification of fundamental rights in the EUCFR.⁶⁶ Therefore, it would be misleading to describe existing GPEU as merely filling the gaps in the EUCFR.⁶⁷ GPEU and fundamental rights may either diverge, or mutually reinforce one another in the construction of the EU legal order. The parallelism of sources reflects in part the need for flexibility and the complexities created by the limited competence of the EU in the area of fundamental rights. However, the parallel sources also create tensions, such as *ratione materiae* between a potentially universal claim of a right as a general principle and the limits of EU competence vis-à-vis the Member States,⁶⁸ or between written codification and unwritten GPEU; or between the EU internal institutional competences: a GPEU, recognised by the CJEU and ranking at primary law level, may contradict (more specific) secondary legislation.⁶⁹

⁶⁴ *Audiolux* (n 16), para 63.

⁶⁵ Art. 52(2), (4), (6) and Art. 53 EUCFR. From the reference in Art. 52(2) EUCFR, it could be inferred that the ECHR was elevated by the Charter itself from material source of GPEU (subject to autonomous moulding by the CJEU) to a formal source of fundamental rights in the EU.

⁶⁶ Herwig C.H. Hofmann and Bucura C. Mihaescu, ‘The Relation between the Charter’s Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case’ (2013) 9 *European Constitutional Law Review* 73, 77-82.

⁶⁷ *Ibid*, 77 f.: referring to a ‘gap’ is problematic with regard to the EUCFR and GPEU because it suggests a hierarchy between the two co-equal sources.

⁶⁸ This is particularly palpable where fundamental rights are linked to values, such as the rule of law, which provide a bridge to the procedure of Article 7 TEU.

⁶⁹ See Koen Lenaerts and Jose A. Gutierrez-Fons, ‘The Constitutional Allocation of Powers and General Principles of EU Law’ (2010) 47 *Common Market Law Review* 1629, 1660 f.

As already shown with regard to the rights-principles distinction in the EUCFR,⁷⁰ the effect of a right may vary depending on its source, e.g. as a GPEU, Charter right or secondary legislation.⁷¹ For example, in the context of non-discrimination/equal treatment, Article 21(1) EUCFR, which includes particular grounds of discrimination, ‘is a particular expression of a general equality principle *tout court*’ (that is, without a focus on a particular ground) as reflected in the general equality right in Article 20 of the EUCFR.⁷² Directives 2000/43 and 2000/78,⁷³ in turn, are ‘specific expressions – in the fields covered by them – of Article 21(1)’ of the EUCFR (non-discrimination).⁷⁴

Although formally independent co-equal sources of primary law,⁷⁵ conflict between the two has been avoided by linking them through interpretation.⁷⁶ As might have been expected, the CJEU made the written EUCFR the ‘primary point of reference’,⁷⁷ in its post-Lisbon case law, without referring to GPEU or the ECHR, even when the relevant right was also recognised as a GPEU.⁷⁸ There is little evidence for GPEU being interpreted in the light of the EUCFR; but, GPEU inform the interpretation of the EUCFR.⁷⁹ This can be derived from Article 6(3) TEU⁸⁰ and the EUCFR itself requires it:⁸¹ Article 53 EUCFR clarifies that the Charter does not

⁷⁰ L.1.b above.

⁷¹ Christa Tobler, ‘General Principles of Equal Treatment in EU Non-Discrimination Law’, Chapter 19, p 4.

⁷² *ibid*, referring to Case C-190/16 *Werner Fries v Lufthansa CityLine GmbH* ECLI:EU:C:2017:513, para 29.

⁷³ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

⁷⁴ Tobler (n 54) 4, citing *Egenberger* (n 28), para 47.

⁷⁵ Cf M. Cherif Bassiouni, ‘A Functional Approach to “General Principles of International Law”’ (1990) 11 *Michigan Journal of International Law* 768, 781-83; but cf also arguments for a primary role of the EUCFR Sacha Prechal, ‘Competence Creep and General Principles of Law’ (2010) 3 *Review of European Administrative Law* 5, 21 f.

⁷⁶ See in more detail Moreno-Lax, *Accessing Asylum in Europe* (n 4), 234, 238-41, 243.

⁷⁷ Tridimas (n 39) 377 with references to case law; Sara Iglesias Sánchez, ‘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, 1599; Aida Torres Pérez, ‘The Federalizing Force of the EU Charter of Fundamental Rights’ (2017) 15 *International Journal of Constitutional Law* 1080, 1092; Sacha Prechal, ‘The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?’ in Christophe Paulussen and others (eds), *Fundamental Rights in International and European Law: Public and Private Law Perspectives* (Springer 2016) 143, 150.

⁷⁸ Case C-258/14 *Eugenia Florescu and Others v Casa Județeană de Pensii Sibiu and Others* ECLI:EU:C:2017:448.

⁷⁹ Tridimas (n 39) 378; Bruno de Witte, ‘Article 53: Level of Protection’ in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 1523, para 53.07; Chiara Amalfitano, *General Principles of EU Law and the Protection of Fundamental Rights* (Elgar 2018) 117 ff. For an argument why the EUCFR should occupy this place and that GPEU might hinder the evolution of the EUCFR see Emily Hancox, ‘The Relationship Between the Charter and General Principles: Looking Back and Looking Forward’ (2020) 22 *Cambridge Yearbook of European Legal Studies* 1, 9-12.

⁸⁰ Iglesias Sánchez (n 77), 1596.

