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The general principles of EU law and the Europeanisation of national laws

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Abstract

Although the ECJ has used general principles of law as a source of rights and obligations from an early stage in the development of EU law, key issues regarding their definition, nature and role as a source of law remain unresolved. How can they be identified? What is their normative basis? Are there rules determining priorities among them and how do they relate to Charter rights? How has their role evolved? Diverse and often bewildering judicial terminology serves to obfuscate the role of principles which, in terms of positive law, stand at the apex of the EU law edifice. This article seeks to revisit some of those questions. It explores the meaning of 'Europeanisation; it attempts a typology of general principles; it seeks to identify their normative basis; and assesses their role both as generators of jus communae and as a source of constitutional conflict.

1. The Europeanisation of law

Academic literature defines Europeanisation in different ways[1], but the term Europeanisation of law is here taken to refer to the convergence of national legal systems and cultures, primarily under the influence of supra-national processes and institutions. Europeanisation has two elements. One refers to supra-national law making. The European Union provides a governance framework that stands above the sovereign state, claims a distinct identity, and

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[1] The term Europeanisation has been used mostly in political science and international relations in connection with the Europeanisation of politics. See, among others, PR Graziano and Maarten P Vink Europeanization: Concept, Theory, and Methods, in S Bulmer, C Lesquene (eds), *The Member States of the European Union* (2nd edn, Oxford University Press, 2013) 31-54, 37ff.; K Featherstone, Introduction: In the name of Europe in K Featherstone and CM Radaelli (eds), *The Politics of Europeanisation*, (Oxford University Press) 3-26; KH Goetz and J-H Meyer-Sahling, 'The Europeanisation of national political systems: Parliaments and executives' (2008) 3(2) Living Reviews in European Governance <http://www.livingreviews.org/lreg-2008-2>accessed 1 April 2020; M Green Cowles, JA Caporaso and T Risse (eds), *Transforming Europe: Europeanization and Domestic Change* (Cornell University Press, 2001). For a discussion from the legal perspective, see, *inter alios*, M Bobek, 'Europeanization of Public Law' in A Von Bogdandy and others (eds), *The Max Planck Handbook in European Public Law, Volume I: The Administrative State* (Oxford University Press, 2016) 631-673, available at SSRN: https://ssrn.com/ab-

generates a corpus of common rules or principles. This element entails a bottom-up process and engenders the Europeanisation of laws. It refers not only to political decision-making but also the courts. The national legal systems provide the raw materials for the articulation of judge-made principles that form part of a binding body of supra-national rules. The second element refers to the influence of supranational sources of law on national legal systems. That influence is not confined to policy outcomes and harmonised national laws but refers, more broadly, to the incremental change and convergence of national legal systems and cultures. Europeanisation here transcends specific areas of law and refers to the evolution, adaptation and convergence of processes, methodologies and institutional behaviour at the national level. It is a dialectical, iterative, and dynamic process that foments the Europeanisation of national legal systems. It is more subtle and unravels within a longer time span compared to the alignment of national laws in specific areas but is more powerful in its effects on legal culture.

There are two main sources of Europeanisation: the European Union and the European Convention for the protection of Human Rights. The first is a much stronger force. Compared to the subsidiary character of the Convention, primacy and direct effect grant EU law an intensity that is an attribute of federal polities. Also, EU law has a broader remit and can impose much wider positive duties on Member States. Whilst, in general, EU law is a much stronger convergence force, the picture is more nuanced in the field of public law. Some ten years after the EU Charter on Fundamental Rights became legally binding, the Convention rather than the Charter remains the primary point of reference for national courts in the field of fundamental rights protection. This may be explained by several factors. The Charter has a more limited scope of application covering only national measures which fall within the scope of EU law. It thus has a limited spillover effect. Also, in comparison to the Convention which is embedded in the national legal traditions, it remains a relative newcomer. Nonetheless, outside the specific field of fundamental rights and in respect of public law more generally, EU law has a far-reaching influence on national laws in relation to processes, substantive outcomes, and methodologies.

Europeanisation may result not only from vertical but also horizontal processes. Here, borrowing and lending between national legal systems occurs through cross-fertilisation generated via formal and informal channels. Import can take place through borrowing legislative solutions from foreign law, judicial references to the law of another country, legal education, or institutional net-

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stract=2757116; F Snyder (ed), *The Europeanisation of Law: The Legal Effects of European Integration* (Hart 2000).

works. In Europe, this form of cross-fertilisation is by no means new. The German and the French legal systems have had a powerful influence on the laws of many European countries already from the 19th century. Horizontal Europeanisation has also been nurtured by EU law and, to a degree, encouraged by the ECJ.[2] More recently, the principle of mutual trust has been interpreted to impose direct obligations on national courts to cooperate with each other with a view to applying EU law.[3]

Europeanisation may thus occur through hierarchical norm alignment as, for example, when EU provisions are transposed into national law. Directives are particularly important in this respect as they require a combination of EU and national decision making and often entail the incorporation of EU norms and concepts into the corpus of established national legislation. Europeanisation may also occur through the judicial application of EU law. It may take place through the infusion of good governance principles, such as transparency or the duty of good administration, or the introduction of methodological tools, such as the principle of proportionality or the protection of legitimate expectations. The process of Europeanisation is more visible in certain areas of law but absent in hardly any. It is evident in the field of regulation (specialized administrative law), and, in recent years, it has been particularly prominent in the field of financial regulation, as the financial crisis precipitated the colonization of this area of law by EU instruments. It has a strong presence in social law, and made intrusions into private law, especially, through consumer law. It has also had a profound effect on the protection of fundamental rights and the general administrative law of the Member States.

The general principles of law, as understood and applied by the ECJ, operate as strong forces of Europeanisation. First, they have ecumenical scope. Being reflections of constitutional values, they do not apply only in specific areas of law but permeate the EU and the national legal systems and provide standards for determining the legality not only of public action but also private conduct. Secondly, they engage primarily the courts who are the pivotal institutional actors in the application of justice. Through influencing judicial methodology, they may affect the national legal system as a whole. Thirdly, owing to their abstract nature, they promote a dialectical development of the law where national laws and EU law interchange roles as borrowers and lenders; and they are characterised by hybridity in their application as, under the preliminary reference procedure, judicial outcomes are often the result of collaboration by the ECJ

2 See eg Case C-283/81 *CILFIT v Ministry of Health* [1982] ECR 3415, para 16.

3 See eg Joined Cases C-404/15 and C-659/15 PPU *Aranyosi v Generalstaatsanwaltschaft Bremen* EU:C:2016:198; Case C-216/18 PPU *LM*, EU:C:2018:586; and, from the perspective of a national court, *Minister for Justice and Equality v Celmer* (No 4) [2018] IEHC 484.

and the national courts. In a nutshell, general principles of law entail the convergence of national legal traditions using shared values as powerful reference points and thus nurturing a common constitutional conscience.

2. General principles: in search of a definition

Given the importance attached to the general principles by the case law, it is somewhat surprising that some 60 years after the establishment of the EEC the meaning of the term general principles still preoccupies us. Diverse and often bewildering terminology serves to obfuscate the role of principles which, in terms of positive law, stand at the apex of the EU law edifice or, at the very least, have enhanced interpretational authority. The case law refers to general principles,[4] sometimes also general principles of law,[5] principles,[6] and even to 'particularly important'[7] or 'essential' principles.[8] Sometimes, reference to the same concept may be made as a principle or a general principle.[9] Semantically, the term principle refers to a proposition that bears legal value but operates at a level of abstraction that distinguishes it from a rule. A rule specifies an outcome or, at least, comes closer to determining one. A principle underlies a disposition. The idea of a principle already embodies a degree of generality both in the sense of abstraction as to its content and in the sense that it underlies several specific rules.[10] The term "general principle"

4 See eg in relation to equality and non-discrimination, Joined Cases C-117/76 and C-16/77 *Ruckdeschel v Hauptzollamt Hamburg-St.Annen* [1977] ECR 1753, para 7, and in relation to proportionality, Case C-295/94 *Hüpeden & Co. KG v Hauptzollamt Hamburg-Jonas* [1996] ECR I-3375, para 23.

