FIDE 2012

Questionnaire General Topic 1

Protection of Fundamental Rights post-Lisbon: The Interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and National Constitutions

by Alessandra Silveira, Pedro Madeira Froufe and Mariana Canotilho[#]

1. Nature and scope of the rights protected (questions 1 and 2)

The Portuguese Constitution dates from 1976. It was approved in the aftermath of the Revolution of 1974, which overthrew a fascist dictatorship and installed a democratic regime. Its original text was the result of intense negotiation and compromise between different political forces, namely liberals and socialists. One of the consequences of this compromise is the establishment of a long catalogue of fundamental rights, combining classical freedoms with economic and social rights. The Constitution has been altered seven times since then, but the *core* of the fundamental rights' list has remained unchanged.

The Portuguese Constitution establishes two categories of fundamental rights: freedoms, rights and guaranties, on one hand, and economic, social and cultural rights, on the other hand. The two categories largely correspond to the traditional distinction between civil/political and social rights, but with some relevant exception, namely on what regards the distribution of concrete rights between the two categories. The rights included in the first category (rights, liberties and guaranties) have a stricter legal regime that includes, among other rules, direct applicability (they may be

[#] CEDU - Centre of Studies in European Union Law, http://www.cedu.direito.uminho.pt/Default.aspx?lang=en-US, University of Minho, Portugal. The research of national jurisprudence was done by the Centre's collaborating members Joana Abreu, Rui do Carmo and Virgílio Pereira.

enforced by a judge, no matter whether or not there is a law regarding that specific right), horizontal effect and a harder set of requisites in case of restriction. However, national doctrine has always emphasized that there is no hierarchy of fundamental rights under the Portuguese constitutional order. The legal value of both civic and political freedoms and economic, social and cultural rights is the same.[1]

As we have noted before, the Portuguese catalogue of fundamental rights is very long and complete. Thanks to the openness and flexibility of the national constitutional order, the number and meaning of fundamental rights' norms could be added or amended in each of the seven constitutional reforms the country has known since 1982, adapting them to legal, political and social changes. Other than that, the Constitution itself foresees the reception and incorporation of fundamental rights recognized in other normative sources, both national and international, such as laws, international conventions and treaties, and international law (art. 16 of the Portuguese Constitution).

For this reason, it is fair to say that the Charter of Fundamental Rights of the European Union does not add much to the Portuguese constitutional order in what regards fundamental rights. Many of the *newest* rights protected by the Charter were already stated in the national constitution, such as the right to genetic identity (art.26 of the Portuguese Constitution), the prohibition of discrimination on the grounds of sexual orientation (art.13, no. 2, of the Portuguese Constitution), the right to a healthy and ecologically balanced environment (art.66 of the Portuguese Constitution) and consumers' rights (art.60 of the Portuguese Constitution).

In face of this framework, it is fair to say that, although unlikely in face of the completeness of the national catalogue of rights, the introduction of *more* protection in the Portuguese legal order by applying the ECFR does not pose a problem to national authorities. First of all, it is the Portuguese Constitution itself that opens the possibility of incorporating new rights (or more favorable interpretations and enlarged fields of application of existing rights), in its art.16, no. 1, that states as following: "the fundamental rights enshrined in the Constitution shall not exclude any others set out in applicable international laws and legal rules". Furthermore, in a specific provision regarding EU law (art.8, no. 4 of the Portuguese Constitution), it is

[1] See J.J. Gomes Canotilho *Direito Constitucional e Teoria da Constituição,* 7ª Edição, Almedina, Coimbra, 2003.

established that "the provisions of the treaties that govern the European Union and the norms issued by its Institutions in the exercise of their respective competences are applicable in Portuguese internal law in accordance with Union law and with respect for the fundamental principles of a democratic state based on the rule of law". This very important constitutional provision is said to have "opened the window" to apply the principle of primacy of EU law in the national legal order, with the only counter-limit being the respect for the "fundamental principles of the democratic State" - in which many authors include the national catalogue of fundamental rights. Therefore, if a EU fundamental rights norm grants a higher level of protection than the one ensured by Portuguese law, there will be no obstacles to its application. In the famous tension between fundamental rights and fundamental boundaries, the Portuguese Constitution has a clear trend towards privileging the first.

The fear that the ECFR, when used internally in matters falling in the Union's law field of application, might provide (significantly) less protection than the national Constitution was, however, mentioned by some national authors[2]. It is our belief, though, that a correct interpretation of the principle of the highest level of protection enshrined in art.53 of the ECFR will prevent such a decrease in fundamental rights protection, by allowing the application of the national constitutional norm – or any other relevant and applicable norm – when it ensures the highest standard of protection of a certain right, in a concrete case.

It is important to note that at least the Portuguese Constitutional Court (although not all the ordinary courts) is reasonably aware of European law and jurisprudence, both from the ECJ and – especially – from the ECtHR. In Sentence 121/2010[3], regarding the constitutional admissibility of same-sex marriage, the Constitutional Court makes reference to several European Parliament resolutions and ECJ's decisions, affirming them to be "important to a global understanding of the issue under ruling", although "family law is not a matter within EU competence".