⁸¹ Tridimas (n 39) 378.

restrict or affect adversely fundamental rights already recognised by EU law, including the Treaties and thus also GPEU,⁸² in particular, rights not contained in the EUCFR.⁸³ Moreover, Articles 52(3) and 52(4) EUCFR state that the EUCFR must be interpreted in accordance with the ECHR as a minimum standard and in harmony with national constitutions, respectively, which are also recognised as material sources of GPEU.⁸⁴ For example, the textually narrower scope of application of the Charter in Article 51(1) EUCFR, which provides that it is binding on Member States ‘only when they are implementing Union law’, has been interpreted more widely in the light of GPEU established prior to the EUCFR, as extending to Member States when acting in the scope of Union law.⁸⁵ The Official Explanations⁸⁶ and CJEU⁸⁷ align the interpretation of the scope of application of the EUCFR with that of GPEU.⁸⁸

GPEU, therefore, are particularly relevant for the interpretation of the EUCFR’s more open-ended fundamental rights provisions and where the Charter diverges from established GPEU.⁸⁹ They have been referred to in tandem with the EUCFR,⁹⁰ also post-Lisbon,⁹¹ to support the evolutive interpretation of the Charter and in regard to new or sensitive legal questions, such as the right to privacy and data protection,⁹² or when departing from ECtHR jurisprudence.⁹³ The CJEU used the EUCFR on occasions even to (merely) ‘reaffirm’ GPEU,⁹⁴ maintaining GPEU as the primary point of reference and source for EU fundamental rights, for example, for the right to effective judicial protection.⁹⁵ The quality and transparency of the reasoning establishing a GPEU is crucial if it is to have this powerful effect to potentially

⁸² *ibid.*

⁸³ de Witte (n 79).

⁸⁴ *ibid.*

⁸⁵ E.g. Case C-112/00 *Schmidberger v. Austria* ECR 2003 I-5659, ECLI:EU:C:2003:333, para 75.

⁸⁶ Explanations (n 52) 32.

⁸⁷ *Åklagaren v Hans Åkerberg Fransson* (n 27), paras 20-21; cf. *Juizes Portugueses* (n 47), para 29. Lenaerts and Gutierrez-Fons (n 69), 1660; Amalfitano (n 79), 97f; Daniel Sarmiento, ‘Who’s Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe’ (2013) 50 *Common Market Law Review* 1267, 1277 ff.

⁸⁸ Explanations (n 52) 32.

⁸⁹ But cf *Hancox* (79), 24.

⁹⁰ Amalfitano (n 79), 117 ff; Hofmann and Mihaescu (n 66) 75-76, with references to case-law.

⁹¹ *ibid.*, citing Case C-1/11 *Interseeroh Scrap and Metals Trading GmbH v Sonderabfall-Management-Gesellschaft Rheinland-Pfalz mbH (SAM)* ECLI:EU:C:2012:194, para 43.

⁹² , para 68; C-356/12 *Wolfgang Glatzel v Freistaat Bayern* ECLI:EU:C:2014:350, paras 43, 49; Amalfitano (n 79), 117-20 with further references.

⁹³ , paras 46, 76; and before the entry into force of the Charter Case C- 550/ 07 P *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission* ECLI:EU:C:2010:512, para 52; Amalfitano (n 79), 117, 135.

⁹⁴ Hofmann and Mihaescu (n 66) 75, with references to case-law; Steve Peers, ‘The Rebirth of the EU’s Charter of Fundamental Rights’ (2011) 13 *Cambridge Yearbook of European Legal Studies* 283, 291, with further references.

⁹⁵ Hofmann and Mihaescu (n 66) 75. For an example, see: *Juizes Portugueses* (n 47), para 35.

‘correct’ the *prima facie* interpretation of or even displace a written norm. Used in that way, general principles can add weight and legitimacy to the CJEU’s reasoning by pointing to the weight and established nature of a right in EU law and other legal orders, adding an external dimension to interpretation or recognition of norms.

b. Continued relevance of general principles as autonomous source of fundamental rights

In addition to supporting interpretation, general principles still fulfil an autonomous function post-Lisbon,⁹⁶ principally in the classic function of general principles to fill gaps in protection⁹⁷ and to develop the law.⁹⁸ As norms, GPEU can be used to determine the scope of application of EU measures and as standards of their legality.⁹⁹

As the EUCFR does not codify all fundamental rights, not even all rights contained in the ECHR,¹⁰⁰ there are notable gaps in protection, such as the right to move freely and choose one’s residence, protected by Article 2(1) of Protocol No 4 to the ECHR and recognised as a GPEU.¹⁰¹ The EUCFR also does not capture all GPEU. Examples are the duty of care of the EU towards its officials in EU staff law,¹⁰² or the right to good administration in Article 41 EUCFR against Member States when implementing EU law where the Charter right has not been interpreted in line with the parallel GPEU.¹⁰³ One might also consider the ability to transform non-justiciable ‘principles’ in the EUCFR into judicially enforceable rights, discussed above,¹⁰⁴ to fill a gap in remedies.

⁹⁶ Tridimas (n 39) 378-379.

⁹⁷ Takis Tridimas, *The General Principles of EU Law* (2nd edn, Oxford University Press 2006) 17-19, 29-35; Lenaerts and Gutiérrez-Fons (n 69), 1629; Neuvonen and Ziegler (n 12), p. 15.

⁹⁸ Amalfitano (n 79), 163.

⁹⁹ Tridimas, ‘Charter’ (n 39) 379; Tridimas, *The General Principles of EU Law* (n 97) 29-35; Lenaerts and Gutiérrez-Fons (n 69), 1629; Neuvonen and Ziegler (n 12), p. 13.

¹⁰⁰ Tridimas, ‘Charter’ (n 39) 377-378.

¹⁰¹ *Ibid* (n 39) 378, referring to C-370/05 *Criminal proceedings against Uwe Kay Festersen* ECLI:EU:C:2007:59, para. 36.