5 See eg in relation to fundamental rights Case 4/73 *Nold v Commission* [1974] ECR 491, para 13; and, more generally, in the context of limitation on the obligation to provide consistent interpretation, see eg Case C-282/10 *Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre* [2012] EU:C:2012:33, para 25.

6 See eg in relation to proportionality: Case 66/82 *Fromançais v Forma* [1983] ECR 395, para 8; and in relation to effectiveness: Case C-184/16 *Petrea v Ypourgos Esoterikon* [2017] EU:C:2017:684, para 65.

7 Thus, the Court has referred to the right to paid annual leave as 'a particularly important principle of EU social law', see eg C-569/16 *Stadt Wuppertal v Bauer* [2018] EU:C:2018:871, para 38; Case C-118/13 *Bollacke v K + K Klaas & Kock Bv* [2014] EU:C:2014:1755, para 15; the same in relation to the right to parental leave: C-385/17 *Hein v Albert Holzkamm GmbH & Co. KG* [2018] EU:C:2018:1018, para 22.

8 See, in relation to the right to annual leave, *Bauer* (n 7) [39].

9 See eg above in relation to proportionality and see also in relation to mutual trust: Case C-25/88 *Wurmser* [1989] EU:C:1989:187, para 18; Case C-284/16 *Achmea* [2018] EU:C:2018:158, para 34.

10 In the Oxford dictionary, principle is defined as 'a general scientific theorem or law that has numerous special applications across a wide field' or a fundamental truth or proposition that serves as the foundation for a system of belief or behaviour or for a chain of reasoning: see <www.oxforddictionaries.com> accessed 10 April 2020. See to the same effect, the definition in the Cambridge Dictionary: 'a basic idea or rule that explains or controls how something happens or works'<https://dictionary.cambridge.org/dictionary/english/principle> accessed 10 April 2020.

refers to a principle that is of fundamental value to the legal system as a whole or at least transcends a specific area and applies to several areas of law.[11]

Without this taxonomy being exclusive, four different conceptions of principles can be identified in EU law. General principles for the protection of the individual deriving from the rule of law (liberal conception); principles that define the constitutional identity of the EU (structural principles); interpretational principles as maxims of justice; and a conception of principles as a juxtaposition to rights.

2.1. Liberal conception

The term general principle refers to principles of law extrapolated from the common constitutional traditions of the Member States, which define the limits of public power and seek to protect the individual. Thus understood, the term signifies *par excellence* the creation of constitutional doctrine and encompasses principles such as the right to non-discrimination, due process, proportionality, legal certainty, the protection of legitimate expectations, and the protection of fundamental rights. These general principles derive from the rule of law, as broadly understood in a liberal democracy, and now overlap with the EU Charter on Fundamental Rights. Prime examples of cases that establish such principles are *Internationale Handelsgesellschaft*[12] (protection of fundamenal rights), which had a transformative effect on EU law, *Johnston*[13] (right to judicial protection), and *Mangold*[14] (prohibition of discrimination on grounds of age). The term 'general principles of EU law' should be confined to this category.

As a general guidance, to be recognized as a general principle, a precept must have the following attributes. First, it must incorporate a minimum ascertainable legally binding content.[15] This is not to say that the principle may not be capable of legislative concretization. But it must have a minimum core content which cannot be interfered with or altered by the legislature or, at least, which is capable of being judicially enforceable in the absence of legislation. Understood in those terms, a principle must incorporate at the very least a negative right, i.e. a right to exclude certain action, and be capable of being used as a trump card by the claimant. Secondly, it must be general in its application,

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11 T Tridimas, *The General Principles of Law* (Oxford University Press, 2nd edn, 2006) 1; Note however that there can be general principles that characterize a specific area of law, i.e. apply to all sub-areas of that specific field, such as tax law.

12 Case C-11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

13 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, para 18.

14 C-144/04 *Werner Mangold v Rüdiger* Helm [2005] ECR I-9981.

15 See Case C-282/10 *Dominguez v CICOA [2011] EU:C:2011:559*, Opinion of AG Trstenjak, para 113.

i.e. have a comprehensive coverage, transcend specific areas of law, and underlie the legal system as a whole. Finally, it must be sufficiently important to be awarded constitutional status. These attributes are easier to establish in theory than verify in practice. *Audiolux*[16] suggests that the ECJ endorses the understanding of general principles proposed above. The Court held that EU law does not recognise a general principle of equality of shareholders under which a dominant shareholder has an obligation to acquire the shares of minority shareholders paying them a control premium. It stated that, although a number of provisions of EU law provided for the equal treatment of shareholders, they were limited to regulating specific situations. They did not "possess the general, comprehensive character ... naturally inherent in general principles of law".[17] It also held that establishing, by means of a general principle, an obligation on a dominant shareholder to treat all minority shareholders equally would require the determination of the situations where minority shareholders required protection, the articulation of specific conditions under which that obligation would apply, and the means by which protection should be offered. Such a decision would require the weighing of competing interests which could only be done through the legislative process.[18] Still, in other cases the Court has done precisely that, anticipating or even altering legislative outcomes. *Audiolux* contrasts sharply with *Mangold*[19] where the ECJ recognized the prohibition of age discrimination as a general principle of EU law.[20] There are two reasons for this differential attitude. First, in *Mangold* the ECJ relied for ascertaining the normative content of the general principle on the Framework Directive on Equality.[21] Whilst the interaction between the general principle and the Framework Directive is based on shaky grounds, the case remains that the existence of the directive was essential to the outcome. There is also a second, more important, difference. In *Audiolux* the ECJ drew a distinction between principles of constitutional status and other principles. It held that the general principles of EU law have constitutional status while the principle claimed in that case was characterised by a degree of detail requiring the adoption of legislation. It could not therefore be regarded as an independent general principle of EU law.[22] The distinction makes

16 Case C-101/08 *Audiolux SA v Groupe Bruxelles Lambert SA (GBL)* [2009] ECR I-9823.
17 ibid [42].
18 ibid [58].
19 Case C-144/04 *Mangold v Helm* [2005] ECR I-9981.
20 See also for gender equality Case C-236/09, *Association Belge des Consommateurs Test-Achats* [2011] ECR I-773 and, more recently, in relation to the right to annual leave which was said to derive directly from the Charter and be horizontally applicable, Case C-569/16 *Bauer*, EU:C:2018:871.
21 Council Directive (EC) 2000/78 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.
22 *Audiolux* (n 16) [63]. See to the same effect: Case C-174/08 *NCC Construction Danmark A/S v Skatteministeriet* [2009] ECR I-10567 (principle of fiscal neutrality).

perfect sense. Given the normative power accorded to general principles, they must be confined to fundamental constitutional values which stand beyond the majoritarian bargain. If anything, the ECJ may be said to take too broad a view of general principles. In *Sturgeon*,[23] for example, it used the general principle of equal treatment to grant specific protection to air travel passengers disregarding in effect the precise directions provided by the applicable EU regulation.

The characterisation of a principle as a general principle of EU law has important legal consequences. It means that the principle applies irrespective of a specific written disposition. It entails duties and obligations and has constitutional status. It trumps non constitutional rules and also gains heightened force as a rule of interpretation. There is also strong presumption against its restrictive application.[24]

The approach of the ECJ in extrapolating general principles is selective and creative. It does not look for a common denominator in the laws of the Member States. Nonetheless, to be elevated to the status of a general principle, a proposition must enjoy a degree of wide acceptance, i.e. represent 'conventional morality'.[25] In *D and Sweden v Council*,[26] decided in 2001, the ECJ felt unable to equate a same sex relation sanctioned by national law to a marriage but hinted that it would have been more adventurous if there had been support in the laws of the Member States.[27] Although the same facts would now be liable to be decided differently, *D and Sweden* is an example of self-restraint in the absence of crystallised national views on same sex relations at the time that the judgment was delivered.

