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## 6.1 Introduction

The fact that the EU, when formally still the EEC, consciously developed an external environmental policy highlights that it never sought to advance economic interests only. Consequently, at least some of the Union's external policies can claim to possess a certain moral calibre. Such an assertion is boosted by the fact that, already quite a few years ago, the EU decided to craft an external human rights policy (EHRP). This policy could only come about once the decision was made to internally cross the Rubicon as well, i.e., when a system of fundamental rights protection was set up to also keep the Union's institutions and Member States in check. For an organisation that focused for years on breathing life into an internal market, this might seem rather odd. Yet, the 'spill-over' to fields adjacent to the internal market, such as social policy, consumer protection and the environment, led to an expansion of the EU's powers, which in turn necessitated the installation of ever greater checks and balances on those powers.

For ardent supporters of European integration, almost every expansion and transfer of competence from the Member State to the EU level constitutes a positive development. For sceptics, such transfers give rise to concerns about the protection

of the fundamental rights of natural and legal persons.<sup>1</sup> Many of these rights are guaranteed by Member State constitutions, and in most countries, individuals can enforce them in national courts. Yet, national mechanisms to control the manner in which the authorities use their powers apply with less vigour to rules made at a higher level. At that higher level, there may well be other mechanisms available, but these will always be decidedly less ‘native’ and practically less accessible. Paradoxically, once an organisation such as the EU crafts an external human rights policy, similar concerns make themselves felt. After all, the third countries that choose to enter into legal relationships with the EU, predicated on the Union’s fundamental rights standards, succumb at least partly to powers from abroad; they agree to tone down their internal means of control, and allow their domestic legal order to be penetrated by norms from the outside.<sup>2</sup> Resistance is especially futile against those rules the EU claims to be elementary and indisputable—even when the constitution and cultural traditions of the third country do not recognise the norms as such. Apart from severing the links with the EU, there will be no way to control the manner in which the external authorities use their powers, and halt the process of ‘normative imperialism’.

Of course, what the Union’s external human rights policy aims to achieve is at its core wholly laudable. Moreover, the aforementioned ‘cultural traditions’ frequently serve as a sham justification for non-democratically governed countries unwilling to switch over to civilised, nearly universally recognised forms of conduct. At the same time, one cannot be too surprised of the repugnance of the Union’s international partners at the assumption that western values and conceptions are the right ones, and that these cannot convincingly be called into question. The question remains, however, where the balance should be struck.

The foregoing touches on just one of the issues that will be explored further in this chapter. For a good understanding of the workings of the EHRP, we will first provide a brief overview of the general place of fundamental rights in the European legal order (Sect. 6.2). We hereafter zoom in on the EHRP’s leading principles (Sect. 6.3). Next, attention is given to some specific external fundamental rights initiatives (Sect. 6.4). In that same section, we return to the discussion above and investigate the recurring complaint that the EU exhibits a disturbing ‘Janus-face’ in the standards for fundamental rights protection it claims to adhere to.

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<sup>1</sup>In the classic sense, the concept denotes those rules that, for starters, guarantee individuals a ‘private’ sphere in which public authorities cannot intervene (for example, the right to freedom of expression), and in addition, limit the ways in which authorities can use their powers in other fields (for example, the right to a fair trial).

<sup>2</sup>Even if, at the negotiation stage, they will of course still have a say on which norms will exert such influence.

## 6.2 The EU and Fundamental Rights: A Concise Overview

The founding treaties of the European Union originally did not contain any provision with regard to the protection of fundamental rights.<sup>3</sup> A common explanation for this is that the *pères-fondateurs* expected them to be a matter for the Council of Europe, and that the process of economic integration set forth in the EC Treaties would not come close to treading upon the subject at all. For that reason, in the early case law, the ECJ chose to dodge or repudiate questions on possible fundamental rights violations. In two cases brought under the TECSC, *Stork* and *Geitling*,<sup>4</sup> the Court refused to go along with the applicants' reasoning that the decisions challenged violated fundamental rights guaranteed by the German constitution. Subsequent events, however, forced the Court to alter its position.

First of all, the 1960s and 1970s arrived, two decades that witnessed great advances in international human rights development. With the adoption of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, it became evident that fundamental rights extended to the political as well as the socio-economic sphere. Unsurprisingly then, the substance of several of the rights laid down in these conventions drew very near to the European Communities' sphere of activities.