[2] See the intervention of Jorge Miranda, in "Reunião Conjunta das Comissões de Assuntos Europeus e de Assuntos Constitucionais, Direitos, Liberdades e Garantias sobre a Carta dos Direitos Fundamentais da União Europeia" (Joint Meeting of the European Affairs and Constitutional Matters Parliamentary Commissions), 14th April 2000, in *A Carta dos Direitos Fundamentais da União Europeia – A Participação da Assembleia da República*, Assembleia da República, Comissão de Assuntos Europeus, Lisboa, 2001.

[3] See Constitutional Court Sentence 121/2010, 8/4/2010.

This attitude of openness towards foreign jurisprudence will make it easier to apply the highest standard of protection of fundamental rights, in a case where several different catalogues of such rights may me mobilized. It would be desirable, however, that the Constitutional Court would engage in dialogue with the ECJ through the preliminary ruling mechanism, in order to clearly define those standards, but that has never occurred.

Regarding the question of the distinction between rights and principles, two notes must be made. First of all, as we have already stressed, the Portuguese Constitution has a remarkable catalogue of rights, whose main feature is exactly to recognize the existence of a subjective fundamental right in many circumstances where most legal orders only recognize general legal principles (for example, the right to equality and non discrimination, stated in art.13, no. 1 and 2 of the Portuguese Constitution; the several rights included in the more general right to a good administration, established in art.268 of the Portuguese Constitution, and all the economic, social and cultural rights, that in many constitutional orders are considered to be principles concerning economic government or general State's goals).

That said, however, we must also note that the Portuguese Constitution also recognizes the possibility of limiting a fundamental right in order to safeguard other constitutionally protected rights and interests (art.18 of the Portuguese Constitution). These 'interests' are often identified with unwritten general principles or constitutional values. Therefore, we do not envisage any difficulties in applying general legal principles as additional sources of fundamental rights protection. The Portuguese Constitutional Court does so, in some cases, when it cannot (or does not want to) apply a specific right[4].

2. Horizontal effect and collision of rights (questions 3, 4, 5 and 6)

The 'horizontal effect' of fundamental rights is accepted in the Portuguese

[4] See Portuguese Constitutional Court Sentence 509/2002, 19/12/2002, regarding legislative measures that restricted the right to a government attributed minimum income to people over 25. The law under appreciation was considered unconstitutional not on grounds of violation of a right to equality and non discrimination, as alleged by the President of the Republic, who was the petitioner, but due to violation of a general principle of respect for human dignity.

legal order, both in its direct and indirect forms. According to art.18, no. 1, of the Constitution, "the constitutional precepts with regard to rights, freedoms and guarantees are directly applicable to and binding on *public and private* entities". This legal regime may also be applied to certain economic, social and cultural rights, if they are considered to have a "similar structure" to the classical civic and political liberties. The binding effect on private parties is, however, "modeled" by the concrete case under appreciation. National doctrine usually considers the horizontal effect to be very strong in situations of *unequal* private relations (between workers and employers, landlords and tenants, the members of an association with its board), and less effective in equal private parties' legal relationships[5]. In many of the latter situations, fundamental rights are protected through the State's duty of protection (*Schutzpflicht*) of citizens against those who intend to harm them or violate their rights, in what amounts to an indirect use of the horizontal effect concept. In more serious cases, though, it is admitted that there is a real binding effect (*Drittwirkung*) on private parties.

This recognition of horizontal effect naturally leads to the emergence of conflicts of rights. These also occur, of course, outside the context of horizontal effect, and may regard all kinds of fundamental rights – rights, freedoms and guarantees (classic civic and political rights) and economic, social and cultural rights. Therefore, in theory, there should not be major differences in the way national courts and the ECJ handle these conflicts, as both admit the collision of rights of the same category *inter se* and the collision of rights from different categories. Also, there should not be major discrepancies in the way conflicts of rights enshrined in the ECHR are dealt with by the ECtHR and national courts.

In practise, however, things are a bit different. As an example, we would like to point out the big list of ECtHR cases regarding freedom of speech in which Portugal has been held responsible of violating art.10 of the ECHR. These decisions show two completely different conceptions of what the right to free speech is about, its role in a democratic society, and the weight it ought to have in case of conflict with other fundamental rights. Whereas Portuguese Courts repeatedly uphold criminal and civil suits against journalists and other private parties on grounds of practise of a

[5] See J. J. Gomes Canotilho and Vital Moreira, *Constituição da República Portuguesa Anotada*, vol. I, 4.ª Edição Revista, Coimbra Editora, Coimbra, 2007.

crime of defamation and violation of the fundamental right to honour and good name, recognised by the Portuguese Constitution, the ECtHR gives primacy to free speech, considering the allegations of the Portuguese courts and government to be insufficient to reasonably justify a limitation to that right[6].

It is our opinion that the balancing between rights in cases of conflict should primarily be made at States' level. This is the best solution if we take into account the current procedural law, namely the lack of a specific "fundamental rights action" or mechanism of access to the ECJ by private parties, and the requisites of accession to the ECtHR. Furthermore, we must always remember that States' courts are EU courts as well. It is their job to apply European law, whenever a certain case falls into its field of application, and to carry on the difficult task of interpreting and conciliating national and European norms. Actually, most of the times, national courts will be in a better position than the ECJ to do this, as they will be more familiar with the context in which the conflict of fundamental rights has risen and with most of the norms to apply. However, they must always have an attitude of openness and dialogue with the ECJ and the ECtHR, by taking their jurisprudence into account and, above all, by using the preliminary ruling mechanism in a more regular tone. Portuguese judges seldom use the preliminary rulings, and this is a problem common to both ordinary and Supreme Courts (namely the Constitutional Court, which ought to make use of it).