2.2. Principles as a form of constitutional identity (structural principles)

The ECJ has established certain distinct attributes of the EU legal order which define the integration paradigm. These include, among others, primacy, direct effect, autonomy, mutual trust, and institutional balance. They may be written, such as the duty of loyal cooperation provided for in Article 4(3) TEU, but are mostly unwritten and derived by the ECJ from the system and the

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23 Joined Cases C-402/07 and C-432/07 *Sturgeon v Condor Flugdienst GmbH* [2009] EU:C:2009:716.

24 See eg *H v Land Berlin*, Case C-174/16, ECLI:EU:C:2017:637, para 44.

25 See J Hart Ely, *Democracy and Distrust* (Boston: Harvard University Press, 1980) 63, n. 97 and references provided therein.

26 Joined Cases C-122 and C-125/99 *D and Sweden v Council* [2001] ECR I-4319.

27 ibid [50]–[51].

underlying rationale of the Treaties. In recent years, such structural principles[28] have experienced resurgence as the ECJ has sought to provide a constitutional blueprint for contemporary EU law, stressing, in particular, the principles of effectiveness, autonomy, and mutual trust.

In Opinion 2/13,[29] the Court held that the specific characteristics of EU law cannot be affected by an international agreement concluded by the EU or the Member States. Those characteristics can only be altered by following the procedure for fully revising the Treaties. Those include features relating to the constitutional structure of the EU, namely the EU institutional framework and the principle of conferral, and characteristics arising from the very nature of EU law, namely the fact that EU law stems from the Treaties as an independent source of law, primacy and direct effect.[30] These essential characteristics give rise to a structured network of principles, rules and mutually interdependent legal relations based on the fundamental premise that Member State share with each other the common values of Article 2 TEU. That premise, in turn, implies and justifies the existence of mutual trust between the Member States that those values will be recognized.[31] This theorization, which became the standard point of reference for subsequent case law, has important implications. By articulating the constitutional underpinnings of mutual trust, it has brought to the fore the legal prerequisites that must exist for it to take effect and, therefore, the obligations of Member States to fulfill them. Mutual trust is thus gradually being transformed from the underlying reason for legislative choices in specific areas, e.g. recognition of judgments or more broadly, freedom, security and justice, to a broader principle that requires Member States to uphold the bases for its existence. It has been elevated from a merely justificatory principle to a source of obligations, thereby acquiring the credentials of a constitutional principle.

The principle of autonomy must also be understood within the above constitutional blueprint. Its key requirements appear to be that the 'essential character' of the powers of the EU and its institutions must remain unaltered[32] and the indispensable conditions for safeguarding that essential character must

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28 For a valuable discussion of structural principles in a specific field, see M Cremona (ed), *Structural Principles in EU External Relations Law* (Bloomsbury, 2018). Note however that the classification of principles as structural is made there in a different context and the definition of structural principles is broader than that provided in this article.

29 Opinion 2/13 on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms EU:C:2014:2454.

30 ibid [166].

31 ibid [167]-[168].

32 Opinion 1/00 on the Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area EU:C:2002:231, para 12; Opinion 1/91 on the draft EEA Agreement ECLI:EU:C:1991:490, paras 61-65.

be respected.[33] The 'essential character' sets a qualitative and not a quantitative criterion although its specific content is difficult to pin down. The 'indispensable conditions' are found in the jurisdiction of the ECJ. As long as the Court remains the final arbiter of the interpretation of EU law in all its guises, this condition is satisfied. Autonomy can best be conceived as the capacity of EU law to define the division of competences, the role of the institutions, and, more broadly, the interpretation of the Treaties by endogenous processes. Whilst the emergence of autonomy can be seen as a sign of constitutional maturity, in contrast to other general principles, it has no direct affinity to the concept of the rule of law as traditionally understood. It entrenches the distinct features of EU law, has a somewhat self-referential blueprint, and is predisposed to asserting a form of EU constitutional exceptionalism.

Both from the perspective of the political and the legal identity of the EU, the two categories of principles discussed above, namely constitutional principles which derive from the rule of law and structural principles, are the most important. The first category is intrinsically linked to the values stated in Article 2 TEU. They evince a certain conception of political authority. The second category provide for a system of governance. They regulate relations between different levels of governance vertically, namely the EU and the Member States, and also among various institutions at a horizontal level. Those two sets of principles are closely connected but in a state of tense symbiosis. They are both defining constitutional attributes of the EU as a new polity and have both been established by the ECJ. It is not an accident that in *Internationale Handelsgesellschaft*,[34] the assertion of primacy of EU law over national constitutions went hand in hand with the establishment of fundamental rights as a source of EU law. The second would not have been possible without the first, since the first was necessary to establish the authority of the Union as a source of rights and obligations. Yet, rule of law principles and structural principles of EU law may come into a trajectory of conflict. Thus, the principle of effectiveness of EU law or the principle of mutual trust may be perceived as lessening the protection of fundamental rights. Opinion 2/13[35] and judgments pertaining to the effects of mutual trust provide echoes of such potential conflict.[36]

33 (n 29)[183]; Opinion 1/09 on the Draft agreement on the creation of a European and Community Patents Court EU:C:2011:123, para 76.

34 *Internationale Handelsgesellschaft* (n 12).

35 Opinion 2/13(n 29)

36 See the discussion below.

2.3. Fundamental maxims

General principles may also take the form of fundamental maxims that underlie the EU legal system. They apply in all areas of law and provide important interpretational guidelines which qualify legislative dispositions. The doctrine of abuse of right belongs to this category. According to it, individuals must not improperly or fraudulently take advantage of provisions of EU law.[37] The doctrine has been applied in particular in the field of VAT but in *Cussens*[38] the ECJ held that it transcends specific EU legislation and is a general principle of law that underpins the EU legal system. It applies both to rights and advantages provided by primary EU law and those arising from regulations or directives.[39] The characterization of abuse as a general principle has certain legal implications. First, it means that it underpins the EU legal order as a whole so that the abuse of EU rights or the circumvention of EU provisions is prohibited even where it is not expressly stated. It thus applies and may be invoked against a private party regardless of a national measure giving effect to it in the domestic legal order.[40] As a general principle, its nature is not derivative to that of the rank of the right which it underlies.[41] It is not, in other words, subject to the limitations of the prohibition of horizontal effect of directives.[42] The second implication is that it may take precedence over other principles such as the principle of legal certainty. The outcome of the balancing would depend on the specific circumstances of the case.

2.4. Principles versus rights

Somewhat ironically, the EU Charter uses the term principles as an anti-thesis to rights. Here, political compromise clashes with legal doctrine to create confusion. Article 51(1) draws a distinction between rights and principles laid down in the Charter. Such a distinction is also made in Article 6(1) TEU and the Preamble to the Charter which in fact recognizes three categories, namely 'rights, freedoms and principles'.[43] But the differences between rights and principles are not clear and, to the extent that they are, remain normatively unsatisfactory.

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37 Case C-321/05 *Hans Markus Kofoed v Skatteministeriet* [2007] ECR I-5795, para 37.
38 Case C-251/16 *Cussens v T.G. Brosnan*, EU:C:2017:881.
39 ibid [30].
40 ibid [44].
41 ibid [30].
42 ibid [28].
43 See Preamble, recital 7.

The distinction is material since some provisions of the Charter apply only to rights and freedoms but not to principles.[44] Rights are to be observed whilst principles are to be respected.[45] Under Article 52(5), Charter provisions which contain principles may be implemented by legislative and executive acts taken by Union institutions and bodies and by acts of Member States when they are implementing Union law. They are to be 'judicially cognisable only in the interpretation of such acts and in the ruling on their legality.'[46] It is unsatisfactory however that the Charter attributes legal significance to a distinction which it assumes but does not explain.