Secondly, with *Van Gend & Loos*, the ECJ had placed the individual at the centre of the European legal order.<sup>5</sup> Furthermore, pursuant to the principle of supremacy, Member State courts were bound to give precedence to Community rules over conflicting national rules and even over national constitutions.<sup>6</sup> The question subsequently arose who would then protect fundamental rights as expressly provided for in those constitutions: if national courts could not override Community law, and if the ECJ could not apply national law, where were individuals to turn if, in the course of the application of EC law, their constitutionally guaranteed rights were violated? High courts in France and Germany assumed that they had to qualify the supremacy of EU law, as long as the issue was not satisfactorily settled at the European level.

Cornered from two sides, the ECJ was left with no choice but to change course. Thus, in *Stauder*,<sup>7</sup> *Nold*,<sup>8</sup> and *Internationale Handelsgesellschaft*,<sup>9</sup> it took on the

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<sup>3</sup>This is all the more remarkable if one recalls that the initial proposals for a European Political Community and a European Defence Community, drawn up in the early 1950s, did contain ample references to fundamental rights. In fact, the EPC Treaty proposed to incorporate in full Section I and the First Protocol of the ECHR. On this context, see further de Búrca (2011).

<sup>4</sup>Case 1/58, *Stork v High Authority*; Case 36/59, *Geitling v High Authority*.

<sup>5</sup>Case 26/62, *NV Internationale Transportonderneming Van Gend & Loos v Nederlandse Administratie der Belastingen*.

<sup>6</sup>Case 6/64, *Costa v ENEL*; Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*.

<sup>7</sup>Case 29/69, *Stauder v Stadt Ulm*.

<sup>8</sup>Case 4/73, *Nold Kohlen- und Baustoffgroßhandlung v Commission*.

<sup>9</sup>Case 11/70, *Internationale Handelsgesellschaft GmbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*.

role of a court willing to engage in the protection of fundamental rights at long last. Taking its cue from constitutional traditions common to the Member States, as well as from international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories (with particular attention for the ECHR<sup>10</sup>), the Court was willing to craft an autonomous catalogue of rights that the EU institutions would henceforth have to observe.

**Box 6.1 The Status of External Human Rights Within the EU: Inspiration, Not Invocation**

It deserves stressing that the articles of the ECHR and all other international instruments referred to the case law of the ECJ are not, as such, materially incorporated in EU law: from the very beginning, the Court has made clear that these documents serve as sources of inspiration. This entails that individuals can never directly invoke the ECHR, ECtHR jurisprudence or any other international fundamental rights convention before the EU Courts—unless the Union has itself acceded to the treaty in question, implemented the contentious provisions, or otherwise allowed for a reliance on those norms.

Even though the scope of protection of certain fundamental rights may differ among Member States, the Court often considers itself able to identify a minimum level of protection that should be afforded throughout the Union.<sup>11</sup> Thus, it has throughout time been happy to fill perceived gaps in the Treaties, seeking to add credibility and legitimacy to the European legal order by taking the rights of individuals seriously. In so doing, it eventually managed to dispose of the threat of national judicial opposition to the principle of supremacy of EC law.

This development did not go unnoticed at the political level, even though legislative progress in this context was very slow. After many soft law recognitions of the substance of the Court's decisions, with the Maastricht Treaty, a provision was finally inserted (then Article F(2) TEU), emphasising that the Union would respect fundamental rights as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States. At the Amsterdam Treaty, this provision was rendered justiciable, which meant that the ECJ was now officially allowed to engage in a review of (most) EU rules for compliance with human rights standards.

The ultimate recognition of the central importance of fundamental rights in the Union arrived with the Lisbon Treaty. The restyled Article 6 TEU not only created a

<sup>10</sup>See e.g. Case 36/75, *Roland Rutili v Minister for the Interior*.

<sup>11</sup>For example, with regard to the right to strike (see Case C-341/05, *Laval un Partneri Ltd. v Svenska Byggnadsarbetareförbundet and Others*), or the right to be protected against age discrimination (see Case C-144/04, *Werner Mangold v Rüdiger Helm*).

legal basis for accession to the ECHR,<sup>12</sup> but also awarded binding force to the Charter of Fundamental Rights,<sup>13</sup> which had before only been solemnly proclaimed. The revised Article 2 TEU put beyond doubt that the Union nowadays truly ‘means business’, proclaiming that the EU is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and human rights, including the rights of persons belonging to minorities.

