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The Evolving Role of Courts for the European Multi-level Security Setting

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Abstract

Since the September 2001 terrorist attacks, transnational activities of security agencies have been expanded considerably. In parallel, with the establishment and extension of the *Area of Freedom, Security and Justice*, the European Union has become an important player in this field – even more so since the full integration of the policies related to policing, security and justice into the EU framework with the Treaty of Lisbon.

The paper analyses, from a trans-disciplinary legal and political science perspective, the role that European courts play in the regulation of such kinds of transnational security activities. With the European Convention on Human Rights, the EU Charter of Fundamental Rights and the fundamental rights guaranteed by national constitutions, the European multi-level system currently has a normative framework that is dense compared to the situation in other parts of the world. Citizens can, under certain conditions, bring cases before national courts, the Council of Europe's *European Court of Human Rights* and the *Court of Justice of the EU*.

The paper's central research question is related to the role that the CJEU plays in the protection of human rights and civil liberties in the emerging EU multi-level security setting, and the structural limits of court interventions in this field. The paper shows that the institutional setting is favourable for a high level of fundamental rights protection. However, the still emerging normative framework leads to highly diverse outcomes regarding the case law brought before the CJEU. This outcome is the result of conflicting interests such as security, individual freedom and the effective application of the relevant secondary EU law.

Keywords: Court of Justice of the EU; European Court of Human Rights; Area of Freedom, Security and Justice; security agencies; transnational policing; human rights

1. Introduction

Since the September 2001 terrorist attacks, transnational activities of security agencies (police agencies, secret services) have been massively expanded, e.g. with worldwide data collection by secret services such as the US *National Security Agency* (NSA) or the institutionalisation of watchlists for people suspected to be related to terrorist activities. Many of these security measures are accompanied by considerable intrusions on individual human rights: primarily privacy and data protection, but also the freedom of movement and sometimes even the right to life and physical welfare.

In parallel, with the establishment and extension of the *Area of Freedom, Security and Justice* (AFSJ), the European Union has become an important player in this field. The importance of the EU as an actor has deepened since the full integration of the policies related to policing, security and justice into the EU framework with the Treaty of Lisbon.

The paper analyses, from a trans-disciplinary legal and political science perspective, the role that European courts, especially the *Court of Justice of the EU* (CJEU), play in the regulation of such kinds of transnational security activities. With the European Convention on Human Rights, the EU Charter of Fundamental Rights and the fundamental rights guaranteed by national constitutions, the European multi-level system currently has a normative framework that is dense compared to the situation in other parts of the world. Citizens can, under certain conditions, bring cases before national courts, the Council of Europe's *European Court of Human Rights* (ECtHR) and the CJEU with its two components – the *Court of Justice* (ECJ) and the *General Court* (formerly *Court of First Instance*).

The paper's central research question is related to the role that these courts play in the protection of human rights and civil liberties in the EU multi-level security setting, and the structural limits of court interventions in this political and administrative field. The paper also discusses the relationship between the limitations of the role that courts can play for the regulation of transnational security activities and the regulatory shortcomings in substantive European and international law. The paper shows that the institutional setting is favourable for a high level of fundamental rights protection. However, the still emerging normative framework leads to highly diverse outcomes regarding the case law brought before the CJEU. This divergent outcome is the result of conflicting interests such as security versus individual freedom in addition to an effective application of EU secondary law, which is reflected in the Court's case law – together with the Court's own institutional interest, especially concerning its relationship with the ECtHR and the Member States' constitutional courts.

The trans-disciplinary approach followed in this paper is situated in the broader political and scholarly debate on the emergence of a European multi-level security system (e.g. Fijnaut 2010 and 2015; Occhipinti 2003; Bigo 1996; Bigo, Carrera et al. 2011; Aden 1998, 2014a and 2014b) and on the role of courts in the European multi-level system (e.g. Weiler 1981; Stone Sweet 2000; Alter 2000, 2001 and 2009; Höpner 2010a and 2010b; Panke 2010; Kelemen 2011; Zapka 2014). The paper intends to connect these two bodies of literature empirically based on a selection of the CJEU's recent case law (see also Aden 2013a on the role of AFSJ issues in the German Constitutional Court's judgment on the constitutionality of the Lisbon Treaty). In the past, the scholarly debates on European courts and on the AFSJ have been only rarely connected (e.g. by Hatzopoulos 2008; Peers 2013, Aden 2013a), as the EU courts' jurisdiction for most aspects of the AFSJ was a "quantité négligeable" until the early 2000s, compared to other European policy areas.