Article 52(5) was inserted in the Charter during the Lisbon Treaty negotiations to limit the justiciability of social rights at the insistence, in particular, of the United Kingdom. It reflects a well-established distinction between so-called personal (or subjective) rights and programmatic constitutional norms which is found in many Member States although the meaning of that distinction is not uniform in the national legal systems.[47] Article 52(5) might be taken to mean that Charter principles cannot give rise to subjective rights. However, a narrower interpretation is also possible. Writing extra-judicially, President Lenaerts has suggested that Charter principles can be relied upon to set aside conflicting legislation but cannot impose positive obligations on the EU or Member States.[48] This does not exclude the possibility of principles being justiciable and leading to the setting aside of conflicting provisions. The Explanations accompanying the Charter are equivocal. According to them the difference is that, whilst rights give rise to 'direct claims for positive action' by the Union and national authorities, principles must be implemented by legislative or executive action at Union or State level and become material only for the purposes of the interpretation or judicial review of such acts.[49]

The distinction drawn in the Charter is unsatisfactory. First, there is no reason why Charter provisions which incorporate principles rather than rights should be denied any interpretative value in the absence of implementing action, as Article 52(5) might suggest. Indeed, the value of constitutional principles is precisely to inform the interpretation of normative rules, including those that

44 See Charter of Fundamental Rights of the European Union [2012] OJ C326/971 (Charter), art 52(1). This circumscribes the limitations on the rights defined by the Charter.

45 ibid [51(1)]. This is reiterated in the Explanations Relating to the Charter of Fundamental Rights [2007] OJ C 303/17, 35.

46 Charter (n 44), art 52(5).

47 See S Peers and S Prechal, Commentary on Article 52 in S Peers, T Hervey, J Kenner, A Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart) 1506, para 52.161.

48 K Lenaerts, 'Exploring the limits of the EU Charter of Fundamental Rights', European Constitutional Law Review (2012) 8(3) 399, 400-401, 403.

49 Explanations (n 45) 35.

have not been adopted specifically in order to implement them. This is the case for example with the principle of environmental protection which is proclaimed in Article 37 of the Charter. It is doubtful however whether Article 52(5) precludes such interpretative function as all provisions of EU and those of national law which fall within the scope of EU law must be seen as a corpus under the constitutional aegis of EU primary law and be interpreted in its light.[50]

Secondly, it may be difficult to ascertain whether a specific disposition provides for a right or a principle. Indeed, the terminology of the Charter is inconsistent as it refers to the 'principles' of legality and proportionality of criminal penalties, which undoubtedly give rise to enforceable rights.[51] By contrast, Article 26, for example, refers to the rights of the elderly but operates in a sea of abstraction.[52] Thus, the language of the Charter is not necessarily conclusive. Also, as the Explanations themselves acknowledge, articles of the Charter may incorporate elements of both principles and rights.[53] Whether a specific provision creates a right depends on its specificity, the context and the purpose for which it is invoked and is to be determined in the light of its wording and objectives. Some provisions of the Charter in the social sphere do give rise to rights. This is true, for example, for the right to annual leave[54] and the right to collective bargaining.[55]

Thirdly, the normative limitations imposed on principles by Article 52(5) appear somewhat contradictory. The case law has derived rights from general, unwritten, principles.[56] By virtue of Article 6(3) TEU, those principles continue to be a source of fundamental rights. The distinction drawn in the Charter therefore does not prevent the Court from ruling that a principle which is recognized as a general principle of law can give rise to enforceable rights. In other words, the term 'principle' as used in Article 52(5) does not have the same meaning as the general principles of law which are recognized as a source of fundamental rights under Article 6(3) TEU or even the premises which are

50 See, in accord, Peers and Prechal (n 47) 1510 [52]-[182], deriving support, inter alia, from Case C-205/02 *Rinke* EU:C:2003:435, paras 24-28.

51 See the heading to Article 49.

52 Examples of provisions which, according to the Explanations, lay down principles rather than rights are Articles 25 (rights of the elderly), Article 26 (integration of persons with disabilities), Article 37 (environmental protection): see Explanations Relating to the Charter of Fundamental Rights (n 45) 35.

53 This is the case, for example, in relation to Articles 23 (equality between men and women), 33 (family and professional life) and 34 (social security and social assistance). Article 34 was considered in Case C-571/10 *Kamberaj* [2012] EU:C:2012:233. see Explanations Relating to the Charter of Fundamental Rights, (n 45) 35.

54 *Bauer* (n 7), art 31(2).

55 Case C-438/05 *Viking* [2007] EU:C:2007:772, art 28.

56 See eg *Mangold* (n 14).

recognized as principles by the ECJ, such as, for example, the principle of autonomy.

All in all, the distinction between rights and principles in the Charter provides political comfort. It has helped to facilitate agreement among Member States to make the Charter binding, but it is of limited use in determining the justiciability of the norms included therein in any specific case which remains a matter of judicial appreciation. It also leads to the fragmentation of the term principle as it bears a different meaning in the Charter from that which it has in the case law.

3. What are the normative bases of general principles?

In the early years of the development of the European Communities, general principles were conceived as principles of administrative law. Given the abstract character of the treaties and the lack of statutory dispositions at EU level, advocates general of the ECJ sought to cover the *lacunae* of written law by recourse to the general principles of law as they could be extrapolated from national legal systems. Advocates General Roemer and Lagrande were particularly instrumental in this respect. There was, in fact, little normative basis in the Treaties. The only express reference to general principles pertained to the non-contractual liability of the EEC[57] and not to judicial review. It was also of limited help since, traditionally, there have been wide differences among the laws of the Member States in relation to the liability of State authorities. Commonality therefore could be established only in the most abstract level. There were also two indirect references. Article 164 EEC (now Article 19(1) TEU) commanded that, in the interpretation and application of the Treaty, the law must be observed but said nothing about where the law could be found. It was reasonable, indeed necessary, for the judiciary that was charged with the task of applying the law to seek to gain inspiration from the normative postures of the constituent legal systems.[58] This provided value continuity and acted as a source of judicial legitimacy. Although, in seeking to establish general principles, the ECJ did not necessarily found expressly its inquiry on Article 164 EEC,[59] the latter provides an anchor for a task that the Court inevitably had to undertake. That Article by no means determines the methodology that the Court should

57 See Article 215(2) EEC, which is now Article 340(2) TFEU.

58 For an express reference to the need gain inspiration from the solutions provided in the national laws to fill the gaps of the EEC Treaty, see Joined Cases C-7/56 and C-3/57 to C- 7/57 *Algera and Others v Assemblée commune* [1957-1958] EU:C:1957:7.

59 For an express link, see Case C-17/74 *Transocean Marine Paint Association v Commission* [1974] ECR 1063, Opinion of Warner AG.

adopt, for example, the level of commonality among national laws that must exist before a general principle is established, or rules of priority in case of conflict. It can legitimately be viewed, however, as an invitation to build EU law gaining inspiration from the standards of justice of national legal systems and thus as an authorization for judicial roaming. Another indirect reference was provided in Article 173(2) EEC (now Article 263(2) TFEU). By referring as a ground of review to the infringement of the treaty or 'any rule of law relating to its application', that provision could be taken to acknowledge judicial recourse not only to specific dispositions of written law but underlying principles that govern judicial review at national level.[60]

In truth, none of the above provisions explain fully the development of general principles as important sources of primary law. The turning point came in *Internationale Handelsgesellschaft*.[61] By binding the Community to respect unwritten fundamental rights as a *quid pro quo* for asserting the primacy of EU law over the national constitutions, *Internationale Handelsgesellschaft* propelled general principles to constitutional doctrine, elevating them to an integral part of the Treaties themselves. *Internationale* marked the transition of general principles from sources of administrative law to the defining pillars of constitutionality. In the Court's conception, they derive not from any specific Treaty provision but from the nature of EU law in the light of a teleological and systematic interpretation. Their normative basis is thus inextricably linked to understanding the founding Treaties as a constitutional text. Once it is accepted that the treaties establish a constitutional order, as the Court did in *Van Gend en Loos*,[62] recourse to the general principles of law becomes inevitable to fill the empty shell of the EU's distinct constitutional space whilst ensuring value continuity and thus providing legitimacy. In a nutshell, teleology plus ex *post facto* acquiescence of judicial developments on the part of the Member States provide political, and ultimately legal, legitimisation of the general principles case law. These judicial developments, which had profound implications for the evolution of EU law, received express treaty endorsement in the Treaty of Maastricht which has now been carried through to Article 6(3) TEU by the Treaty of Lisbon despite the granting of binding effect to the Charter.