Of course, even in a framework of overture, it is possible that differences still subsist. The concrete material content of fundamental rights is always somewhat shaped by culture, social and historic facts, which will necessarily be distinct across the Member States and the EU itself. We can see, for instances, the possibility of difficulties in uniform decisions concerning the right to strike (art.57 of the Portuguese Constitution), which is placed among the category of classical freedoms, with a highly protective constitutional regime, that among other thing prohibits the use of *lock-out* tactics. This constitutional precept seems to step away from the principle of equality of arms between employees and employers stated in art.28

[6] See, for example, ECtHR Sentences Pinto Coelho v. Portugal, 28/6/2011; Publico - Comunicação Social, S.A. and Others v. Portugal, 7/12/2010; Alves Da Silva v. Portugal, 20/10/2009.

ECFR. This would be a case in which it would be necessary to choose between the two, applying the principle of the highest level of protection (art.53 ECFR)[7].

Regarding the enforcement of equality and non-discrimination directives, there is little national case law on the matter (at least in what regards the 'stereotype cases'). Anyway, the principle of equality in the enjoyment and exercise of fundamental rights was already a general legal principle included in the Portuguese constitutional regime of fundamental rights, applicable to all rights (classical civil liberties and economic and social rights). The problems posed by the legislative regulation that has come through the transposition or influence of EU law should not pose any problems that did not already arise before. However, the Portuguese jurisprudence, namely the Constitutional Court's, shows a quite "loose" interpretation of that principle, claiming it to be equivalent to a *prohibition of arbitrary discrimination*, but allowing positive discriminations or reasonably justified distinctions, even if based in traditionally "forbidden grounds" (like sex, religion or sexual orientation)[8]. It will be interesting to see, in the future, if the obligation of compliance with EU non-discrimination law will lead to different case-law.

3. Consequences of the entry into force of the EU Charter of Fundamental Rights (questions 7 and 8)

The review of the jurisprudence available in the online databases of the appeals courts and of the Superior Courts[9], as well as the Constitutional Court[10], show that the legal strength of the ECFR has not yet had the (desirable) effects of a stronger

[7] See J. J. Gomes Canotilho and Vital Moreira, *Constituição da República Portuguesa Anotada*, vol.I, 4.ª Edição Revista, Coimbra Editora, Coimbra, 2007.

[8] See Constitutional Court Sentences 232/2003, 13/5/2003, 121/2010, 8/4/2010.

[9] See www.dgsi.pt, where the sentences of the Appeals' courts of Oporto, Lisbon, Coimbra, Guimarães and Évora, as well as the North and South Central Administrative Courts and the Supreme Court and the Supreme Administrative Court are available. The decisions of first instance courts are nor available online, and it is not possible to take their jurisprudence into account in this report. Anyway, the example of the Appeals' courts and the Supreme Courts is quite enlightening.

[10] See website www.tribunalconstitucional.pt .

protection of fundamental rights, when compared to the pre-Lisbon Treaty situation. Before being given the same legal binding force of the treaties, the few judicial references to the ECFR included it in the list of "international fundamental rights catalogues",[11] although it really was a "political document, without legal binding force, except through fundamental principles commonly accepted as general principles of law."[12] Anyway, as a Member State of the European Union, the Portuguese State should feel "if not bound, at least identified with the principles stated in the ECFR."[13] That way, the Portuguese members of the judiciary became used to cite the ECFR only to confirm a right already protected by the Portuguese Constitution or the ECHR – it was merely a confirmation of what other more familiar normative elements already stated, but it did not really make any difference that they were declared in a European Charter of Fundamental Rights.

Unfortunately, the post-Lisbon situation is not substantively different from the previous period. In what concerns the frequency of references to the ECFR, there is an undeniable ascending curve, but we are not very enthusiastic about it, as the starting point was obviously scarce. Furthermore, the references to the ECFR are still only references – they do not bring any development or judicial densification of a fundamental right, in the light of the European legal order. Undoubtedly, the most frequently invoked legal norm is art.47 of the ECFR, which states several rights related to the right to effective judicial protection (and this may be regarded with cautious optimism, having in mind the implications of art.19 TEU, according to which Member States are forced to establish the necessary mechanisms to ensure effective judicial protections in all the matters of EU law). However, the reference to art.47 in our jurisprudence does not imply a reference to its current legally binding force, as the Charter is still automatically included in the list of sources of internal and international law that contain the right to effective judicial protection, without 1) the need to test such a reference from the point of view of the material field of application

[11] In this sense, see Sentence of the Supreme Court of Justice of 6/10/2004, online with number SJ200410060018753.

[12] Idem.

[13] In this sense, see Sentence of the Supreme Court of Justice of 13/7/2005, online with number SJ200507130004764.

of the Union's law and 2) having in mind the specificities of the judicial protection of fundamental rights in the EU.