2. The evolving European multi-level security setting and fundamental rights before and after 2001 and 2009

In a trans-disciplinary, historical-institutionalist perspective, the 2001 terrorist attacks and the changes of the legal framework for the AFSJ with the Treaty of Lisbon can be perceived as critical junctures that modify previous path-dependencies and that explain change that has occurred for the role of courts in this field (cf. Schmidt 2010 on the application of the historical-institutionalist concept of path-dependencies on the EU courts' case law).

The relevance of legal protection against transnational activities of security agencies is directly connected to the intensity of the security measures. Recent escalation of activity is often framed as a reaction to the 2001 terrorist attacks. However, a long-term perspective shows that the developments that emerged since 2001 also build upon path-dependencies established over several decades. Since the 1970s, trans-border security cooperation has become an important issue in Western Europe, and transnational police cooperation dating even back to the late 19th century (cf. Fijnaut 2010 and 2015; Deflem 2002). With a growing intensity of cooperation, cases in which individual liberties and rights are affected are more likely to occur.

From the very beginning, transnational cooperation among security agencies was related to information sharing about people suspected to be involved in criminal activities or believed to be a danger for public security. However, only since the 1970s when police agencies started to

use computer technology for their databases, was police information sharing conceived as a human rights issue. This new perception was strongly underlined in the 1980s when the German Constitutional Court (*Bundesverfassungsgericht*) established the fundamental right to *informational self-determination* (BVerfGE 65, 1; cf. Schlögel 2010, 47-52; Aden 1998 and 2014a). The status as a fundamental right means that collecting and transferring data restricts *informational self-determination* and therefore requires justification by a law. Proportionality of the security measure is then required in relation to the intensity of the intrusion into privacy. Soon this perspective became influential at the European level where police cooperation was more and more officialised and legitimised by international law treaties and later by EU law. While transnational information sharing among security agencies was mostly informal at the beginning, there has been at least some kind of pro forma regulation in the relevant pieces of EU law for *Schengen*, *Europol*, *Eurodac*, the *Visa Information System* etc. (cf. Boehm 2012; Aden 1998 and 2014a and 2014c; Albrecht 2015), while the instruments for information sharing among secret services remain mostly unregulated and secret.

Individuals' fundamental rights are also broadly concerned where security agencies have gained access to data initially gathered for other purposes. In the EU multi-level system this is the case for fingerprints (*Eurodac*) and for the *Visa Information System* (VIS). Both databases established for visa and immigration policy can be used by security agencies under conditions defined in the relevant secondary EU law (cf. Balzacq & Léonard 2013; Aden 2014c).

In the period after the September 2001 terrorist attacks, intensified cooperation led to new measures restricting individual rights. People suspected to be related to the financing of terrorist activities were placed on *terrorist lists* established by the UN Security Council and by the European Union. Being listed has severe consequences including restrictions on travelling and participation in economic life (cf. Eckes 2009; Sullivan & Hayes 2010; Aden 2013b). Preventive data retention became a major issue in that period – sometimes based on legal instruments (cf. Boehm 2012; Boehm & Cole 2014; European Commission 2012), sometimes on more or less informal practices established by transnational networks of secret services under the lead of the US NSA (cf. the Beckedahl & Meister (eds.) 2013).

The instruments available for EU-wide law enforcement increased with the European Arrest Warrant. This law enforcement tool facilitates the easy arrest of individuals anywhere in the EU for crimes that they are suspected to have committed in other Member States. Therefore cases in which the individuals concerned feel a need to have such kinds of measures checked by a court have become much more relevant (cf. Peers 2013; Aden 2013a).