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60 For the articulation of this argument, see P Craig, 'General Principles of Law: Treaty, Historical and Normative Foundations' in K Ziegler, P Neuvonen, and V Moreno-Lax (eds), *Research Handbook on General Principles of EU Law* (Edward Elgar Press, 2019), Oxford Legal Studies Research Paper No. 46/2019 <https://ssrn.com/abstract=3414315>accessed 10 April 2020.

61 Case C-11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

62 Case C-26/62 *Van Gend en Loos* [1963] ECR 1.

4. Relationship between the general principles and the Charter

Article 6 TEU recognizes essentially three sources of fundamental rights: the Charter, the European Convention on Human Rights, and the constitutional traditions common to the Member States. Fundamental rights, as guaranteed by the latter two, 'shall constitute general principles' of EU law.[63] Article 6 however does not provide any guidance as to the relationship among the different sources of fundamental rights. It does not draw a priority between them nor does it differentiate between the Charter and general principles of law as to their effects.[64] Following the entry into force of the Lisbon Treaty, the primary point of reference for the protection of fundamental rights should be the Charter. This is in keeping with the intentions of the treaty authors, which granted the Charter the same value as that of the Treaties, and also the objectives of the Charter as a document which concretises the values of the EU polity. Also, the Charter is the first source of fundamental rights protection referred to in Article 6. Furthermore, viewing the Charter as the primary source of EU fundamental rights is more in keeping with national constitutional cultures which, bred in a civil law tradition, feel more comfortable with written lists of rights, however indeterminate, than case law.[65] The case law of the ECJ confirms that the Charter is now the primary point of reference.[66] Nonetheless, the interpretation of the Charter will be informed by the general principles of law. The various sources of rights provided in Article 6 are interrelated in a way which may make it difficult to ascertain the autonomous input of each source. Notably, in *Glatzel* the Court held that the principle of non-discrimination, laid down in Article 21(1) of the Charter, is a particular expression of the principle of equal treatment which is a general principle of EU and is enshrined in Article 20 of the Charter.[67] Similarly, the Court views Article 47 of the Charter as reaffirming the general principle of effective judicial protec-

63 Article 6(3) TEU. This corresponds to the pre-Lisbon version of Article 6(2) TEU although the formulation of Article 6(3) as it currently stands is somewhat different.

64 For a more expansive analysis, see T Tridimas, The General Principles of Law: Who Needs Them? [2016] Cahiers de Droit Européen 419.

65 An example of this is provided by the attitude of the German Federal Constitutional Court towards EU law. See, in particular, the *Honeywell* judgment of the *Bundesverfassungsgericht*, BVERFG, 2 BvR 2661/06, 6 July 2010.

66 See eg Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission et al v Kadi (Kadi II)* EU:C:2013:518; Case C-236/09 *Association Belge des Consommateurs Test-Achats* [2011] ECR I-773; Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd v Minister for Communications*, EU:C:2014:238.

67 Case C-356/12 *Glatzel v Freistaat Bayern*, EU:C:2014:350, para 43. This was reiterated in relation to the prohibition of discrimination on grounds of sexual orientation in Case C-528/13 *Léger v Ministre des Affaires sociales, de la Santé et des Droits des femmes* EU:C:2015:288, para 48.

tion[68] and continues to refer as general principles of law both to fundamental rights[69] and the rights of defence.[70] Along the same lines, *H.N.* held that, whilst Article 41 of the Charter is addressed solely to EU bodies, the right to good administration enshrined therein is a general principle of law which binds not only EU agencies but also national authorities[71] and can be invoked against the latter even though Article 41 cannot.[72] The ECJ has thus been keen to preserve the independent normative input of general principles although their concrete added value in a specific case may not always be easy to discern. One can expect that the general principles of law will, in most cases, be used to influence and morph the interpretation of the Charter rather than establish autonomous, self-standing rights. The provisions of the Charter are so abstract and all-embracing that it is more likely that the ECJ will bring within them any emerging general principles. Keeping things under one roof makes eminent sense. The Charter itself appears to require that its provisions must be interpreted in the light of general principles of law. In particular, the Charter does not intend to restrict or adversely affect fundamental rights as recognised by Union law,[73] and therefore detract from the level of protection afforded by general principles. It must also be interpreted in harmony with the national constitutional provisions and in concordance with the Convention.[74] The treaty setting therefore provides a framework for the integration of general principles into the interpretation of the Charter. Indeed, the post-Charter case law often assimilates fundamental rights as they are guaranteed by the Charter and as they derive from general principles of law.[75]

Beyond the Charter, the general principles of law continue to serve a number of functions.

They continue to have a value as underlying principles of the constitution which influence the interpretation and application of the law and provide yardsticks for determining the validity of legislation. This applies for example to the principle of protection of legitimate expectations and the principle of

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68 See Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, EU:C:2018:117, para 35; Case C-510/11 P *Kone Oyj and Others v Commission*, EU:C:2013:696, para 23.

69 Joined Cases C-141/12 and C-372/12 *YS v Minister voor Immigratie, Integratie en Asiel* [2014] EU:C:2014:2081, para 54 and case law cited therein.

70 Case C-166/13 *Mukarubega* [2014] EU:C:2014:2336, para 44.

71 Case C-604/12 *H. N. v Minister for Justice, Equality and Law Reform*, EU:C:2014:302; confirmed in Joined Cases C-141/12 and C-372/12, *YS v Minister voor Immigratie, Integratie en Asiel*, EU:C:2014:2081.

72 Case C-419/14 *WebMindLicenses* [2015] EU:C:2015:832, para 83.

73 Charter of Fundamental Rights of the European Union [2012] OJ C326/391, art 53.

74 ibid [52(4)].

75 See eg Case C-131/12 *Google Spain v AEPD*, EU:C:2014:317, para 68; Case C-176/12 *AMS v Union locale des syndicats CGT* [2014] EU:C:2014:2, para 42; Case C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co. KG* , EU:C:2010:21, paras 21-22.

legal certainty which have been used to annul EU measures or determine their interpretation and scope of application.[76] They serve to fill the lacunae of written law. They promote a systematic, teleological and consistent interpretation rationalizing polynomy and ensuring coherence. They serve to promote the development of a *jus communae* even in areas which hitherto have been largely untouched by EU law, namely private and criminal law. Furthermore, in many instances the Charter states that rights or principles are to be applied in accordance with national law.[77] In such cases, national law does not have a free hand but any limitations that it may provide must be compatible with the general principles of law, such as the principle of proportionality. Finally, general principles fulfill an important methodological function. Proportionality, in particular, has developed into a universal standard of constitutionality. The methodology followed by the ECJ in interpreting the Charter is no different from its traditional methodology in applying the general principles of law. If anything, the Charter appears to have inspired a somewhat more coherent rights-based analysis and a higher standard of review.[78] The judicial inquiry has become more structured but it is by no means obvious that cases decided before the Charter came into force would have been decided differently if the Charter was applicable at the time.