Already in 2007, in order to contribute to the realisation of these objectives, the EU Monitoring Centre for Racism and Xenophobia was recast into a dedicated Fundamental Rights Agency.<sup>14</sup> Importantly though, this agency is charged with providing expertise, formulating appropriate courses of action and supporting the adoption and implementation of the relevant rules; it is not empowered to examine individual complaints or to exercise regulatory decision-making powers.

After years of negotiation on the Union joining the ECHR, that process unexpectedly ground to halt in December 2014. In a lengthy opinion that reverberated like a bombshell, the Court declared the draft accession agreement incompatible with EU law, mainly out of fear that the autonomy and the special characteristics of the European legal order would be compromised.<sup>15</sup> Considering the arguments employed to support that conclusion, and the magnitude of the problems flagged by the ECJ, the stagnation caused appears difficult to overcome.<sup>16</sup>

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## 6.3 Leading Principles of the EHRP

### 6.3.1 Legal Basis and Relation with Other External Competences

Contrary to the CCP and EEP, which were officially included in the Treaties at identifiable points in time, the EHRP has no precise ‘birth date’. In the early 1990s, numerous political statements proclaiming the importance of respecting and safeguarding human rights in international relations saw the light of day.<sup>17</sup> The desire for a common and consistent approach was strongly evident, but what persisted nevertheless was a piecemeal approach. As a result, in the current legal framework, a separate title or chapter on the Union’s external human rights policy still cannot be found.

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<sup>12</sup>A basis the ECJ earlier considered to be lacking in its Opinion 2/94, *Accession of the Community to the European Convention on Human Rights*.

<sup>13</sup>*Charter of Fundamental Rights of the European Union*, OJ [2010] C 83/389.

<sup>14</sup>*Council Regulation 168/2007 establishing a European Union Agency for Fundamental Rights*, OJ [2007] L 53/1.

<sup>15</sup>Opinion 2/13, *Accession of the European Union to the European Convention on Human Rights*.

<sup>16</sup>Cf. Halberstam (2015).

<sup>17</sup>See e.g. Resolution of the Council and of the Member States meeting in the Council on human rights, democracy and development, Bull. EC 1991, p. 122.

In Article 21(1) TEU, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity and equality and solidarity are listed among the principles that guide the Union's action on the international scene. Also, in the second section of that provision, consolidation and support for democracy, the rule of law, human rights and the principles of international law are listed as objectives of EU external action. Yet there is, as said, no distinct set of provisions on this subject: the substance of the EHRP is integrated in the Union's substantive external policies—figuratively, a silver thread running through it all.

**Box 6.2 Human Rights 'Mainstreaming'**

Scholars have referred to the idea encapsulated in Article 21 TEU as 'horizontalisation' of human rights, or with an even catchier term: human rights 'mainstreaming'. Consequently, due attention and continuous respect for human rights form an objective of, and condition for, the conduct of every type of external action. This *inter alia* stretches out to the Common Commercial Policy and the EU's Development Cooperation Policy. After all, Article 207 TFEU states that the CCP shall be conducted in the context of the principles and objectives of the Union's external action, which itself refers back to Article 21 TEU. The same goes for the EDCP, pursuant to Article 208 (1) TFEU.

The foregoing should not be taken to mean that the Union is incapable of taking targeted autonomous action with regard to the protection of human rights at the international level. Indeed, for quite some time, such a manoeuvre was outlawed by virtue of the Court's Opinion 2/94, so that the EU could only enter into agreements that did not have a principal fundamental rights objective.<sup>18</sup> With the Treaty of Amsterdam, an explicit legal basis was created for adopting internal measures to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, proffering an implied competence for external action.<sup>19</sup> The Lisbon Treaty solidified the possibility to become party to other international human rights agreements: at the present day and time, a power to that effect may be inferred from the inclusion of respect for fundamental rights in the EU's official objectives.<sup>20</sup>

<sup>18</sup>With the Court positing that there existed neither an explicit, nor anything on which to base an implied external competence, in light of the fact that no general power was conferred to enact rules in this field.