When the Treaty of Lisbon entered into force in 2009, full integration of AFSJ policies into the EU framework became another critical juncture for the courts' role in the multi-level field. With the full integration of the Charter of Fundamental Rights into EU primary law, the normative framework has developed considerably towards – at least potentially – a higher weight of fundamental rights in CJEU case law. And with the European Parliament's increased powers for AFSJ, the elaboration of the relevant substantive law is subject to broader political debates than before, whereas previously justice and home affairs ministers decided alone in most cases (cf. Aden 2015). However, this does not mean that the new secondary legislation to be applied by the CJEU is necessarily more oriented towards the protection of civil liberties (cf. Albrecht 2015 and Kietz 2015).

3. Remedies before courts in the emerging EU multi-level security system: two types of access to courts and potential inter-court competition

In democratic rule of law systems, providing legal remedies against activities of security agencies that restrict individual rights is among the core tasks of courts. In the EU, this is a recent phenomenon, as internal security cooperation only became an official EU policy with the Treaty of Maastricht, and even then remained an intergovernmental *third pillar* until 2009 when the Treaty of Lisbon entered into force. With successive steps bringing the former *third pillar* policies closer to a core EU competency, the number of cases related to security issues brought before EU courts was already important in the period before 2009.

As there are still no “operative” police units at the EU level, the Member States' security agencies play an important role in the implementation of security measures in the EU multi-level system. Therefore, individuals concerned can also use legal remedies before national courts. Thus, the intensity of legal protection depends upon the domestic legal system and the relevant procedural law. European harmonisation is low in this field, and the intensity of legal protection therefore depends upon the access to legal remedies that national law allows to individuals.

All EU Member States are also members of the Council of Europe and the European Convention on Human Rights (ECHR). Therefore, cases in which the Member States' security agencies implement security measures based on EU law might also be brought before the European Court of Human Rights (ECtHR) if individuals feel that their Conventional rights have been violated. Apparently, this has not been relevant in practical terms yet, but

this might change in the future when the EU becomes a member of the ECHR. However, the CJEU's opinion (no. 2/13) published on 18 December 2014 on the draft accession treaty demonstrates that the accession also creates a potential concurrence and inter-court competition between the CJEU and the ECtHR – the outcome of which remains uncertain.

In the perspective of the citizens' remedies against security agencies' activities that endanger their fundamental rights, two types of courts can be distinguished: courts with direct and with indirect citizens' access. The ECtHR and some national constitutional courts, e.g. the German *Bundesverfassungsgericht*, under certain formal requirements, grant direct access to citizens. Normally, all remedies before ordinary national courts have to be exhausted before citizens can bring an application before the ECtHR or a constitutional complaint before the *Bundesverfassungsgericht*. By contrast, for the CJEU, direct access is limited to cases in which citizens are directly concerned by an EU decision, for example, as recipient of a subsidy or as employee of an EU institution. This has led to numerous strategies developed by (potential) litigants to use other pathways for access to the CJEU, especially preliminary reference proceedings that require a case before a national court in which the citizens convince judges to refer to the CJEU questions related to EU law aspects of the case (cf. Alter 2001 on strategies developed by citizens and NGOs).

4. The Court of Justice of the European Union: highly contested judgments and the Courts' extended role for AFSJ issues since the Treaty of Lisbon

The trans-disciplinary debate on the role that the Court of Justice of the EU plays in the European multi-level system was initially built around the question how to explain the Court's political influence. The "classical" judgments that established politically highly relevant landmark elements of doctrine such as the supremacy of EU law over the Member States' law in the 1960s and the direct effect of European directives that have not been correctly implemented by the Member States in the 1970s and 1980s have been in the centre of the relevant scholarly debates (e.g. Weiler 1981 and 1999; Cappelletti, Seccombe & Weiler, 1986; Stone Sweet 2000; Craig 2001; Alter 2001).

In recent years, there has been a shift towards a controversial debate on the impact of judgments by the Court of Justice on individual liberties. The contributions to this debate are characterised by divergent perspectives which depend upon the chosen policy fields or normative judgments found in the scholarly literature.