The scope application of general principles has broadened as the EU legal order has evolved. Thus, the expansion of EU law in the area of freedom, security and justice has provided fruitful ground for the application of fundamental rights and general principles, among others, in the field of immigration and criminal justice. New principles have been enunciated, such as the doctrine of abuse of rights, and there has been a growth spurt in structural principles, through the development of the principles of autonomy and mutual trust. A further change has been the transformation of effectiveness. Traditionally, effectiveness was conceived as an attribute of EU rights contributing to the enhancement of their scope, their substantive content and the remedies for their protection.[79] This function is now supplemented by an emphasis on effectiveness not as a property of rights but as a feature of all EU norms imposing obligations,

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

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

78 See eg *Digital Rights Ireland* (n 66) and *Google Spain* (n 75).

79 For a discussion of remedies, see, inter alia, M Eliantonio, *Europeanisation of Administrative Justice? The Influence of the ECJ's case law in Italy, Germany and England* (Europa Law Publishing, 2008).

thus enhancing their enforcement and acting as a countervailing force to the rights of the individual.[80] Despite the above changes, the Court's methodology in discovering and applying general principles has remained essentially the same. They are perceived as constitutional maxims that trump legislative choices at EU level and national action. Neither the Lisbon Treaty nor the financial crisis, both of which have led to important constitutional changes, have altered the essential function of general principles or the methodology in their application.

The inter-relationship among general principles, the values of Article 2 TEU, and the Charter is illustrated by *Portuguese Judges*.[81] The ECJ breathed independent meaning to Article 19(1) TEU and elevated it to an overarching principle linked to Article 2 imposing autonomous substantive obligations. The Court held that the material scope of application of Article 19(1) is broader than the Charter in that it applies to 'the fields covered by Union law', irrespective of whether the Member States are implementing Union law within the meaning of Article 51(1) of the latter.[82] Thus, Article 19(1) applied in that case not because the Portuguese measure reducing public sector salaries fell *ratione materiae* within the substantive scope of EU law but because it affected a judicial body which could be called upon to apply EU law. The jurisdictional link necessary to activate the application of Article 19(1) relies on potentiality and is much more tenuous than that required to trigger the application of the Charter. *Portuguese Judges* is first and foremost about institutional powers and government structures and not about substantive rights, processes or remedies. The Court essentially held that the values of the Union entail certain institutional guarantees, including judicial independence. National laws must protect those guarantees in relation to judicial institutions which in *abstracto* may apply EU law. With an eye on the rule of law crisis in Hungary and Poland, the Court embarked on laying down limits on majoritarianism. It follows from the judgment that Article 19(1) has a broader scope of application than Article 47[83] but its substantive content is informed and indeed coterminous with the latter. So, once a national measure falls within the scope of application of Article 19(1), the guarantees of Article 47 apply.

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80 According to the established case law, Member States must provide for penalties for the enforcement of EU obligations which are not only proportionate but also sufficiently effective and dissuasive. See eg Case C-230/01 *Penycoed* [2004] EU:2004:20, para 36 and see further Case C-105/14 *Taricco* [2015] EU:C:2015:555, and Case C-42/17 *M.A.S.* [2017] EU:C:2017:936, discussed below.

81 Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, EU:C:2018:117.

82 ibid [29].

83 In contrast to Article 19(1) TEU, Article 47 of the Charter requires that the subject-matter of the dispute must be linked to EU law. See for example, Case C-457/09 *Chartry v État belge* [2011] ECR I-136 .

5. From convergence to conflict

Although all general principles of law emanate from the rule of law and, at an abstract level, can be seen as expressions of the same values, when applied concretely they may find themselves in a trajectory of conflict. One may identify, among others, three kinds of conflict: conflicts between general principles or constitutional rights *inter se*; conflicts between substantive principles, i.e. general principles emanating from the rule of law, and structural principles; and conflicts between general principles as understood in EU law and their counterparts as understood in national laws.[84]

5.1. Conflicts between general principles or constitutional rights inter se

Constitutional rights, whether in the form of Charter rights or general principles of law, may point to opposite directions. For example, the freedom of expression may come into conflict with the right to privacy. Such conflicts are a well-established feature of constitutional law and may be managed at different levels. The constitution itself may recognize certain rights but not others or may draw, expressly or by implication, some form of ranking. Legislation may also seek to draw a balance between conflicting rights by concretising and providing for exceptions. Prioritization and balancing are standard features of constitutional adjudication.

Although some of the rights protected by the Charter are understood to be absolute,[85] EU written law tends to shy away from express ranking. Nonetheless, there is judicial ranking. The case law provides strong indications that the right to judicial protection stands at the very apex of the constitutional edifice. Some components of it, i.e. judicial independence, are part of the very essence of the rule of law as an EU value.[86] Furthermore, the need to comply with the right to judicial protection may lead to a highly partial reading of the Treaties. It may result in the availability of a procedure even in cases where it appears to be ex-

84 A further kind of conflict may lie in the way fundamental rights are understood by the ECJ and by the European Court of Human Rights. This is not addressed in this article.

85 These include at least human dignity (Article 1), the prohibition of torture and inhuman or degrading treatment or punishment (Article 4) and the prohibition of slavery and forced labour (Article 5). Note however that even in relation to absolute rights, the scope of application of the right and its substantive content, and therefore the recognition of possible limitations, is a matter of judicial interpretation.

86 See eg Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* [2018] EU:C:2018:117, para 36.

cluded by the Treaties[87] or even the extension of judicial review to acts whose judicial control the Treaties place beyond the Court's jurisdiction.[88]

Rights, other than absolute ones, may be restricted subject to the safeguards of Article 52(1) of the Charter. Absent any formal or informal ranking, conflicts are to be resolved by drawing a fair balance between the competing rights. This balancing exercise has become more complex as integration has advanced. The expansion of EU competence, the growth of Union legislation, and the proliferation of EU constitutional rights has resulted in the EU embracing a wider spectrum of interests and the ensuing need to compromise them where they are in a trajectory of conflict. The Charter, being all embracing, protects a variety of principles, rights and freedoms which may be contradictory and priority may need to be given to one or other of them in specific circumstances. Also, EU directives increasingly cover diverse aspects of economic life and may protect opposing interests. Such statutory conflicts are often concretisations of tensions between clashing constitutional rights. In terms of political power, the colonization of rights and state imperatives by EU law has made the weighing game more horizontal, i.e. between competing EU rights and less vertical, i.e. between competing EU and national rights.[89] The ECJ has stressed that an assessment must be carried out in accordance with the need to reconcile the opposing rights and strike a fair balance between them.[90] That duty is imposed on both the national authorities when they implement or apply a directive and the courts in interpreting the measures in issue.[91] In general, rules which foreclose balancing are unlikely to find judicial favour.[92] The gradual shift towards a more horizontal juxtaposition of conflicting EU interests, however, need not mean less involvement of national courts. The latter may also perform that balancing subject to oversight by the ECJ whose optimal intervention is one of providing guidance to the national courts rather than prescribing outcomes in preliminary references.

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87 See eg Case C-72/15 *Rosneft* [2017] EU:C:2017:236 holding that, irrespective of the terms of Article 275(2) TFEU, the ECJ has jurisdiction to examine the validity of restrictive measures imposed on individuals on a reference for a preliminary ruling and not only on a direct action under Article 263(4) TFEU.

88 See Case C-294/83 *Les Verts v Parliament* [1986] ECR 1339 and, more recently, Case C-455/14 P *H v Council* [2016] EU:C:2016:569, holding that a decision of the EU Police Mission in Bosnia-Herzegovina to redeploy personnel seconded by a Member State and not by the EU was amenable to judicial review even though it had been taken on a CFSP legal basis.

89 See eg Case C-544/10 *Deutsches Weintor eG v Land Rheinland-Pfalz* [2012] EU:C:2012:526 and Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk* [2013] EU:C:2013:28.