As defined by the Treaties, the system of fundamental rights protection in the European Union is based 1) in their recognition as general principles of EU law and 2) in the appeal to fundamental norms of several sources: European norms (from the Treaties and especially from the ECFR), national norms (corresponding to the common and individual constitutional traditions of the Member States) and international norms of human rights (especially the ECHR). None of this is altered by the entry into force of the ECFR – that now adds to the already existing protection (art.6, no. 3, TEU). And even if the essential *core*[14] of a norm is apparently the same in several legal orders – the Union's, the national and the international legal orders – there are systemic differences that may produce different standards – and thus the cautious filter the ECJ has imposed, to ensure the structure and objectives of the European legal order.

However, the specific criteria of the EU legal order are not being taken into account by the Portuguese courts when they apply norms of the ECFR that contain fundamental rights simultaneously protected by the national Constitution and the ECHR.[15] Let's see: the specificities of fundamental rights protection in the EU (and the interconstitutionality[16] logic that inspires them) have led to the statement of a

[14] The expression belongs to Alexander Egger, *EU-fundamental rights in the national legal order: the obligations of the Member States revisited*, *in* Yearbook of European Law, 25, 2006.

[15] The specificities of the European Union's fundamental rights protection system have been pointed since ECJ's Sentence Hauer (13/12/1979, proc.44/79), in which it is affirmed that a breach in fundamental rights caused by a European act may only be reviewed under the Union's law, on the contrary the effectiveness and on the European legal order would be compromised.

[16] Interconstitutionality, in the context of EU law, corresponds to the reflexive interaction of norms from several sources that co-exist in the same political space – and demands a networked performance to solve common problems. About the question of the co-existence of norms from different sources in the same political space, see Maria Luísa Duarte, *União Europeia e direitos fundamentais – no espaço da internormatividade*, AAFDL, Lisboa, 2006; J. J. Gomes Canotilho, "*Brancosos*" *e interconstitucionalidade. Itinerários dos discursos sobre a historicidade constitucional*, Almedina, Coimbra, 2006; Paulo Rangel, *Uma teoria da "interconstitucionalidade": pluralismo e Constituição no pensamento de Francisco Lucas Pires*, *in* O estado do Estado. Ensaios de política constitucional sobre justiça e democracia, Dom Quixote, Alfragide, 2009; Marcelo Neves, *Transconstitucionalismo*,

principle of the highest level of protection, in arts.52, no. 3, and 53 of the ECFR. That principle must be understood as a principle of preference of the most favourable norm[17]. In this sense, if for the resolution of a concrete case several different legal regimes concerning the same fundamental right (protected simultaneously by the national Constitution, the ECHR and the ECFR) may be mobilized, the one to apply is the legal regime that offers the highest protection to the subject of that right.[18]

The problem posed to national courts that come across the application of European norms to concrete cases – or with the application of national norms that execute/transpose European directives – is precisely to find the fundamental rights standard to apply, because EU law orders them to use the highest level of protection, under arts.52, no. 2, and 53 of the ECFR. In this context, the dialogue between jurisdictions using preliminary rulings (art.267 TFEU) is indispensable when it comes to determining the normative content to apply to a certain concrete situation in a framework of multilevel constitutionalism. Regrettably, Portuguese courts seem to

---

Martins Fontes, São Paulo, 2009; J. J. Gomes Canotilho, *Estado de direito e internormatividade*, *in* Alessandra Silveira (ed.), Direito da União Europeia e transnacionalidade, Quid juris, Lisboa, 2010; Alessandra Silveira, *Da interconstitucionalidade na União Europeia (ou do esbatimento de fronteiras entre ordens jurídicas)*, *in* Revista Scientia Iuridica, no. 326, 2011.

[17] Art.53 of the ECFR states that "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions". If this norm intends to preserve the level of protection currently granted, in their fields of application, by the Union's, Member States' and the ECHR's law, then none of the standards ensured in these legal orders should be drawn back. Therefore, in a situation of concurrence of several different levels of protection, the highest one shall be applied.

[18] About the highest level of protection, see Leonardo Besselink, *Entrapped by the maximum standard: on fundamental rights, pluralism and subsidiarity in the European Union*, *in* Common Market Law Review, nº35, 1998; Joseph Weiler/Nicholas Lokhart, *"Taking rights seriously" seriously: the European Court and its fundamental rights jurisprudence,* Part I e Part II, *in* Common Market Law Review, nº32, 1995; Mariana Rodrigues Canotilho, O *princípio do nível mais elevado de protecção e garantia dos direitos fundamentais na União Europeia*, *in* 50 Anos do Tratado de Roma, Alessandra Silveira (ed.), Quid juris, Lisboa, 2007; J. J. Gomes Canotilho, *Estado de direito e internormatividade*, *cit.*

know very little of these developments[19], not realising that when the case falls into the field of application of the Union's law, the standard to apply is no longer the one of the Portuguese Constitution, but the EU's, which orders them to necessarily apply the highest level of protection. On the other hand, when the matters of the case are not part of the field of application of the Union's law, the automatic reference to the ECFR, following the norms that protect the same fundamental right in the Portuguese Constitution and the ECHR, does not have any practical purpose…