Those scholars interested in labour policy intensively debated a number of judgments that tended to attribute a higher legal value to the economic fundamental freedoms compared to the workers' and trade unions' collective fundamental rights (cf. Joerges & Rödl 2009, 10 ff.; Höpner, 2010b, 15 ff.; Sack 2010). In 2007, in the *Viking Line* case, the Court had to answer the question whether activities organised by trade unions to force a company to conclude a labour agreement were in line with freedom of establishment (Article 49 TFEU). The Court held that the protection of workers' rights can be of general public interest, but claimed a case by case check of the proportionality of the trade unions' activities in relation to the employer's freedom of establishment (ECJ, case C-438/05, judgment of 18.12.2007, *International Transport Workers' Federation/ Finish Seamen's Union v. Viking Line ABP et al.*). As the EU Charter of Fundamental Rights became binding only with the Treaty of Lisbon, the Court did not take into account the *right of collective bargaining and action* guaranteed in Article 28 of the Charter. The Court's judgment in the 2007 *Laval* case has been contested in a similar way. In this case, the Court had to decide on a conflict between trade unions blocking construction sites in order to prevent employers from paying low wages. The employers argued that this was an illegal infringement to the free movement of services. Again the Court did not take Article 28 of the Charter into account nor the "common tradition" of the Member States' fundamental rights. Another highly contested case related to labour law and trade unions concerned public procurement law. The Court held that rules declaring domestic wages based on trade agreements binding for companies from other Member States for public procurement ("*Tariftreueklausel*") are incompatible with the free movement of services (ECJ, case C-346/06, judgment of 3.4.2008 (*Rüffert*); cf. Sack 2010, 631-632 for a critique.)

For the policies that belonged to the *third pillar* from the Treaty of Maastricht until the Treaty of Lisbon entered into force, the Court's case law gained importance with the successive steps that brought AFSJ issues closer to the general EU framework – several years before the end of the *third pillar*. Preliminary reference proceedings gained importance for this policy field when Member States made use of the option opened by ex-Article 35 TEU (in the Amsterdam Treaty version) to recognise the Court's jurisdiction for third pillar cases (cf. Tohidipur 2008, 121 f.).

4.1 Judgments on the legal value of third pillar instruments

The Court used ex-Article 35 cases to extend the legal value of laws passed under the third pillar regime. In the broadly discussed 2005 *Pupino* case, the Court stated clearly that third

pillar framework decisions, the equivalent to directives in the former *third pillar*, were part of its jurisdiction (ECJ, case C-105/03, judgment of 16.6.2005, *Criminal proceedings against Maria Pupino*; cf. Callewaert 2007).

In 2005, the Belgian lawyers' NGO *Advocaaten voor de Wereld* challenged the validity of the EU third pillar framework-decision on the European arrest warrant (2002/584/JHA) and convinced a Belgian court to send questions on this purpose to the ECJ. In its judgment, the Court rejected the argument brought forward by the litigants that the framework decision was in conflict with the principles of equality and non-discrimination (ECJ, case C-303/2005, judgment of 3.5.2007, *Advocaaten voor de Wereld v. Leden van de Ministerraad*; cf. Hatzopoulos 2008). Interestingly, the Court intensively referred to the old version of Article 6 TEU and to the relevant case law by the ECtHR – and even mentioned the EU Charter of Fundamental Rights (paragraph 46) - a rarity at that time.

Both judgments continued the Court's "classical" line of pro-European case-law. They contributed to reduce uncertainties related to the legal value of the former third pillar instruments that had persisted until then – by attributing them a legal value very similar to the core EC law at that time. With the Treaty of Lisbon and the integration of the third pillar into the new EU framework, this case law has become legal history. However, in a trans-disciplinary perspective, these cases still demonstrate the persistence of the "classical" line of pro-European ECJ/CJEU decisions.