<sup>19</sup>See e.g. Council Decision 2010/48 concerning the conclusion by the European Community of the UN Convention on the Rights of Persons with Disabilities, [2010] OJ L 23/35.

<sup>20</sup>Article 2 TEU.

### 6.3.2 Human Rights Conditionality

A particular way in which the integration of the EHRP in other fields of EU external competence manifests itself is through the concept of ‘human rights conditionality’. This concept denotes that bilateral and multilateral agreements with third countries and international organisations of whatever type (partnership, association, cooperation, etcetera) are predicated upon a full respect for human rights; once the treaty partners fail to live up to that commitment, the agreement will be suspended or terminated. To this end, special ‘human rights clauses’ are inserted. Essentially, these clauses state that the agreement is based on (an assumption of) respect for democratic principles and fundamental rights.<sup>21</sup>

In the first generation of human rights clauses, the basic provision was coupled with a non-compliance clause, which stipulated that parties reserved the right to suspend the agreement, in whole or in part, with immediate effect, in case of a serious breach.<sup>22</sup> In the second generation, the system was refined further.<sup>23</sup> In this more advanced rendition, which presently constitutes the standard clause, the non-compliance clause gives a contracting party the right to take ‘appropriate measures’ if another party fails to fulfil an obligation under the agreement. There-with, the aggrieved party is granted more room for deciding on the specific form of its reaction (e.g. qualified suspension or termination, giving an ultimatum for redress, imposition of sanctions, taking of countervailing actions). The modern provisions ordinarily specify that consultations should, in any case, always precede an invocation of the non-compliance clause; moreover, whatever measures may eventually be adopted, preference should always be given to those that are least onerous to the functioning of the main agreement and the fulfilment of its objectives. It is occasionally also stipulated that the measures must be revoked as soon as the reason for their adoption has disappeared.

For many years now, the EU has been actively implementing human rights conditionality in its international relationships. Human rights clauses even crop up in complex multilateral conventions like the Cotonou Agreement.<sup>24</sup> The more sophisticated version of the non-compliance clause has proven to be a potent instrument, allowing for targeted action against fundamental rights violations by individual countries without placing other treaty partners at a disadvantage,

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<sup>21</sup>A pioneering study offers Hoffmeister (1998); see also Bartels (2005).

<sup>22</sup>Dubbed the ‘Baltic clause’, as this model was first employed in agreements with Estonia, Latvia and Lithuania. Precursors can be found in trade agreements with Argentina, Chile and Uruguay, but these displayed considerably more ambiguity.

<sup>23</sup>Commonly referred to as the ‘Bulgaria clause’, after the agreement with that country, in which the refined provisions were included for the first time.

<sup>24</sup>See Article 9(2), Article 96 and Article 97 of the Partnership agreement between the Members of the African, Caribbean and Pacific Group of States and the European Community and its Member States signed in Cotonou on 23 June 2000, OJ [2000] L 317/3.

compromising the operation of the treaty or (needlessly) collapsing it in its entirety.<sup>25</sup>

To date, while agreements containing human rights clauses have not established specific organs for monitoring their implementation, subcommittees have been established on an ad hoc basis with that purpose. Even in their absence, it is possible (or even mandatory) to bring the pertinent issues to the table of other joint institutions such as the cooperation/association council or parliamentary bodies.<sup>26</sup> In contrast, conceived as they are for the political realm, the clauses do not mean to create legally enforceable obligations for private parties.

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## 6.4 EHRP Practices and Their Discontents

### 6.4.1 Initiatives for Promoting Fundamental Rights in the Wider World

As indicated above, for the longest time, the EU did not dispose of a general competence in the field of human rights, and therewith, it also lacked the power to formulate a coherent external policy and conclude dedicated international treaties in this field. The resistance against the attribution of such a general competence stemmed from the idea that it would upset the balance between the EU and its Member States: from a constitutional perspective, the Union is not a federation, and thus, it should not be wrapped in such garments. Additionally, it had to be avoided that the EU or its predecessors would go and duplicate the role of other international organisations, e.g. the OSCE and the Council of Europe.<sup>27</sup>

Over time, though, the antagonism declined, and the cautious seeping in of a human rights dimension in various external policies was first condoned, and later actively supported by the Member States. Since the early 1990s, fundamental rights have been steadfastly anchored in the provisions governing the internal and external dimensions of EU law, a development that blazed a trail for the adoption of laws and policies aiming exclusively at encouraging the observance of a high standard of protection.