¹⁰² Cf Amalfitano (n 79), 171.

¹⁰³ , para 68; Hofmann and Mihaescu (n 66), 82, 96 f., 100; critical of the CJEU’s interpretation of Art. 41 EUCFR diverging from GPEU Amalfitano (n 79), 152.

¹⁰⁴ Above [text nr n 62](#).

Furthermore, GPEU may be used to update the framework of EU fundamental rights by constructing new rights.¹⁰⁵ Over a midterm perspective, the EUCFR will still contain rights that are more extensive and may be the primary catalyst for new GPEU.¹⁰⁶ But this dynamic may change over time: over the longer term, unwritten GPEU are more flexible tools to develop EU fundamental rights. Moreover, GPEU can draw from a wider range of external (material) sources, as well as secondary legislation, whereas the TEU and provisions of the EUCFR explicitly refer only to the integration of ECHR and rights found in the constitutions of the EU Member States as material sources of GPEU.¹⁰⁷

Finally, GPEU can still be relied upon where rights under the EUCFR might be interpreted restrictively in future, where they are contingent on Member State recognition, or subject to more far-reaching limitations.¹⁰⁸ For example, although the right to marry and found a family in Article 9 EUCFR is broad enough to cover same-sex marriage, it is subject to ‘the national laws governing the exercise of these rights’, leaving discretion to the Member State,¹⁰⁹ whereas the corresponding GPEU may not be subject to such a limitation.¹¹⁰ Similarly, should the scope of the EUCFR be interpreted more restrictively in future, GPEU would still apply.¹¹¹ GPEU may also be used to avoid any debate about obligations under the Charter on the basis of an opt-out¹¹² under Protocol 30¹¹³ and, thus, ensure uniform application of fundamental rights throughout the EU, regardless of such claims. However, using GPEU in that way, potentially even correcting outcomes under the written EUCFR, needs to be handled with care.

¹⁰⁵ Amalfitano (n 79), 117 ff, 163 ff, with possible examples at 167-171: protection of minorities (from Art. 2 TEU), a right to water (from the right to dignity and right to life, Art. 1 and 2 EUCFR), the right to access to the internet (freedom of expression), a right to a guaranteed minimum income (from the right to life and right to social assistance, and fight against social exclusion and poverty, Art. 2 EUCFR), the right to recognition of civil partnerships or the right to a registered union (from the practice of other institutions, constitutional traditions of the Member States and the ECHR), or the duty of care of the EU towards its staff (from international law and Member States’ legal principles).

¹⁰⁶ Lenaerts and Gutiérrez-Fons (n 69), 1660.

¹⁰⁷ Art 52(3)(4) EUCFR, above [text at n 84](#).

¹⁰⁸ Lock (n 62) 87.

¹⁰⁹ *ibid*, referring to Art 9 EUCFR.

¹¹⁰ Lock (n 62) 87; Amalfitano (n 79), 174 f.

¹¹¹ Cf. *Juízes Portugueses* (n 47), and (n 103).

¹¹² For the lack of legal effect of Protocol 30, see Joined Cases C-411/10 and C-493/10 *N. S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* [2011] EU:C:2011:865, para 120; Christiaan Timmermans, ‘The Relationship between the European Court of Justice and the European Court of Human Rights’ in Anthony Arnall, Catherine Barnard, Michael Dougan and Eleanor Spaventa (eds), *A Constitutional Order of States?: Essays in EU Law in Honour of Alan Dashwood* (Hart 2011) 151, 160.

¹¹³ Protocol No 30 on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom [2008] OJ C115/313.

Detailed and transparent reasoning is essential to build the legitimacy and acceptance in particular in such scenarios of conflict of GPEU with other rules.

3. The Relationship between general principles, fundamental rights and fundamental freedoms and the objectives of the EU

EU fundamental rights also overlap with fundamental (market) freedoms, for example, the fundamental rights to choose an occupation, conduct a business and to move freely.¹¹⁴ Both provide individual rights, recognised as GPEU, and rank as co-equal sources¹¹⁵ in primary law. At the same time, the internal market is part of the EU objectives, with the fundamental freedoms being a principal tool to achieve it.¹¹⁶ Fundamental rights are also encompassed by the EU's objectives in Article 3 TEU,¹¹⁷ in addition to being part of the EU's values (as constitutional principles) in Article 2 TEU.

Conflicts may therefore arise in different constellations in a complex embrace of rights and objectives that shape and limit each other, and principally need to be resolved by balancing¹¹⁸: between individual rights (including GPEU) and between individual rights and objectives as well as between objectives, respectively. Implications for EU and Member State competences provide contextual factors for the balancing exercise.

Conflicts between individual rights, that is fundamental rights (regardless of source¹¹⁹), and market freedoms are the classic constellation to be resolved by balancing in the individual case.¹²⁰ This is because the relevant norms formally enjoy an equal rank as primary law, with the possible exception of a core of norms that might be constructed at a higher level of hierarchy within primary law.¹²¹ However, as has been critically observed, the relationship between the market freedoms and fundamental rights was biased towards economic integration (and hence the federalising EU competences) because of the aims and structure of the EU legal order as a

¹¹⁴ Articles 15, 16 and 45 EUCFR, respectively.

¹¹⁵ Above (n 75).

¹¹⁶ Article 3(3) TEU.

¹¹⁷ Article 3(1) TEU and Article 3(5), regarding human rights in the external dimension.

¹¹⁸ The existence of hierarchy within EU constitutional law (text around n 31) does not preclude balancing but needs to be reflected in it; however, a non-negotiable constitutional core, which would need to be established by interpretation, would posit absolute limits.