4.2 Individuals concerned by substantive European law: *ne bis in idem*

For other types of cases, the Court started to intervene when relevant parts of AFSJ issues had been transferred to the first pillar by the Treaty of Amsterdam, especially Schengen cooperation. In a number of cases, the Court had to decide how to handle the *ne bis in idem* principle laid down Article 50 Schengen Convention and also in the Charter of Fundamental Rights: "No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law" (Article 50). Cases in which citizens had been convicted for criminal offenses in one Member State and were then accused for the same kind of offense related to the first case in another Member State were brought before the Court, e.g. cases of trans-border drug trafficking or violations of customs law (e.g. ECJ, case C-436/04, *Van Esbroeck*, judgment of 9.3.2006; case C-367/05, *Kraaijenbrink*, judgment of 18.7.2007; case C-467/04 *Gasparini et al.*, judgment of 28.9.2006). In the *Van Esbroeck* case, the Court

required the “existence of a set of facts which are inextricably linked together” for the application of *ne bis in idem* – and the Court found that this is the case for the importation and exportation of the same illegal drugs. However, the outcome of these cases was not necessarily directed towards a high level of protection of *ne bis in idem* as a fundamental right. In the *Kraaijenbrink* case, the Court found that the same criminal intention is not sufficient as a link between different criminal acts – and that therefore the national criminal courts may punish these acts separately (cf. Weyembergh 2013 for an in-depth analysis of the relevant cases).

Even if the normative value of *ne bis in idem* has been further strengthened with the Charter of Fundamental Rights, complex cases in which new questions are raised continue to be brought before the Court. In the *Akerberg Fransson* case, the Court found that the combination of a sanction foreseen by tax law and by criminal law is not in conflict with the *ne bis in idem* principle (CJEU, case C-617/10, *Aklagare v. Hans Akerberg Fransson*, judgment of 26.2.2013). For cases of punishments that combine imprisonments and a fine, the Court held that *ne bis in idem* is not yet violated if the same case is being heard before a criminal court in another Member State (e.g. CJEU, case C-129/14, judgment of 27.5.2014).

The *ne bis in idem* cases show that the Court is far away from judicial activism in favor of a broad interpretation of fundamental rights.

4.3 Autonomous interpretation of fundamental rights by the EU courts: the terrorist watchlist cases

Annulment cases occurred where individual rights were directly affected by decisions under EU law. Repeatedly citizens brought cases before the Court related to the terrorist watchlists. The cases show the importance of the institutional setting for access to justice. Because the EU doubles the listing according to Regulation (EC) no. 881/2002, the individuals concerned have the right to challenge this decision in an annulment procedure according to Article 263 TFEU (ex-Article 230 TEC). At the beginning, the former Court of First Instance (now: General Court) ruled that the EU simply had to accept decisions by the UN Security Council to put someone’s name on the UN terrorist list (Court of First Instance, case T-315/01 *Kadi v. Council and Commission*, judgment of 21.9.2005). Only when the Court of Justice heard the case in the second instance, were the litigants able to successfully argue that the listing had to be annulled because they did not respect minimum procedural standards for decisions restricting human rights (ECJ, case C-402 and 415/05 P, judgment of 3.9.2008, *Kadi and Al*

Barakaat International Foundation v. Council of the EU; cf. Eckes 2010; Aden 2013b). In these cases, the Court did not yet quote the fundamental rights guaranteed by the EU Charter.

This changed in the next round of judgments in these cases. After the 2008 judgment, the UN and the EU somewhat improved the procedural standards for the listing process, especially with an ombudsperson established to hear cases in which the individuals or groups concerned demand a de-listing (cf. Aden 2013b). According to the revised procedure, Mr. Kadi was listed again, and he initiated a new case before the General Court that he won (Case T-85/09 *Kadi v. European Commission*, judgment of 17 June 2010). This time, the first instance judgment was challenged in an appeal before the Court of Justice by the Commission and a number of Member States. The Court of Justice rejected the appeal and referred to the right to good administration (Article 41 (2)) and to the right to an effective remedy and to a fair trial (Article 47) guaranteed by the EU Charter of Fundamental Rights that now had become binding (CJEU, cases C-584/10 P, C-593/10 P and C-595/10, judgment of 18 July 2013).