In 2001, the Commission issued a Communication that outlined three ways in which the EU could forge ahead on the global scene: by promoting coherent and consistent policies in support of human rights and democratisation; by placing a higher priority on human rights and democratisation in relations with third countries and taking a more pro-active approach; and by adopting a more strategic approach to the European Initiative for Democracy and Human Rights,<sup>28</sup> matching projects in the field with firm EU commitments on human rights and democracy.

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<sup>25</sup>As corroborated by e.g. Portela (2010).

<sup>26</sup>See also Chap. 8, Sect. 8.2.3.

<sup>27</sup>Cf. von Bogdandy (2000).

<sup>28</sup>In existence from 2000 through 2006.

Herewith, the requirement of ‘mainstreaming’ across all external policy areas became solidly entrenched.

A decade later, a Joint Communication of the Commission and the High Representative fuelled the adoption of a Strategic Framework and Action Plan for Human Rights and Democracy in 2012.<sup>29</sup> The Plan explicitly referred to a number of thematic priorities, among which the abolition of the death penalty, the eradication of torture, freedom of expression, and support for international courts and tribunals. That same year, the EU appointed its first Special Representative for Human Rights.<sup>30</sup>

### **Box 6.3 European Human Rights Promotion at the United Nations**

For a long time, the EU has been energetically promoting respect for human rights in the various organs and bodies of the United Nations, inter alia through statements and debates in the General Assembly and the prominent ‘Third Committee’. In its 2012 Action Plan, the Union equally underlined the leading role of the UN Human Rights Council (HRC) in addressing urgent cases of human rights violations, and pledged to contribute vigorously to its effective functioning. The HRC was also singled out in that document as a suitable forum for the EU to encourage awareness and protection of economic, social and cultural rights, as well as the freedom of religion and belief.

Whereas the basis for a coherent EHRP is at present broader than ever, human rights objectives have been pursued with the greatest zeal in relationships with selected countries or regions (premised on conditionality), or in the specific context of other external policies. Concrete examples of the latter approach can e.g. be found in myriad ad hoc decisions in the CFSP, or in trade instruments such as the GSP Regulation. The EU has also implemented different types of human-rights-focused bilateral dialogues (both ad hoc and structured).

The European Instrument for Democracy and Human Rights (EIDHR) may possibly be regarded the most uniform instrument to date.<sup>31</sup> Launched in 2006, it replaced the earlier European Initiative for Democracy and Human Rights and builds on its achievements. The first ‘pillar’ of the EIDHR consists of supporting, developing and consolidating democracy in third countries by enhancing participatory and representative democracy, in particular by reinforcing an active role for civil society, and by improving the reliability of electoral processes, in particular by

<sup>29</sup>Joint Communication by the European Commission and EU High Representative, Human Rights and Democracy at the Heart of EU External Action—Towards a more Effective Approach, COM (2011) 886 final; Human Rights and Democracy: EU Strategic Framework and EU Action Plan, Council Doc. No. 11855/12, 25 June 2012. The latter was reaffirmed and extended in July 2015.

<sup>30</sup>Decision 2012/440/CFSP appointing the European Union Special Representative for Human Rights, OJ [2012] L 200/21.

<sup>31</sup>Regulation 235/2014 establishing a financing instrument for the promotion of democracy and human rights worldwide, OJ [2014] L 77/85.

dispatching EU observation missions. The second ‘pillar’ aims at enhancing respect for human rights and fundamental freedoms, strengthening their protection, implementation and monitoring, mainly through support for relevant civil society organisations, human rights defenders, and victims of repression and abuse. The Instrument was adjusted in 2014 to cope with new demands and realities. The idea was also to make it more user-friendly in procedural terms (tendering and funding applications). Simultaneously, a stronger emphasis was placed on vulnerable groups (national, ethnic, religious and linguistic minorities, women, LGBTI, indigenous peoples), reticent countries and emergency situations (where human rights are excessively endangered).