¹¹⁹ Hofmann and Mihaescu (n 66), 81.

¹²⁰ *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* (n 53).

¹²¹ See above **text at n 31**.

specific project of economic integration and the only gradual emergence of fundamental rights within it.¹²² EU fundamental rights primarily limited the EU's legislation, but rarely the market freedoms in the Treaty.¹²³ This meant that fundamental rights questions often played out as competence issues in the face of human rights challenges by the Member States, which were contained: Member States only could invoke their national fundamental rights as exceptions to the market freedoms under exceptional circumstances, and these are, in principle, limited in turn by the EU's fundamental rights.¹²⁴ This interplay gave rise to the criticism of competence creep through GPEU, which seem to be binding the Member States more than the EU institutions.¹²⁵

In addition, conflicts may arise between individual rights and the wider policy objectives of the EU. However, the picture is not clear-cut because the EUCFR includes some market freedoms as fundamental rights, such as the right to conduct a business,¹²⁶ thus merging market and fundamental freedoms, at least to an extent. The EUCFR itself provides that such rights are to be interpreted in line with the relevant Treaty provisions,¹²⁷ thus injecting fundamental rights with market freedoms and market objectives. This blurs the lines between individual (fundamental) rights as limits on the exercise of EU competences, and functional market freedoms as tools to further the integration objective.¹²⁸ This effect is independent of the source of fundamental rights. GPEU might be deployed in both ways, to reinforce or to limit (overly) functionalist interpretation of the EUCFR.¹²⁹

Because of the potential tension between the economic objectives of integration and the constitutional values of the EU, as laid down in its constitutional principles, constitutional

¹²² See e.g. *Viking* (n 63); Catherine Barnard, 'EU Employment Law and the European Social Model: The Past, the Present and the Future' (2014) 67 *Current Legal Problems* 199, 204-6; already Katja S Ziegler, 'Grundfreiheiten und soziale Dimensionen des Binnenmarktes - die Verfassung als Impuls?' (2004 (Beiheft 3)) *Europarecht* 13. For an argument that internal market law, however, is also structurally capable of accommodating non-economic interests: Stephen Weatherill, 'Viking and Laval: The EU Internal Market Perspective' in Mark Freedland and Jeremias Prassl (eds), *Viking, Laval and Beyond* (Hart 2014) 23.

¹²³ Prechal, 'Competence Creep and General Principles of Law' (n 75), 8-11, 15-17.

¹²⁴ E.g. *Schmidberger v. Austria* (n 85); C-260/89 *Elliniki Radiophonia Tileorassi AE (ERT) v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* ECLI:EU:C:1991:254, para. 43.

¹²⁵ Tridimas, *The General Principles of EU Law* (n 97) 76. In relation to the principle of equal treatment, see also Gillian More, 'The Principle of Equal Treatment: From Market Unifier to Fundamental Right?' in Paul Craig and Grainne de Búrca (eds), *The Evolution of EU Law* (OUP 1999) 535.

¹²⁶ Above (n 114).

¹²⁷ Art. 52(2) EUCFR.

¹²⁸ So in , para. 31 f. Critically Stephen Weatherill, 'Use and Abuse of the EU's Charter of Fundamental Rights: On the Improper Veneration of 'Freedom of Contract'' (2014) 10 *European Review of Contract Law* 167, 171 f., 177 f.; Niall O'Connor, 'Whose Autonomy is it Anyway? Freedom of Contract, the Right to Work and the General Principles of EU Law' (2020) *Industrial Law Journal* 285, 295 f.

¹²⁹ O'Connor (n 128), 286 f.

principles must be conceptually distinguished from the EU's objectives. Objectives inform the teleological interpretation of EU law and provide the functional rationale for European integration.¹³⁰ However, objectives are limited by, and must be interpreted in light of, the EU's constitutional principles (posited values) which underpin the system as a whole and act as limits to the EU's powers. Hence objectives and constitutional principles cannot be used interchangeably. This has consequences both for the balancing exercise between constitutional principles and objectives, and for the interpretation of constitutional principles, including GPEU, in the light of objectives: objectives may not be used to displace wholesale the limits imposed by constitutional principles; where integration objectives limit constitutional principles, this must be subject to a carefully reasoned, transparent balancing exercise.¹³¹ This applies even more where fundamental rights as constitutional principles are 'turbo-charged' in a specific direction by objectives.¹³² For GPEU, because of their potentially far-reaching effect on the balance between objectives and constitutional limits of the EU, this means further that the inductive process in which they are constructed needs to be based on transparent reasoning with a sensitivity for the context and implications.

III. The external context: general principles as a tool for coherence, judicial dialogue and influence

Beyond their role for the internal, autonomous construction of fundamental rights in the EU legal order, GPEU are also part of the wider context of international human rights law with which they can interact. GPEU, and human rights more generally, may serve as tools with an 'importing' and 'exporting' dimension.

1. Importing external standards in the construction of the internal legal order

International human rights law could be 'imported' directly or indirectly¹³³ formally as international law, which is integral part of the EU legal order, through treaties, customary law,

¹³⁰ von Bogdandy (n 35), 19, 23 and 45; Henry G Schermers and Denis F Waelbroeck, *Judicial Protection in the European Union* (6th edn, Kluwer 2001) 29, para 55.

¹³¹ See further Moreno-Lax and Ziegler, Ch. 13

¹³² Above (n 128); Jeremias Prassl, 'Business Freedoms and Employment Rights in the European Union' (2015) 17 *Cambridge Yearbook of European Legal Studies* 189.