90 See, eg Case C-275/06 *Promusicae* [2008] ECR I-271, paras 65 and 66; *Deutsches Weintor eG* (n 91) [47];

91 Case-12/11 *McDonagh v Ryanair Ltd*, EU:C:2013:43, para 43; *Promusicae* (n 90) [68].

92 See , Joined Cases C-468/10 and C-469/10 *Asociación Nacional de Establecimientos Financieros de Crédito (ASNEF) v Administración del Estado*, EU:C:2011:777.

Conflicts may also occur at the level of abstract general principles. In *TWD*[93] and *AssiDoman*,[94] in assessing limitations on the right to judicial review and the right to obtain effective remedies against EU institutions, the Court gave priority to the principle of legal certainty over the principles of legality and judicial protection. Legislative determination may also determine the balance. In *Alimanovic*,[95] retreating from a broad reading of social rights for migrant workers, the ECJ held that, in the circumstances of the case, no individual assessment was necessary before deciding to refuse social assistance since the Citizenship Directive provided detailed conditions for entitlement giving precedence to legal certainty over proportionality.[96]

5.2. Conflicts between general principles emanating from the rule of law and structural principles

Structural principles of EU law may come into conflict with, or condition, substantive ones. A prime example is provided by the principle of mutual trust which both in asylum law and the field of the European Arrest Warrant (EAW) may come into a trajectory of conflict with the protection of fundamental rights. In the area of freedom, security and justice, mutual trust imposes two obligations on Member States.[97] First, when implementing EU law, Member States may be required to presume that fundamental rights have been observed by the other Member States, so that they may not demand a higher level of national protection than that provided by EU law. Secondly, save in exceptional cases, they may not check whether another Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU. The second obligation differs from the first in that it does not pertain to the level of protection but competence to verify whether that level is observed. It also differs in that it is cast in less absolute terms, being applicable 'save in exceptional circumstances'.[98] This exception has been the subject of case law in the fields of asylum and the EAW.

93 Case C-188/92 *TWD v Germany* [1994] ECR I-833.
94 Case C-310/97 *Commission v AssiDöman Kraft Products AB (Woodpulp III)* [1999] ECR I-5363
95 Case C-67/14 *Jobcenter Berlin Neukölln v Alimanovic* [2015] EU:C:2015:597.
96 ibid [61]; , Case C-299/14 *Vestische Arbeit Jobcenter Kreis Recklinghausen v Garcia Nieto* [2016] EU:C:2016:114, para 49; see also the earlier judgment in Case C-333/13 *Dano*, EU:C:2014:2358.
97 Opinion 2/13 (n 29) [192]; Case C-216/18 PPU *LM*, EU:C:2018:586, para 37.
98 Opinion 2/13 (n 29) [192]; *LM* (n 99) [36]; Case C-452/16 PPU *Poltorak*, EU:C:2016:858, para 26.

In *N.S.*[99] the ECJ examined whether a Member State should send back asylum seekers to the Member State responsible for examining their application under the Dublin II Regulation,[100] if such return exposed them to inhuman or degrading treatment. The Court appeared to draw a distinction between mere infringements of fundamental rights in the Member State of return and systemic flaws in the conditions of asylum seekers resulting in inhuman or degrading treatment. Only where there is a substantial risk of such system flaws, the rules laid down in Dublin II can be displaced.[101] *N.S.* confirms that, under the Dublin II system, mutual trust does not create a conclusive presumption that the Member State of return complies with fundamental rights. Nevertheless, the threshold of 'systemic flaws' may be far too stringent. It does not exist under the Convention.[102] *N.S.* introduces a threshold that 'exists nowhere else in refugee law'.[103] *N.S.* exposes, perhaps, not so much a flaw in the reasoning of the Court as in the mutual recognition principle which is aspirational in character and relies on commitment to fundamental rights protection rather than compliance with them.

The potential conflict between mutual trust and fundamental rights protection came to the fore in the field of the EAW in *Aranyosi*[104] and *LM*.[105] The issue in both cases was whether the courts of the State that has been asked to execute an EAW may refuse surrender on the ground that the fundamental rights of the person concerned may be violated in the Member State that issued it.[106]

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99 Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department* [2011] EU:C:2011:865.

100 Council Regulation (EC) 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L50/1.

101 Confirmed in Case C-4/11 *Puid* [2013] EU:C:2013:740, para 30. See subsequently the amendments made in Dublin III (Regulation (EU) 604/2013 establishing the criteria and mechanisms for determining the Member Stare responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L180/31 and Case C-578/16 PPU *C.K., H.F., A.S. v Republica Slovenija*, EU:C:2017:127 and the discussion in T Tridimas, 'Competence, Human Rights, and Asylum: What Price for Mutual Recognition?' in I Goevare and S Garben (eds), *The Division of Competences in the EU Legal Order – A Post-Lisbon Assessment* (Hart Publishing, 2017) 151-170.

102 According to the judgment in *Soering v United Kingdom* (1989) 11 EHRR 439, the removal of a person from a member state of the Council of Europe to another country is forbidden if it is shown that there is a real risk that the person transferred will suffer treatment contrary to Article 3 of ECHR.

103 See *R (on the application of EM (Eritrea) v Secretary of State for the Home Department* [2014] UKSC 12, para 39, per Lord Kerr.

104 Joined Cases C-404/15 and C-659/15 *PPU Aranyosi* [2016] EU:C:2016:198.

105 Case C-216/18 *PPU LM* [2018] EU:C:2018:586.

106 *Aranyosi* pertained to the risk of a breach of Article 4 of the Charter (prohibition of torture and inhuman or degrading treatment); *LM* pertained to the right to an independent tribunal under Article 47(2) of the Charter.

The ECJ introduced a two-step approach. It held that, as a first step, the judicial authority of the executing Member State must assess whether by virtue of systemic or generalized deficiencies in the places of detention of the issuing Member State, there is a real risk of inhuman or degrading treatment. [107] If such a real risk exists, the court must make a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk.[108]

Aranyosi is less strict than *N.S.* The term 'generalised' deficiencies, which was absent in *N.S.*, is an important gloss that does away with the need to define 'systemic' and provides a lower threshold. [109] Still, this line of case law is problematic. Since fundamental rights are centred on the individual treatment of a person, the first step seems otiose.

The *Aranyosi* line of case law can be seen as a narrow judicial exception to the principle of mutual recognition. As the Court stated, mutual recognition is the cornerstone of the EAW system.[110] The Framework Decision[111] provides for exhaustive lists of mandatory and optional grounds on the basis of which the executing court may refuse to execute an EAW. Seen in that light, any further exception would appear to run counter to the principle of *numerus clausus*. Notably, the Court founded the exception not directly on the need to comply with the Charter as a higher ranking source of law but on Article 1(3) of the Framework Decision which states the Framework Decision must not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 TEU. The exception is thus presented as emanating from the Framework Decision itself rather than as being imposed by the hierarchically superior command of Article 6 although it is difficult to see why the result should have been different in the absence of the Article 1(3) reservation. The recognition of mutual recognition as a principle has important repercussions in that exceptions to it must be narrowly construed.[112] It thus establishes a framework of analysis which is not rights-centred but rather seeks

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107 *Aranyosi* (n 104) [89].

108 ibid [92].

109 In general, systemic might be taken to refer to weaknesses that are intrinsic to the system for the administration of justice whilst generalized refers to those which are widespread and may be operational albeit not inherent in the way the prison system is structured. See *R (on the application of EM (Eritrea) v Secretary of State for Home Department* [2014] UKSC 12, at paras 52 and 66 per Lord Kerr. Since *Aranyosi*, the case law refers disjunctively to 'systemic or generalized deficiencies: see *Dorobantu*, C-128/18, ECLI:EU:C:2019:857, at the dispositif and para 85.

110 *Aranyosi* (n 104) [79].

111 See Council Framework Decision 2002/584 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1, recital 6; *Aranyosi* (n 104) [79].