It derives from the ECJ's jurisprudence[20], confirmed by art.51 of the ECFR[21], that the rights protected in the EU may be invoked when the measure at stake belongs to the material field of application of EU law. This means that the Union's fundamental rights protection is dragged to the sphere of action of Member States whenever they apply EU law – and that its standard of protection will co-exist with the standards of national Constitutions and of the ECHR, giving origin to the referred phenomenon of multilevel fundamental rights law. That phenomenon shows the overlap of levels of fundamental rights protection in the European Union, which produces a kind of "multilevel protection of fundamental rights" – as Marta Cartabia

[19] The principle of the highest level of protection is referred to (by a private party) in Sentence 283/2005, 25/5/2005, of the Constitutional Court; also by a party in Supreme Administrative Court Sentence of 18/11/2010, available online with number 0837/09; by the judge in Guimarães Appeals Court Sentence of 23/4/2009, available online with number 9180/07.3TBBRG.G1; also by the judges in Constitutional Court's Sentence no.121/2010, referring J. J. Gomes Canotilho/Vital Moreira, *Constituição da República Portuguesa Anotada*, vol.I, 4.ª edição, Coimbra Editora, Coimbra, 2007, p.368.

[20] It is firm ECJ's jurisprudence that Member States must respect fundamental rights protected by the Union's law: 1) when applying the EU law, 2) when temporarily derogating European norms, 3) when transposing European directives, 4) when adopting national measures of execution of European legislation, 5) when applying national law in the material field of application of Union's law.

[21] To understand ECFR art.51, see Marta Cartabia, *in L'Europa dei diritti. Commento alla Carta dei diritti fondamentali dell'Unione Europea*, Raffaele Bifulco/Marta Cartabia/Alfonso Celotto (eds), Il Mulino, Bologna, 2001, p.348, where the author defends that the norm reflects the American *incorporation* doctrine – related to application of the 14th Ammendment to the US Constitution – according to which European fundamental rights bind not only the Union's Institutions, but also national authorities, when applying EU law.

suggests, paraphrasing Ingolf Pernice and his multilevel constitutionalism[22]. This allows the (highest) level of protection of fundamental rights ensured in the EU to enter into the national legal orders – at least when its authorities act in the field of application of the Union's law – overcoming the dualist vision according to which the standard of fundamental rights protection to apply by national authorities is the one stated in the national Constitution, whereas the patter of fundamental rights protection to be followed by European authorities should be the one defined by the ECFR.

Thus, if the fundamental rights protection of the EU depends on whether or not the situation falls under the field of application of the Union's law, it is important to clearly define the extension of that field. The solution of the enigma results from both the letter and the spirit of art.51 ECFR: the field of application of EU law is the one that derives from its competences, as stated in art.2 TFEU. Therefore, if the Union is competent in a certain field, the standard of fundamental rights protection to apply to concrete cases is the EU's. This problem was not as clearly posed in the EU, because the Treaties did not define criteria to direct the division of competences between Member States and Union – something that is now stated in art.5 TEU, arts.1 to 6 TFEU, having art.51 ECFR established an evident relationship between the fundamental rights protection of the EU with the field of application of EU law defined by the Union's competences. Therefore, for one to be able to invoke the European standard of protection, it is enough that the measure adopted by national or European authorities belongs to the field of application of EU law. In the meanwhile, Portuguese jurisprudence does not show concern for testing whether or not the case under appreciation belongs to that field of application or not[23]. And even when it is

[22] In this sense, see Marta Cartabia, *in L'Europa dei diritti. Commento alla Carta dei diritti fondamentali dell'Unione Europea*, cit., p.348. To understand the concept of "multilevel constitutionalism" see Ingolf Pernice, *Multilevel constitutionalism in the European Union*, *in* European Law Review, 27, 2002.

[23] In this sense, see Supreme Court Sentence of 30/6/2011, available online with number 1272/04.7TBBCL.G1.S1, in which the Court, concerning the freedom of expression protected by art.11 ECFR, says that "The States' obligation to protect the right came up after the facts under appreciation, reason by which taking it into consideration is only useful to explain the reasoning of the Court the hierarchy of values that presides it". The situation did not fall within the field of application of EU law, and there was no need to invoke the ECFR; anyway, the sentence seems to ignore that the application of the European standard of protection does not depend on the date of the facts.

obvious that the situation does belong to the field of application of EU law, the protection coming from the European legal order, through the ECFR, does not seem to have lost the secondary character that was attributed to it by the Portuguese judiciary before the ECFR became primary law of the EU[24].

Having this scenario in mind, the fearful distinction between rights and principles made in the Charter ends up not having any practical consequences in the Portuguese jurisprudence. Under art.6, no. 1, TEU and art.52, no. 7, ECFR, the Comments[25] related to the Charter must be taken into account by the different judicial organs of the EU and of the Member States, when they interpreter the ECFR's norms.