¹³³ Treaty obligations of the Member States could be imported indirectly into the EU acquis as obligations pre-dating EU membership (*qua* Article 351 TFEU or international law, such as Article 103 UN Charter) or through

and general principles referred to in Article 38(1)(c) of the ICJ Statute.¹³⁴ The Treaties refer explicitly to some human rights instruments.¹³⁵ Formal interaction with international human rights instruments is, however, limited in practice.

Instead, GPEU are constructed predominantly through an informal process by an evaluative comparative method from external material sources in international law, including the ECHR, other human rights treaties, and Member States' law. The informal process enables the EU legal order methodologically to be open to 'cross-fertilisation' – but also keeps external sources 'at arm's length'. Fundamental rights as GPEU, if used appropriately, can help to maintain coherence of the EU legal space with its wider context with regard to both the international and Member States' legal orders. The link of human rights with often common values facilitates interaction,¹³⁶ making fundamental/human rights a dynamic area in which general principles operate in the EU legal order. Whether and to what extent this opportunity is used is, however, a separate question, but there is potential for more active and transparent engagement of the EU.¹³⁷

Although all international human rights can be a material source of GPEU, as the preamble and Explanations to the EUCFR explicitly acknowledge, the CJEU predominantly uses the ECHR. The CJEU has been criticised for this selectivity,¹³⁸ as it may result in disconnecting EU law from international human rights and the loss of coherence, and potentially even to challenges to the primacy of EU law by Member States where they consider EU fundamental rights to provide insufficient protection.¹³⁹ It has also been noted that the CJEU made fewer references to the ECHR since the 2009 Lisbon Treaty made it formally binding and required ECHR accession.¹⁴⁰ There may be a number of reasons for this.¹⁴¹

succession of the EU into them. See Tawhida Ahmed and Israel de Jesús Butler, 'The European Union and Human Rights: An International Law Perspective' (2006) 17 *European Journal of International Law* 771, 772.

¹³⁴ On GPEU and GPIL see Emanuel Castellarin, 'General Principles of EU Law and General International Law' in Mads Andenas and others (eds), *General Principles and the Coherence of International Law* (Brill 2019) 131. On EU law and international human rights see Moreno-Lax, *Assessing Asylum in Europe* (n 4), 206-17, 229-40.

¹³⁵ Art. 78 TFEU refers to the Refugee Convention which could be used directly as a standard of validity, see Hemme Battjes, *European Asylum Law and International Law* (Martinus Nijhoff 2006) 101.

¹³⁶ David Nelken, 'Disclosing/Invoking Legal Culture: An Introduction' (1995) 4 *Social and Legal Studies* 435, 440.

¹³⁷ See Neuvonen and Ziegler, Ch 1, **section IV**.

¹³⁸ Israel de Jesús Butler and Oliver de Schutter, 'Binding the EU to International Human Rights Law' (2008) *Yearbook of European Law* 277, 279 ff.; de Búrca (n 19), 173 f.

¹³⁹ Butler and de Schutter (n 138), 284; Ziegler, 'Beyond Pluralism' (n 21), 684-7.

¹⁴⁰ de Búrca (n 138).

¹⁴¹ This may not necessarily mean the ECHR is not considered, see Jasper Krommendijk, 'The Use of ECtHR Case Law by the Court of Justice after Lisbon: The View of Luxembourg Insiders' (2015) 22 *Maastricht Journal of European and Comparative Law* 812.

However, one reason why the CJEU held the Draft Accession Agreement to the ECHR to be incompatible with the autonomy of the EU legal order was that it did not ‘coordinate’ the obligations under the Charter and the ECHR;¹⁴² in other words, it did not limit the protection of the ECHR to the level of the EUCFR. Through GPEU, the ECHR was elevated *de facto* to the level of primary law,¹⁴³ but its precise effect mediated by the flexible, evaluative domestic construction of GPEU. If the EU acceded to the ECHR, it would become directly applicable in the EU, but only rank below primary EU law, including the EUCFR.¹⁴⁴ This points to a concern about the *de facto* influence and potential loss of flexibility because of the formal effect of the ECHR in the EU legal order post-accession, even though its substantive effect through GPEU would continue in parallel, which could generate friction and contradictions.

If lack of references were to imply a lack of engagement and more inward-looking approach of the EU legal order,¹⁴⁵ it would risk limiting its opportunities for judicial dialogue in general, and via GPEU in particular. This could lead to a loss of both coherence with and influence on the international and other legal orders. The next section will demonstrate the potential of GPEU with the widespread and rich interaction in the context of international human rights law.

2. Exporting standards informally through interaction?: Opening dialogue and soft power influence

Interaction, including through general principles, can trigger and facilitate international legal discourse that has the potential to influence other legal orders. Influence results from the persuasiveness of a solution, but the framing in terms of a general principle can ‘flag’ potential for engagement and judicial dialogue. GPEU law may be considered to be a regional variation of general principles of law as referred to in the ICJ Statute.¹⁴⁶ Where human rights bodies explicitly identify human rights also as general principles, they signal the potential for, and

¹⁴² *Opinion 2/13* (n 20), para 189, in regard to their respective Articles 53, as required to protect the supremacy of EU law according to Case C-399/11 *Stefano Melloni v Ministerio Fiscal* EU:C:2013:107, para 60.

¹⁴³ Art 6(3) TEU.

¹⁴⁴ Case C-266/16 R (*Western Sahara Campaign UK*) v *Commissioners for Her Majesty’s Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs* ECLI:EU:C:2018:118, para. 46.

¹⁴⁵ See above n 141.