112 *LM* (n 105) [41]; C-327/18 PPU *RO* [2018] EU:C:2018:733, para 37.

to accommodate fundamental rights concerns by causing as little disruption as possible to the EU criminal justice model. The underlying construct may be conceived as being that mutual recognition does not provide for a derogation from the protection of fundamental rights but rather establishes a rule of jurisdiction: it is for the courts of the issuing Member State and not those of the executing Member State to ensure compliance with EU fundamental rights and the latter courts must trust the former will do their job. A similar thread underlies the common asylum system. This however leads to an outsourcing of protection which abrogates the courts of the executing Member State of their jurisdiction to protect fundamental rights in the specific case and is liable to lead to a lower level of protection. Whilst *Aranyosi* and *LM* are receptive to a narrow interpretation,[113] they do highlight that constitutional rights and structural principles of EU law may be in a trajectory of conflict.

5.3. Conflicts between EU and national law principles

A third type of conflict arises where an EU principle clashes with a countervailing principle provided by national law. This may occur, for example, where a fundamental freedom collides with a national constitutional principle, such as human dignity.[114] It may also occur where a constitutional principle as recognised by EU law is interpreted differently from its counterpart as recognised by national law. In such a case, the national standard may be displaced by the EU one. The national standard may be preserved if the situation in issue does not fall within the scope of EU law (separation) or if the ECJ interprets the EU principle in question so as to incorporate the national standard and thus a clash is avoided (incorporation) or if the Court considers that the application of the national standard is permissible even though the situation falls within the scope of EU law (tolerance). The incorporation of national standards into the definition of EU rights is rarely express. When defining general principles of law or Charter rights, the ECJ does not seek to establish a specific line of derivation from national constitutional principles. *Mangold* illustrates that the ECJ is not particularly concerned with anchoring general

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113 In both cases, the ECJ answered the questions posed by reference to the two-limbs test because of the circumstances giving rise to the reference. The referring court questioned whether surrender would be incompatible with Charter rights because of generalized problems in the issuing Member State. The judgments do not preclude the finding that surrender would be in breach of the Charter where there is evidence that there is a risk that the rights of the specific individual would be violated in the issuing Member State. In such a case, it is submitted, there would be no need to satisfy the first limb of the test.

114 See eg Case C-36/02 *Omega* [2004] ECR I-9609; Case C-244/06 *Dynamic Medien Vertriebs GmbH v Avides Media AG* [2008] EU:C:2008:85.

principles on commonality or specific provisions of national constitutions[115] whilst *Melloni,* where the EU standard displaced the national one, testifies that the Court is committed to an autonomous interpretation of the Charter.[116]

Taricco[117] and *M.A.S.*[118] provide illustrations of a dialogic exchange leading to the third kind of preservation mentioned above, namely tolerance. The cases concerned Italian rules pertaining to the limitation periods for the prosecution of criminal offences. In *Taricco*, the ECJ held that, to comply with the obligation of Member States to combat fraud against EU finances, a national court must disapply national rules of criminal procedure which prevented the imposition of effective penalties in cases of serious fraud. Subsequently, in *M.A.S.,* the Italian Constitutional Court expressed doubts as to whether *Taricco* was compatible with the overriding principle of Article 25 of the Italian Constitution which requires that rules of criminal law are precise and cannot be retroactive. In its response, the ECJ held that, if the national court concluded that the obligation to disapply the provisions of the Criminal Code conflicted with the principle that offences and penalties must be defined by law, it would not be obliged to comply with that obligation. It would then be for the national legislature to take the necessary measures.[119]

M.A.S. raises a number of important constitutional issues. It may be said that, strictly speaking, the judgment is not a departure from *Taricco* as in the two cases the ECJ was dealing with different aspects of Article 49(1) of the Charter. In *Taricco*, it examined the prohibition on the retroactive application of criminal laws whilst in *M.A.S.* it focused mostly on the requirement that criminal penalties must be defined by law. Also, the questions asked in each case were different. Nonetheless, there is little doubt that in *M.A.S.* the ECJ backtracked in the light of circumspect but justifiable criticism by the Corte costituzionale. Also, it expressly accepted that the requirements of foreseeability, precision and non-retroactivity preclude the national court from disapplying the provisions of the Criminal Code in issue.[120]

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115 Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981; for a discussion, see above, Chapter

116 Case C-399/11 *Melloni*, EU:C:2013:107. The ECJ held that Article 4a of the Framework Decision on the EAW, which requires a person convicted in absentia to be surrendered if he was properly informed of the trial and chose not to appear, was compatible with the right to an effective remedy and the right to a hearing as provided in the Charter. It then held that that interpretation foreclosed the possibility of a Member State refusing to execute the warrant on the ground that the standard of protection of the right to a fair trial is higher under the national constitution. Such a view would run counter to the primacy of EU law.

117 Case C-105/14 *Taricco,* EU:C:2015:555.

118 Case C-42/17 *M.A.S* [2017] EU:C:2017:936.

119 ibid [60].

120 ibid.

The key point from *M.A.S.* is that Member State obligations to comply effectively with EU law cannot take precedence over the need to observe the principles of legality and non-retroactivity of criminal penalties. There is however some uncertainty as to the source of fundamental rights that the Court applied. It referred to the importance of the principle that offences must be defined by law both in the EU legal order and the national legal systems.[121] It also stated that Article 49 of the Charter must be observed by the Member States where they implement EU law as was the case in issue. Essentially, however, the ECJ allowed the national court to apply the higher constitutional standard provided by national law because there was no EU legislation governing the area. It held that the national authorities and courts remain free to apply national standards of protection of fundamental rights, on condition that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.[122] *M.A.S.* stands as authority that, where EU law has not specified the conditions for the punishment of a violation, the national rules applicable must comply with the national constitutional standards to the extent that they are higher than those applicable under the Charter.

Conclusion

The general principles of law are one of the strongest forces of the Europeanisation of national laws. There are three principal reasons for this. First, they have ecumenical scope and pervade, directly or indirectly, all areas of national law. They thus influence both substance and process not only in specific areas of regulation but also in general administrative law and, even, in the fields of private law and criminal law. Secondly, being an integral part of the EU Treaties, they have constitutional status. They form the most potent form of constitutional law outside the formal constitutions of the Member States. Thirdly, they result from the interlocution of judicial actors, fostering a dialectical development of the law where national laws and EU law interchange roles as borrowers and lenders. In the post-Lisbon era, the general principles remain a potent source of law and an integral part of the Court's methodology. They are general in their scope, but they are much more than prefatory generalisations. Whilst the Charter is the primary point of reference for the protection of fundamental rights, the general principles endure not only as an interpretational tool and supplementary sources but also as the predominant methodolo-

121 ibid [51].
122 ibid [47].

gical tool which shapes judicial reasoning and helps to morph outcomes. Their protean nature facilitates the ranking of constitutional imperatives and plays an important role not only in defining rights but also relations between the EU and its Member States.

The post-Lisbon era has also experienced a resurgence of structural principles through the judicial articulation of mutual trust, autonomy and effectiveness. Whilst these can be seen as attributes of the maturity of EU law, they are principles of organic entrenchment that, as Opinion 2/13, *N.S.* and *Taricco* suggest, may come into a trajectory of conflict with the rights-based outlook of general principles as traditionally understood. Judicial rhetoric vacillates between the overbearing importance of individual rights and the need to respect evolving models of integration. But the protection of fundamental rights must remain the overarching guiding consideration.

All in all, the Court's methodological addiction to general principles derives from its adherence to a substantive version of the rule of law. The general principles synergise the constitutional underpinnings of the EU polity, shape the normative content of EU values, and facilitate constitutional dialogue. Their ecumenical scope, high constitutional status, and value as tools of methodology which often shape the inquiry in constitutional adjudication grants them enormous power as generators of *jus communae*. Although they are by no means employed mechanically by the Court, they have an activist bias. But their omnipresence, their varying content, and the fact that they may be understood differently by different judicial actors may also generate conflict.