[24] In this sense, see Lisbon Appeals Court sentence of 16/9/2010, available online with number 3232/08.0TBTVD-A.L1-8. The question to be decided was centred in the appreciation of the international competence of the Court to rule the case. The decision under appeal was based in the application of art.8 of EU Regulation 2201/2003 EC, according to which Member States' courts are competent in matters of parental liability concerning a child who lives in that State when the complaint is filled. There was no doubt that the minor in question was then living in Spain – where there was also a court process regarding the regulation of parental duties. However, one of the parties maintained that the Portuguese court should have considered itself competent to judge on whether or not it was in a better position to ensure to child's best interest, having in mind that the girl had a particular relationship with Portugal, according to art.15, no. 3 of the mentioned Regulation. The Appeals Court's decision denied the petition, concluding that Portuguese courts were incompetent. What is impressive is that the petitioner invoked several norms of the ECFR (namely arts.20, 21, 24, 47 and 52) and expressly asked for a preliminary ruling of the ECJ, without the Court even discussing the arguments concerning fundamental rights protection in the European legal order. In the allegations, we read that the Portuguese Court was supposedly violating the main point of the Regulation, expressed in paragraph 33 of the preamble, which states: "This Regulation recognises the fundamental rights and observes the principles of the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure respect for the fundamental rights of the child as set out in Article 24 of the Charter of Fundamental Rights of the European Union". In case of litigation concerning parental duties or children's custody, whenever the competence of the judge called upon to rule the case depends, under EU law, on an answer of the ECJ, this Court adopts the accelerated procedure foreseen in art.23a of the ECJ's Statute and art.104b of the ECJ's Procedure Regulation, with the preliminary ruling being answered in two months. As an example, and because the fundamental rights protection based in the ECFR is largely discussed, see ECJ Sentence J. McB., 5/10/2010, proc. C-400/10 PPU, whose petition entered the Court in 6/8/2010.

[25] The Comments on the ECFR were elaborated under the Convention's *Praesidium* responsibility and published in the OJ of the EU (C-303) in 14/12/07.

According to the comments to art.52 ECFR, the Charter establishes a distinction between rights and principles. Following that distinction, principles are important to the interpretation and judicial review of legislative acts (or execution measures) of European authorities or national authorities applying EU law. However, principles, unlike rights and freedoms, cannot be used to ground direct requests that demand positive action of the Union's Institutions or of Member States' authorities.

This interpretation seems to reintroduce "through the Comments' window" the distinction between civic and political rights, on one hand, and economic and social rights, on the other, that the original version of the ECFR intended to remove. Anyway, the Comments themselves admit that some norms of the ECFR may contain both elements of a right/freedom and of a principle. What is certain is that the protection of fundamental rights in the European Union has evolved from their recognition as general principles of EU law – and that has not prevented the development of that protection in a legal order that is clearly based in principles. This is so, that even with the entry into force of the ECFR, the principle of equality and non discrimination, namely in the field of work relations, has led to unexpected developments in the ECJ's jurisprudence.[26] As Maria Luísa Duarte suggests, Comments written in a definite institutional and timeframe may not, in the future, limit the interpretative freedom of the Union and Member States' courts, nor sustain the interpretative and contextual dynamics of the Charter. [27]

4. Consequences of the EU's adhesion to ECHR (questions 9 and 10)

In the absence of a specific catalogue of fundamental rights, the ECJ has admitted, since the decade of 1970, that the ECHR works as a framework of reference to the protection of fundamental rights in the European legal order. Even with the entrance into force of the ECFR, art.6, no. 3, of TEU, still clearly states that fundamental rights, as guaranteed by the ECHR and as they result from the

[26] See ECJ Sentence Seda Kücükdeveci, 19/1/2010, proc.C-555/07.

[27] In this sense, Maria Luísa Duarte, *Estudos sobre o Tratado de Lisboa*, Almedina, Coimbra, 2010, p.95.

constitutional traditions common to the Member States, shall constitute general principles of the Union's law[28]. Meanwhile, the European Union has not signed the ECHR – only its Member States have done so – and for that reason private parties may not address the ECtHR, in case there is a flaw in the system of fundamental rights protection of the EU, on the grounds of violation of a right stated in the ECHR. This will, however, change, because art.6, no. 2, TEU authorises accession to the ECHR[29]. Anyway, in what regards the current relations between the ECJ and the ECtHR, we must point out that the ECtHR has developed a jurisprudence of *deference* towards the ECJ, based on the presumption of equivalent protection or sufficient judicial protection in fundamental rights matters, ensured by the ECJ. In the *Bosphorus* sentence against Ireland[30], in which this country was accused of violating its obligations under the ECHR by applying a EU regulation, the ECtHR has established that a signatory State respects its obligations under the ECHR when its actions are intended to comply with legal obligations deriving from its statute of EU Member State. Furthermore, we would like to point out that, lately, it has been the ECJ's jurisprudence to influence the ECtHR – something that is evident in recent decisions that relate no the prohibition of discrimination against transgender people.[31]

---

[28] The fact that the fundamental rights granted by the ECHR and resulting from common constitutional traditions are part of EU law as general principles (and not as directly applicable rules) does not demand, in our view, the acknowledgement of limits to the observance of these rights in the Union's law field of application. The recognition of such rights as general principles only continues the development of a specific system of protection, based in interconstitutionality, and guided by the principle of the highest level of protection.

[29] The accession process was surrounded by care, having in mind the technical difficulties that it takes; art.218, no. 8, TFEU, establishes the need for an agreement approved by all the Member States in accordance with their respective constitutional requirements; there is also Additional Protocol 8, concerning the Union's accession to the ECHR; finally, there is the Declaration added to the final conclusions of the Intergovernmental Conference that approved the Lisbon Treaty, concerning art.6, no. 2, TEU, that requests a regular dialogue between the ECJ and the ECtHR and suggests that the accession should preserve the specificities of the EU legal order.

[30] ECtHR sentence Bosphorus v. Ireland, 30/06/2005, no. 45036/98.