¹⁴⁶ So Special Rapporteur Marcelo Vázquez-Bermúdez, First Report on General Principles of Law, International Law Commission, A/CN.4/732, 5 April 2019, para. 137; see also regarding generality para 5, with reference to *Audiolux* (n 16), paras 42 and 50.

thus facilitate, interaction and cross-fertilisation. This is because of the affinity of the concepts of general principles in international and EU law (and indeed domestic law), even if they contain specific variations, and the added connotations of this classification, e.g. to legitimacy, weight and significance, and widespread acceptance (or even claims to universality¹⁴⁷) of the norm.

Occasionally international human rights tribunals have referred explicitly to general principles, for example the European Court of Human Rights to the right of access to a court in *Golder*,¹⁴⁸ or the International Tribunal for the Former Yugoslavia to human dignity.¹⁴⁹ The ECtHR held in *Golder* that, as aspects of the right to a fair trial, the principle that a civil claim must be capable of being submitted to a judge and the principle which forbids the denial of justice,¹⁵⁰ were general principles in the sense of Article 38(1)(c) of the Statute of the International Court of Justice because they were ‘universally “recognised” fundamental principles of law’.¹⁵¹ However, explicit reference to general principles in human rights cases where interaction takes place are rare.¹⁵² This does not mean that a specific human right does not meet the criteria of a general principle.¹⁵³ As within EU law,¹⁵⁴ there may be many reasons why general principles are not referred to, such as where a codification exists. Additionally, where customary international law exists, tribunals do not need to rely on the residual source of general principles. But, interaction in the field of international human rights more generally is relevant even without explicit references to general principles, and can, to an extent, be extrapolated. Many international human rights either qualify as general principles or have similarly ‘radiating’ effects towards other legal orders as general principles. The chapter will

¹⁴⁷ *Golder v the United Kingdom* App No 4451/70 (ECtHR, 21 February 1975), Series A, No. 18, para 35. *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, IACtHR Series A No 18 (17 September 2003), paras 86 f.

¹⁴⁸ *Golder* (n 147), para. 36; Magdalena Forowicz, *The Reception of International Law in the European Court of Human Rights* (Oxford University Press 2010), 360.

¹⁴⁹ ICTY, *Prosecutor v Anto Furundžija*, Judgment of 10 December 1998 (IT-95-17/1-T), Trial Chamber, Judicial Reports 1998, paras. 177–186 (referring to general principles of law and engaging in comparative exercise to define rape); para. 183 (general principle of respect for human dignity).

¹⁵⁰ *Golder* (n 147), para 35.

¹⁵¹ *ibid.*

¹⁵² Although references to general principles as one of the applicable sources of international law are more frequent, e.g. American Court of Human Rights: *Advisory Opinion on the Environment and Human Rights*, 15 November 2017 (OC-23/17), Series A, No. 23, para. 45; *Advisory Opinion on the Rights of Legal Persons*, 26 February 2016 (OC-22/16), Series A, No. 22, para. 29; *Advisory Opinion on the Rights and Guarantees of Children in the Context of Migration and/or in Need for International Protection*, 19 August 2014 (OC-21/14), Series A, No. 21, para. 60.

¹⁵³ Amalfitano (n 79), 113 (for GPEU and the EUCFR). See also Neuvonen and Ziegler (n 12), p. 6, with further references to literature.

¹⁵⁴ Amalfitano (n 79) *ibid.*, 121 f.; see also above n 140.

not analyse whether a particular human right is also a general principle of law. Instead, it will demonstrate the potential of general principles to facilitate inward and outward engagement of the EU, drawing from examples of the widespread interaction from international human rights law¹⁵⁵.

Famously, the Inter-American Court of Human Rights (IACtHR) recognised the principle of non-discrimination/equality explicitly as a general principle because it is widely recognised and accepted in international law and directly linked with the widely shared value of human dignity.¹⁵⁶ The IACtHR considered that its wide recognition

‘is evidence that there is a universal obligation to respect and guarantee the human rights arising from that general basic principle...The principle of equality and non-discrimination is fundamental for the safeguard of human rights in both international and domestic law.’¹⁵⁷

In recognising this right as a general principle, the IACtHR had regard to a very wide range of international sources, ranging from binding human rights treaties and the EUCFR to soft-law instruments.¹⁵⁸ The IACtHR went beyond the CJEU’s approach¹⁵⁹ in ascertaining the existence of a general principle by adopting a more rigorous and transparent approach to demonstrate the wide acceptance and general nature of this principle. Because of its generality, the principle of non-discrimination could be used to fill a gap in protection and ‘migrate’ across legal orders. The ECtHR famously imported the principle of indirect discrimination into the ECHR by reference to EU law and international human rights sources.¹⁶⁰ The European Committee of Social Rights imported it in turn from the ECHR to interpret the European Social Charter.¹⁶¹

¹⁵⁵ See in detail Aristi Volou, *Engagement between Legal Orders in the Context of Socio-Economic Rights* (PhD thesis, Leicester 2020), ch 3.

¹⁵⁶ *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, IACtHR Series A No 18 (17 September 2003), paras 86-87. See also African Commission on Human and Peoples’ Rights: *Malawi African Association and Others v Mauritania* Comm Nos 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98 (ACmmHPR, 11 May 2000), para 131.

¹⁵⁷ *Undocumented Migrants* (n 156), paras 86, 88.

¹⁵⁸ *ibid*, para 86, n 33.

¹⁵⁹ E.g. in *Mangold* (n 6). See below text at n 176.

¹⁶⁰ *DH and Others v Czech Republic* App No 57325/00 (ECtHR, 13 November 2007), paras 82-84, 60, 184.

¹⁶¹ *International Federation for Human Rights (FIDH) v Ireland* Complaint No 110/2014 (ECSR, 12 May 2017), para 122.