Useful as political statements, human rights dialogues, clauses and sanctioning decisions may be, perhaps in everyday practice, the EIDHR makes the most tangible difference of all. Primarily, it is a financial instrument through which aid can be disbursed where it is maximally effective, even where no established (development cooperation or other type of) relationship exists.<sup>32</sup> The EIDHR has so far given support to groups and individuals on every continent. Importantly, it can be (and has been) deployed without the consent of the governments of the countries concerned. In so doing, the EU has extended generous assistance to NGOs and civil society actors standing up for democracy and human rights around the world.

#### **6.4.2 An Exercise in Hypocrisy?**

On the basis of these samples, one might be inclined to think that the EHRP showcases the benign intentions of the Member States and Union institutions, and that it testifies to the thick moral fibre of the EU’s external action. As a number of commentators have pointed out however, there is a rather distressing shadow-side to the EHRP which politicians and civil servants usually choose to downplay or ignore.

At the heart of the matter lies the accusation that the Union pursues respect for human rights in a much more energetic and rigorous way externally than internally; that it turns a blind eye to gross violations of fundamental rights that take place within the Member States themselves, but ordinarily accepts nothing of the kind from its treaty partners. Cases in point have been the appalling treatment of minorities like the Roma in countries like France and Italy, or the facilitation of CIA ‘black sites’ in the war on terror by countries like Poland and Romania—all left unaddressed by the Union’s institutions, bodies and agencies at the domestic

<sup>32</sup>For the 2014–2020 period the EIDHR has a budget of € 1.3 million. The selection of projects funded under the EIDHR takes place in several ways: global calls for proposals (touching on any of the instrument’s objectives); country calls for proposals (specific to one country, covering local projects); or direct support to human rights defenders through ad hoc grants (when quick intervention through small and targeted actions is needed).

and supranational levels. The EU, in other words, displays a ‘Janus-face’, professing to adhere to a standard that it does not live up to itself.<sup>33</sup>

**Box 6.4 True Colours? Human Rights in the Asylum and Refugee Crisis**

The asylum and refugee crisis that erupted in the mid-2010s added a number of undignified episodes to this series. While the majority of Member States did try to find solutions in all sincerity, human rights of third country nationals were repeatedly, and sometimes entirely consciously, trampled upon—with incidents ranging from the unilateral closure of borders and denial of rights of passage, forced returns in violation of the ‘Dublin’ rules, detention under atrocious conditions in numerous patently unsuitable locations, or shady deals with international partners with an eye to radically stemming the flows. Journalists, NGOs, dissenting politicians and other activists rightly condemned what they considered an utter betrayal of European values.

Vivid examples of double standards can also be found in the run-up to EU enlargement. Officially, the admittance of new members is conditional upon an unqualified respect for fundamental rights, as the Copenhagen Criteria make clear. Yet, in 2004 as well as 2007, the EU consciously eroded its own precepts, contenting itself instead with empty promises and paper realities, so as to avoid political feuds and humiliation when the timetables for accession would prove impossible to meet.<sup>34</sup>

When looking at the situation within the Union, certainly the means are available to ensure a high level of protection, with Article 7 TEU figuring as an iconic tool. However, a prevailing sense of comity seems to prevent it from being put into action. The upshot is a tragic spinelessness vis-à-vis countries such as Hungary and Poland, actively eroding the rule of law, but let off the hook for much too long, after repeated threats and warnings.

The EU Courts manage to disappoint with a certain regularity too. Although as indicated above, they have been engaging in judicial review for compliance with fundamental rights for decades now, such review often seems artificially numb, as it still only relatively rarely leads to an annulment of the acts concerned.<sup>35</sup> The ECJ’s sudden blocking of the road towards ECHR accession has been equally confounding.<sup>36</sup> Whereas the stressing of autonomy might serve to justify a deviant

<sup>33</sup>See Williams (2004), Fierro (2003), Bulterman (2001). Contrast however the early assessment of Alston and Weiler (1998), who regarded the external human rights policy as much more meaningful than the internal one.

<sup>34</sup>This aspect is discussed further in Chap. 8. For extensive analyses, see Williams (2000) and Kochenov (2008).

<sup>35</sup>But cf. Joined Cases C-402/05 P & C-415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission*.