[31] In this sense, ECJ Sentence P. v. S., 30/04/1996, proc.C-13/94. In this process, the ECJ had to rule on a dismissal caused by the worker's gender change, and decide whether or not it amounted to discrimination by reason of sex. At the time, the ECtHR had not yet spoken about the matter – something it would only do latter, in Sentence Christine Goodwin v. United Kingdom, 11/07/2002, no.

However, when the accession to the ECHR becomes final, the ECtHR will have, at least in theory, the last word on the protection of fundamental rights in the EU, as private parties will be able to address this Court, in case there is a flaw in the EU's protection system, if their rights stated in the ECHR are violated. A flaw or gap in the Union's protection system may occur especially 1) because of the absence of specific judicial remedies/mechanisms to guarantee fundamental rights in the EU's legal order; 2) because of the difficulties of private parties in addressing the ECJ; 3) because of the resistance of some national courts in dialoguing with the ECJ through preliminary rulings[32]. All of this may prevent the ECJ from solving questions related to fundamental rights – and, in that case, the current presumption of equivalent protection does not make much sense. It is not possible, in the meanwhile, to predict if relationship of *deference* of the ECtHR towards the ECJ will survive after the Union's accession to the ECHR. If that *deference* is maintained, it may put into question the very usefulness of the accession; but in case it is not maintained, the compliance with the principle of the highest level of protection, stated in EU law (art.53 ECFR), may be endangered. Here's the big unanswered question: to know how the accession to the ECHR is compatible with the quest for the highest level of protection, a legal demand of the Union's law. If the accession to the ECHR is not compatible with such a principle of multi-level fundamental rights law, then it will be

---

28957/95. The central question was to define the field of protection of the principle of equality between men and women in professional life – which prohibits that a woman or a man be treated in an arbitrary way because of their sex. There is discrimination by reason of sex when someone is victim of an arbitrary treatment (without reasonable justification) when compared to someone belonging to the opposite sex – and that was not exactly the situation under trial. However, the ECJ decided that when someone is fired because of their intention of having a gender change operation or by having been subjected to such surgery, he or she is victim of discriminatory treatment, in comparison with the people of the sex they used to belong to. In 2002, in the Christine Goodwin case, the ECtHR followed the ECJ's footsteps and decided that nothing opposed the legal recognition of the petitioner's gender change, censoring the ECHR signatory States that refuse such recognition to transgender people.

[32] One of the ways to check the degree of "European awareness" of the national courts is to see the frequency with which they engage in dialogue with the ECJ. Portuguese preliminary ruling requests since the country's accession to the EU are 77 – more or less the number of German preliminary rulings every year. There are, however, positive signs. The ECJ's 2010 report shows that, for the first time ever, Portugal has made 10 preliminary ruling requests – almost all coming from courts in the North of the Country, especially Minho.

a disturbing factor, more than an advantage in what regards the fundamental rights' protection already existent in the EU.

According to arts. 52, no. 3, and 53 of the ECFR, in its respective field of application, the Union's law will grant the highest protection available from the many that may be mobilized to the solution of a concrete case concerning fundamental rights. And that highest protection ensured by the EU's law may be the one established by the ECFR, by the ECHR or by national constitutions, as there may be "differences between the legally relevant levels of protection that derive both from the texts and from their interpretation/practical application, done by the different judicial organs of the different levels of the system" [33]. Nothing may guarantee that the highest level of protection would be the one granted by the ECHR, which is the one the ECtHR would use as a parameter to rule on fundamental rights issues in the EU. In the same way, nothing may ensure that the ECtHR wants to (or can) work accordingly to the principle of the highest level of protection, whenever it is called to decide about flaws in the multilevel system of protection of the EU.

This compels the EU to develop a highly sophisticated system of protection, in order to avoid that, due to its own systemic deficiencies, its citizens be subjected to a level of protection that is inferior to the one that the Union has to offer. The last judicial developments of the ECJ, regarding *a citizenship of rights*, seem to point in that direction[34], but are not yet enough. Anyway, having in mind the requisites to access the ECtHR and the difficulties of response in reasonable time, we think that perfecting the Union's multilevel system depends less on the accession to the ECHR and more on specific actions towards the protection of fundamental rights in the European legal order – which would guarantee a higher protection than the one granted by the subsidiary system of the ECHR. In conclusion, it is important to remember that the Portuguese jurisprudence available in online databanks does not make reference to the *Bosphorus* doctrine when the parties make allegations based in the ECHR, probably because the national judiciary is not yet sufficiently at ease with the specificities of fundamental rights protection in the EU.

[33] In this sense, see J. J. Gomes Canotilho, *Estado de direito e internormatividade*, *cit.*, p.182.

[34] We will develop this idea in the next point, about the ECJ's Zambrano sentence, 8/3/2011, proc.C-34/09.