Another example of the use of a general principle across legal orders was the argument advanced by Mexico in front of the International Court of Justice (ICJ) in *Avena*.¹⁶² It argued on the basis of the wide recognition of the principle in domestic and international criminal and human rights law that illegally obtained evidence had to be excluded from criminal proceedings. This was generally recognised in national legal systems and the procedural rules of international criminal tribunals, the Rome Statute of the International Criminal Court, many international human rights treaties¹⁶³ and the practice of international human rights bodies.¹⁶⁴

A further example is the reasoning of the ECtHR in *Scoppola v Italy*¹⁶⁵ to justify the *lex mitior* principle (to apply the more lenient penalty), although Article 7(1) ECHR prohibits only more severe penalties.¹⁶⁶ The *lex mitior* principle has been enshrined in the EUCFR and recognised as a general principle.¹⁶⁷ Although the ECtHR did not explicitly refer to it being a general principle, it reasoned in comparable terms that it became ‘a fundamental principle of criminal law’, which was widely recognised in European and international law, and reflected a ‘consensus’ about the fundamental importance of this principle,¹⁶⁸ which was established by an empirical/comparative approach.¹⁶⁹ Like the IACtHR, the ECtHR’s reasoning was rigorous, citing a wide range of international law sources,¹⁷⁰ including EU law, the Statute of the International Criminal Court and the case law of the International Criminal Tribunal for Former Yugoslavia.¹⁷¹

¹⁶² *Case Concerning Avena and Other Mexican Nationals (Mexico v United States of America)* [2004] ICJ Rep 12, Memorial of Mexico, paras 375–380; Marcelo Vázquez-Bermúdez, *Second Report on General Principles of Law* (International Law Commission, A/CN.4/7741 9 April 2020) para 99.

¹⁶³ Article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 8(3) ACHR (right to a fair trial).

¹⁶⁴ Mexico advanced this argument in the case of *Avena*: International Law Commission, ‘Second Report on General Principles of Law’ (27 April–5 June and 6 July–7 August 2020) UN Doc A/CN.4/741, p 32, citing *Case Concerning Avena and Other Mexican Nationals (Mexico v United States of America)* [2004] ICJ Rep 12, Memorial of Mexico, paras 375–380.

¹⁶⁵ *Scoppola v Italy (No 2)* App No 10249/03 (ECtHR, 17 September 2009), paras 105–106.

¹⁶⁶ *ibid*, para 109.

¹⁶⁷ Joined Cases C-387/02, C-391/02 and C-403/02 *Criminal proceedings against Silvio Berlusconi, Sergio Adelchi and Marcello Dell’Utri and Others* ECLI:EU:C:2005:270, paras 68, 74 f. See also AG Bobek in , para. 155–63.

¹⁶⁸ *Scoppola (No 2)* (n 165).

¹⁶⁹ On the European consensus approach see Ineta Ziemele, ‘European Consensus and International Law’ in Anne van Aaken and Julia Motoc (eds), *The European Convention on Human Rights and General International Law* (OUP 2018) 23 and 36–39 (for relationship with regional customary international law).

¹⁷⁰ Article 9 of the American Convention on Human Rights, Article 49(1) of the EUCFR, the case-law of the CJEU, which recognised the principle of the retroactive application of the more lenient penalty as a GPEU because it formed part of the constitutional traditions common to the EU Member States

¹⁷¹ *Scoppola (No 2)* (n 165), paras 35–41, 105.

These examples illustrate that international human rights tribunals make frequent, extensive, and often rigorous use of the comparative method,¹⁷² establishing generality and widespread acceptance of a principle with transparent reasoning which leads to extensive interaction in the context of human rights. This contrasts with the CJEU's more limited 'evaluative comparison',¹⁷³ or creative,¹⁷⁴ rather than empirical,¹⁷⁵ approach to the actual comparative examination of Member States' law. The CJEU's decision in *Mangold* is an example of a failure to adopt a rigorous and transparent comparative law method and its consequences. When establishing the principle of non-discrimination on grounds of age as a GPEU, it referred only loosely to 'various international instruments and...the constitutional traditions common to the Member States', glossing over the fact that only the constitutions of two States and one international instrument recognised this principle at the time of the judgment.¹⁷⁶ By filling gaps in protection in their own legal order in a transparent, well-reasoned manner through widely recognised rights in other legal orders, international human rights tribunals ensure that a right is firmly grounded and externally 'validated'. Such reasoning also supports the legitimacy of a right and development of law in a legal order more generally. This can pre-empt criticism of inappropriate judicial law-making by amending the text of a treaty,¹⁷⁷ contributing to the persuasive authority, legitimacy and, in turn, compliance.

IV. Human rights as general principles in the UK after Brexit

The effects of GPEU are of interest for the protection of rights in the UK legal order even after its exit from the EU. The EU (Withdrawal) Act 2018 (EUWA) provided for a principally whole-sale transposition of EU law into domestic law as 'retained EU law', a new category of norms in the UK legal system. This was to avoid gaps in the law and to provide a mechanism to amend the retained EU law within UK law as considered necessary. However, at least on the

¹⁷² Bassiouni (n 75) 809.

¹⁷³ Case C- 550/ 07 P *Opinion of AG Kokott in Akzo Nobel* ECLI:EU:C:2010:229, para 94; Lenaerts and Gutierrez-Fons (n 69), 1654.

¹⁷⁴ Amalfitano (n 79), 29, pointing to an inverse relationship of the number of Member States and the comparative analysis.

¹⁷⁵ For the comparative law method of the CJEU, see: Giuseppe Martinico, 'General Principles of EU Law and Comparative Law' Ch 5.

¹⁷⁶ *Mangold* (n 6), paras 74-75; Tridimas, 'Charter' (n 39) 367-368.