<sup>36</sup>Opinion 2/13, *Accession of the European Union to the European Convention on Human Rights*.

level of protection, the preferences of the Union judiciary cannot easily be glossed over either when non-EU courts reach contrary conclusions in identical cases and see good reason to find for the claimants.<sup>37</sup>

Another criticism levelled at the EHRP concerns the overt bias in regarding western conceptions of fundamental rights as ‘the best in the business’, which leads to the forms of normative imperialism referred to earlier. While the Union feigns to have embraced a universal model, especially the much-trumpeted social and cultural rights evidence that in reality, an interior and particular standard is being promoted. In the long run, it is uncertain how long such patronising strategies can be upheld when the EU’s treaty partners may well choose to explode the linkages and divert their attention to other, less-demanding, non-western countries and organisations.

To add insult to injury, there is ample proof that the Union does not deal with its treaty partners in the same manner, and that some countries are unfairly treated as more equal than others. Quite frequently, such inconsistencies can be explained by overriding commercial interests, which ‘necessitate’ turning a blind eye to a partner’s fundamental rights record. In the past, this has particularly held true for relations with a host of Asian, African and Middle Eastern nations. By consequence, human rights clauses are not invoked as strictly and structurally as one might expect.

Incontestably, the efficacy of any sort of rule is undermined when it is not applied consistently. Moreover, as mentioned in the introduction to this chapter, countries cannot always be expected to subscribe to foreign benchmarks, especially if it entails that seized national courts have to forfeit their jurisdiction to deal with the matter. Both aspects are problematic in the context of the relations between the EU and the wider world. In essence, it amounts to an exercise in hypocrisy when treaty partners are held to account while internally, one is reluctant to let barking be followed by biting, or even abstains from barking at all. Put differently, if fundamental rights are not taken seriously in one’s own backyard, one’s credibility in the wider neighbourhood is bound to diminish as well. Vice versa, it can then not reasonably be expected either that the Union’s treaty partners bow to its authority at every junction, for they too would seem entitled to an own dose of sanctimoniousness. This results in an unfortunate vicious circle, giving cause for embarrassment to all those concerned.

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## 6.5 Conclusion

Disheartening criticisms notwithstanding, there is no denying that fundamental rights in the Union did come a long way. As remarked, in the early beginning, none of the Treaties made any reference to the concept, let alone outline a system

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<sup>37</sup>Compare e.g. ECtHR, *Tillack v Belgium*, Application No. 20477/05, and Case T-193/04, *Tillack v Commission*.

for their protection. The present could not be more different, with the EU finally disposing of its own ‘Bill of Rights’ in the form of a Fundamental Rights Charter that applies categorically to its institutions, bodies and agencies, as well as to the Member States when implementing Union law.<sup>38</sup> Moreover, should a Union accession to the ECHR be realised after all, an exceedingly high internal level of protection could be established, in stark contrast with the earlier minimalism.

In 2001 already, the Commission signalled its intention to utilise the Charter as a yardstick for external policies as well. Yet, when attempting to deploy it for such less-obvious purposes, its defects should not be overlooked. Although some have qualified the document as the most advanced of its kind, one of its most prominent shortcomings is the absence of the notion of collective or group rights. For sure, through the EIDHR, groups and minorities in third countries can continue to count on generous support, enabling them to strengthen or consolidate their position even in endemically hostile environments. Yet, the EU does not simply suffer from a lack of standards here, for in these cases, no unequivocal standards have been enshrined in primary law at all.

This again goes to show that the Union has to align its internal and external human rights policies more closely, preferably along the lines of the highest common denominator, in order to counter accusations of insincerity. The European External Action Service, once it has fully come of age, might go on to play a pivotal part here.<sup>39</sup> One way or the other, the EU has to become more aware of how it is being perceived as a global actor when it makes a mockery of its own policies, and realise that at the end of the day, good intentions alone do not suffice. In order to stake any credible claim to morality, one needs to act accordingly, speak out against any violations, and make good on every principle or aspiration expressed.

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<sup>38</sup>See Article 51(1) of the Charter.

<sup>39</sup>At the EEAS’s inception, focal points were established in all relevant EU delegations, tasked with monitoring and advancing the Union’s human rights policy goals. In 2015, a human rights division was created within the Service itself.

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