5. The future of fundamental rights' protection (questions 11, 12, 13 and 14)

Let us recall the concept of a *citizenship of rights*, which is being developed by the ECJ. Recent sentences of this Court (ending in the *Zambrano* decision) allow us to apply the European standard of fundamental rights' protection, based in European citizenship, in order to guaranty the full and secure exercise of the rights recognised by the Union. It was held, until recently, that the possibility of invoking fundamental rights protected by the European legal order depended on the circumstances, namely on the application, in the concrete case, of a European norm (especially an economic liberty, through which the connexion with the European fundamental rights' standards was established), or national rules included in the material scope of application of Union's law (as Member States are subjected to the fundamental rights recognised by the Union's legal order when applying European law). However, recent jurisprudence of the ECJ rethinks this question having in mind the formal recognition of fundamental rights by the ECFR – it is now possible to apply the European standard of fundamental rights, through European citizenship (art.20 TFUE), independently of the application of any other norm of the Union's law.

The *Zambrano* process confronts the European legal order with the meaning and scope of citizenship: is its purpose only to support the economic freedom of movement of economically active citizens, or does it correspond to a uniform catalogue of rights and duties, typical of a Union based on the rule of law, in which fundamental rights perform an essential role? What is at stake here is the urgent need for densification of the scope of application of fundamental rights in the European Union and the consequent access by citizens to the European standard of protection, in order to avoid an inadmissible difference in the treatment of the so-called dynamic citizens (who exercise their classic European rights/economic freedoms and therefore benefit from the European standard of fundamental rights) on one hand, and of static citizens (who do not exercise economic freedoms, and for that reason do not benefit from the European standard) on the other.

The current status of protection of fundamental rights in the European Union does not allow the continuation of the phenomenon of reverse discrimination[35] (which implies the difference in treatment, even in what regards fundamental rights, between static and dynamic citizens) that goes clearly against art.18 TFEU – according to which discrimination on grounds of nationality is prohibited. That result would no longer be compatible with the current context of a *citizenship of rights* and with the trend to match legal positions, using the European fundamental rights standard as basis. It was predictable that the entrance into force of the ECFR would force such demands, as both the EU and Member States are now formally subjected to the same standards of legality (Union based on the rule of law*)* and fundamental rights (through the principle of the highest level of protection – art.53 ECFR). However, the consequences of these new unfolding of fundamental rights in the European integration process are yet to be seen.

If we have to identify what the *Zambrano* sentence adds to the so-called *citizenship acquis*, it is possible to say that, in between the lines of the decision one may read the following conclusions: 1) European citizenship (art.20 TFEU) is not subordinated to the previous exercise of an economic freedom and 2) through European citizenship one may accede to the European standard of fundamental rights' protection. It seems little, but it is not so. In spite of apparently being one more sentence on the protection of third country nationals related to European citizens,[36]

---

[35] As Advocate-General Poiares Maduro explains in its Opinion on the Carbonati process (C-72/03), presented in the 6th May 2004, the expression "reverse discrimination" refers to the cases in which nationals of a Member State who did not use their freedoms of movement find themselves in a less favourable legal situation than the nationals who did exercise the rights based in those freedoms. About this matter, see Henry Schermers/Denis Waelbroeck, *Judicial protection in the European Union*, Kluwer Law International, The Hague/London/New York, 2001, pp.92, where one reads: "whenever a Member State gives a preferential treatment to the nationals of other Member States as opposed to its own national, this should also amount to a discrimination prohibited by the Treaty." And yet: "the Court may be prepared, under certain circumstances, to prohibit reverse discrimination if there is a sufficient relationship with Community law."

[36] There is a lot of jurisprudence in which the ECJ relates economic freedoms with the protection of private and family life (then based in the common constitutional traditional of Member States and the ECHR – and now in art.7 ECFR) and forced Member States to protect third country nationals who were related to European citizens. As examples, see ECJ sentences Mary Carpenter, 11/7/2002, proc.C-60/00; Hacene Ackrich, 23/9/2003, proc.C-109/01; Orfanopoulos, 29/4/2004, joint proc. C-482/01 and

Zambrano carries the seed of a general theory of fundamental rights for the EU (if such is ever achievable, one day), because it confronts the European legal order with all the worrying questions in the field of fundamental rights, in a Union that is supposed to be based on the rule of law.[37]

To conclude, we would say that national law and EU law are so closely interconnected in certain matters that it is not always easy to define the border between them – and this way to decide on whether or not the situation is part of the Union's law field of application, a pre-requisite to invoke the ECFR standard of protection. In this sense, if national courts are familiar with the specificities of fundamental rights protection in the EU legal order, we will certainly see a trend to equalise the European citizens' legal protection, through the prosecution of the highest level of protection under the ECFR. In order to achieve that highest level of protection, however, it is desirable that all European citizens may enjoy the individual constitutional traditions that are recognised as applicable standard in a concrete case by the ECJ. It is therefore very important that the national courts – *maxime* Portuguese courts – engage in dialogue with the ECJ whenever they face a situation where a fundamental right simultaneously protected by the Portuguese Constitution, the ECHR and the ECFR is at stake, in the field of application of EU law.

C-493/01; C. Zhu and M. L. Chen, 19/10/2004, proc.C-200/02; Yunyng Jia, 9/1/2007, proc.C-1/05; R. N. G. Eind, 11/12/2007, proc.C-291/05; Metock, 25/7/2008, proc.C-127/08.

[37] At the moment, the ECJ is facing a preliminary ruling (Dereci Case) which enhances the question of knowing if the Zambrano case is applicable in a situation where there is not financial dependence of the European citizen towards her/his relatives who are not European citizens (proc.C-256/11). The ECJ now has the opportunity to develop the Zambrano Case.