¹⁷⁷ For an example of the vehement critical reception of the CJEU's approach in *Mangold* (n 6), see: Roman Herzog and Lüder Gerken, 'Stop the European Court of Justice' (*euobserver*, 10 September 2008) <<https://euobserver.com/opinion/26714>> accessed 15 August 2021.

surface,¹⁷⁸ the EUCFR as an instrument was explicitly not retained.¹⁷⁹ At the same time, fundamental rights existing irrespective of the Charter,¹⁸⁰ as well as case law,¹⁸¹ and general principles that have been recognised in the case law of the CJEU before the UK's exit, are retained and remain applicable.¹⁸² This includes Charter rights recognised as general principles, such as effective judicial protection in Article 47 EUCFR,¹⁸³ and rights of defence in Article 48 EUCFR, as well as rights only recognised as general principles, but not in the EUCFR.¹⁸⁴ However, Charter rights which have not been recognised as general principles no longer apply in UK law,¹⁸⁵ such as the right to paid annual leave.¹⁸⁶

GPEU after Brexit may have two 'after-lives'. First, GPEU are formally part of retained EU law until modified by UK legislation or ministerial order, but in a more limited and static way: only as far as they have been recognised in CJEU case law and only to inform the interpretation of UK law (including retained EU law).¹⁸⁷ They no longer provide a self-standing right of action in UK law,¹⁸⁸ and cannot be used to review the legality and quash UK administrative or legislative action.¹⁸⁹ Nonetheless, the interpretive effect may still be powerful with regard to UK law and, in particular, where (and as long as) retained EU law applies, which can be interpreted in the light of a general principle.¹⁹⁰ Because retained EU law still enjoys supremacy,¹⁹¹ it could indirectly still give power to a general principle to disapply a conflicting domestic act.¹⁹²

Second, GPEU may have an informal or indirect effect as a catalyst for developing UK law. A possible example could be the development of the grounds of judicial review to include

¹⁷⁸ It may be argued that Charter rights, nevertheless, are retained as pre-existing EU law of which the Charter is declaratory, as stated by the European Union (Withdrawal) Act 2018, Explanatory Notes (Chapter 16), para 106. See for detail Paul Craig, 'Constitutional Principle, the Rule of Law and Political Reality: The European Union (Withdrawal) Act 2018' (2019) 82 *Modern Law Review* 319, 331 f.

¹⁷⁹ EUWA, s 5(4).

¹⁸⁰ EUWA, s 5(5).

¹⁸¹ EUWA, s. 6(7).

¹⁸² EUWA, s 5(5); Schedule 1, para. 2. This raises the question of the relationship between the two provisions.

¹⁸³ *Juizes Portugueses* (n 47), para 35.

¹⁸⁴ See for examples above, text near n 101.

¹⁸⁵ EUWA, s 5(4), sch 1(2).

¹⁸⁶ Article 31(2) EUCFR; although recognised as an 'essential principle of EU social law', it was not a general principle of EU law: Case C-684-16 *Max-Planck-Gesellschaft zur Förderung der Wissenschaften e.V. v Tetsuji Shimizu* EU:C:2018:874, para 69.

¹⁸⁷ EUWA, s 6(3)(a); Explanatory Notes (n 115) 38, para 210.

¹⁸⁸ EUWA, Schedule 1, para. 3(1).

¹⁸⁹ EUWA, Schedule 1, para. 3(2); Explanatory Notes (n 115) 38, para 210.

¹⁹⁰ See *Lipton v BA City Flyer Limited* [2021] EWCA Civ 454.

¹⁹¹ EUWA, s 5(2).

¹⁹² Cf the scenario in *Walker v Innospec* [2017] UKSC 17; see Catherine Barnard, 'So Long, Farewell, Auf Wiedersehen, Adieu: Brexit and the Charter of Fundamental Rights' (2019) 82 *Modern Law Review* 319, 364.

proportionality as a general ground for review, rather than through the lens of EU law.¹⁹³ General principles could inform the development of fundamental rights under the common law. This may be important where gaps arise because the ECHR/Human Rights Act and common law do not capture all rights protected by the EUCFR and GPEU. Particularly, social and economic rights, although protected by other international human rights treaties, such as European Social Charter 1961, have not been incorporated into UK law and are not directly enforceable in UK courts. As has been shown by reference to the practice of international human rights tribunals, interaction with other legal orders provides opportunities for developing the law and influence, and the same applies to national courts. Even if direct engagement of UK courts specifically with future CJEU jurisprudence seems unlikely as a result of the political decision to detach itself from the CJEU, there may still be continuing potential for engagement as part of the wider international context.

V. Conclusion

EU fundamental rights are closely intertwined with GPEU. They mutually reinforce one another in a dialectic relationship. But the unwritten nature and power of GPEU not only to fill gaps but also to modify the interpretation of or even override other (written) norms requires particular rigour and transparency of reasoning where they are deployed. This chapter reflected on questions relating to the internal construction of the EU legal order through GPEU in the area of fundamental rights: the relationship of constitutional principles and the EUCFR with GPEU, and between fundamental rights and fundamental freedoms and GPEU. It then put GPEU in the wider international human rights context in which EU fundamental rights operate to demonstrate both the potential for engagement and interaction through general principles and for building greater legitimacy – provided reasoning based on GPEU is both methodologically rigorous and transparent. GPEU may thus not only function as a tool to construct the EU legal order autonomously internally, but also provide a link to the wider international legal environment as a tool for coherence and facilitator of legal and judicial dialogue and cross-fertilisation of legal orders. The ‘afterlife’ of GPEU in the UK legal order may become an interesting case study of the formal separation but continued informal interaction of two legal orders.

¹⁹³ Craig (n 178), 333 f.