These cases show a trend in the Court's AFSJ case law: While the Court apparently does not tend to a wide material interpretation of the fundamental rights guaranteed by the Charter, the series of watchlist cases has considerably strengthened procedural requirements and legal remedies for EU law based State intrusions into fundamental rights. This is in line with a trend in national constitutional law, e.g. with the "protection of fundamental rights by procedures" ("Grundrechtsschutz durch Verfahren") claimed by the German *Bundesverfassungsgericht*.

4.4 The CJEU as a constitutional court applying the proportionality doctrine? The invalid data retention directive

Similarly, the Court's position developed for data retention. In 2006, the Irish government had challenged the EC Data Retention Directive 2006/24/EC. However, the legal question to be answered was related to the EC competence to regulate data retention, not to the restrictions to fundamental rights that data retention constitutes. Ireland's annulment case was not successful. The Court followed the Commission's legal position saying that the EC was entitled to regulate data retention under the first pillar because of the implications for the internal market in relation to telecommunication services (ECJ, case C-301/06, judgment of 10.2.2009; *Ireland v. European Parliament and Council*; cf. Kahler 2008).

In 2012, data retention was challenged again in preliminary reference cases initiated in Ireland and in Austria. This time, the Court declared Directive 2006/24/EC invalid, arguing that the obligation of data retention as required by the Directive is not proportional in view of the interference with the right to the protection of private life (Article 7) and data protection (Article 8) guaranteed by the Charter of Fundamental Rights (CJEU, cases C-293/12 and C-594/12, judgment of 8.4.2014; cf. Boehm & Cole 2014). Interestingly, this judgment is mainly relying on proportionality arguments – with the Court holding that data retention is not incompatible with fundamental rights under all circumstances. These arguments are very close to the German Constitutional Court’s 2010 judgment on the German transposition of the data retention directive (BVerfGE 125, 260), even if the Constitutional Court did not dare to question the constitutionality of the European Directive at that time (cf. Aden 2013a).

If constitutional courts construct their judgments around proportionality arguments, they leave a margin to politics to use far-reaching restrictions on fundamental rights if the security aim is very important, e.g. the prevention of terrorist attacks. The German Constitutional Court has been using this strategy in a whole series of security-related judgments (cf. Schlögel 2010 and Aden 2013a for a critical analysis).

4.5 Fundamental rights limited by effective EU law?

Some of the cases discussed above, especially the 2014 data retention case, demonstrate that the new status of the Charter has the potential to bring the Court’s role closer to a classical (constitutional) court protecting the citizens against excessive security measures. However, this role is less clear when the fundamental rights guaranteed by the Charter are in conflict with other elements of EU law doctrine, e.g. *effet utile*. This occurred for example in the *Akerberg Fransson* case with its restrictive interpretation of the *ne bis in idem* principle (CJEU, case C-617/10, judgment of 26 February 2013; see section 4.2 above).

Other cases show that the Charter does not necessarily motivate the Court to make judgments in which it opts for an activist and broadening interpretation of fundamental rights. In a preliminary reference case from a German administrative court, challenging the obligation to include biometrical data in passports, established by Regulation (EC) No. 2252/2004, the Court did not find this obligation disproportionate in relation to the aim to prevent the fraudulent use of passports (CJEU, case C-291/12, judgment of 17 October 2013).

Article 53 of the Charter guarantees a high level of protection for the interpretation of the rights included in the Charter and in other legal documents, i.e. in national constitutions:

“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”. In a preliminary reference case concerning the European arrest warrant, brought before the CJEU by the Spanish Constitutional Court, the CJEU opted for a more restrictive interpretation of Article 53: “The interpretation envisaged by the national court at the outset is that Article 53 of the Charter gives general authorisation to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law. Such an interpretation would, in particular, allow a Member State to make the execution of a European arrest warrant issued for the purposes of executing a sentence rendered in absentia subject to conditions intended to avoid an interpretation which restricts or adversely affects fundamental rights recognised by its constitution, even though the application of such conditions is not allowed under Article 4a(1) of Framework Decision 2002/584. Such an interpretation of Article 53 of the Charter cannot be accepted” (CJEU, case C-399/11, *Stefano Melloni v. Ministerio Fiscal*, judgment of 26.2.2013, paragraphs 56-57).

These cases demonstrate that, despite the data retention judgment, the CJEU is currently far from becoming a leading activist for the protection of fundamental rights.

5. Old and new interconnections between the Court of Justice of the EU and the European Court of Human Rights in the European multi-level security system

Until now, the European Court of Human Rights (ECtHR) has not been directly linked to EU law cases. However, the ECtHR influence on policing in the European multi-level system is considerable. For example, in the early 1990s, the Court contributed to establishing the principle that legal rules allowing the Member States to restrict fundamental rights must describe precisely what security agencies shall be allowed to do (ECtHR, application 11801/85, *Kruslin and Huvig v. France*, judgment of 24 April 1990; cf. Aden 1998, 381). In numerous cases, the Court has defined limits for security agencies, for example, in relation to the prohibition of torture (Article 3), the right to liberty (Article 5) or the right to protection of private life (Article 8) as guaranteed by the European Convention on Human Rights.

The role of the Convention and of the ECtHR will probably become even more important in the emerging European multi-level security system when the option of the EU's accession to the Convention foreseen in Article 6 (2) TEU and currently under negotiation becomes reality. In cases related to fundamental rights, judgments by the CJEU will then no longer be the last word, as individuals may bring the same case before the ECtHR. This might explain the restrictive outcome of the CJEU's opinion no. 2/13 on the draft accession treaty published in December 2014.

6. Conclusion and outlook: National und European courts in the evolving European multi-level security setting – the uncertain way towards accountability and rule of law

In conclusion, the emerging European multi-level security system has developed a number of instruments that endanger the citizens' fundamental rights. Binding the security agencies' trans-border activities to legal rules and to a high level of protection for the individual rights concerned has therefore become ever more important.

The parallel existence of legal remedies at different levels in the European multi-level system – national courts, the CJEU and the ECtHR – may be interpreted as an indicator for a development towards a high level of protection for the individuals' fundamental rights. However, the paper has shown that a positioning towards a high level of protection for the citizens' fundamental rights cannot be clearly detected for the CJEU. The Court now frequently uses references to the Charter of Fundamental Rights, since the Charter has become legally binding with the Treaty of Lisbon, and also frequently quotes the ECtHR's case law in its judgments. However, it is still not clear how the Court will position fundamental rights in relation to other elements of EU law: the economic fundamental freedoms, the *effet utile* doctrine and in relation to security interests brought forward in the relevant cases. For future rounds of Treaty revisions, this leads to the question whether the hierarchy of norms should be revised in order to attribute a higher legal value to fundamental rights in relation to economic fundamental freedoms.

The further development of the CJEU's role in the EU system will not only be determined autonomously in the legal system (in the sense of Luhmann 1995), but also depends upon political decision-making. Even more than in the past, this decision-making is restricted by the unanimity required for Treaty amendments (cf. Alter 2000 and 2001 on the consequences for political reactions to the ECJ's case law).

This paper has shown that the interconnections between CJEU case law and politics are not limited to the annulment cases in which Member State governments are the litigants (cf. Adam, Bauer & Hartlapp 2015 on these cases) – or to the infringement proceedings directed against Member States (cf. Panke 2010). Cases from the citizens' everyday life brought before the CJEU in preliminary reference proceedings largely depend upon the wording of secondary EU law as it has been passed by politics: for the AFSJ mainly by the Member States governments before the Treaty of Lisbon and now involving the Parliament and the Council.

Another interesting question is related to the future relationship between national (constitutional) courts, the CJEU and the ECtHR. Will conflicts and concurrence between these courts become more relevant – or will there be coordination in favour of the protection of the individuals' rights (cf. Jaeger 2005)? The further development of the European system of multi-level legal remedies will therefore remain an interesting topic for further trans-disciplinary research.

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