Special Issue: *Lisbon vs. Lisbon*

# "Lisbon vs. Lisbon": Fundamental Rights and Fundamental Freedoms

*By Daniel Augenstein*[*] *& Bert van Roermund*[**]

## A. Introduction

In March 2000, the Lisbon European Council agreed upon a new strategic goal for the European Union: to become the "most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion."[1] One decade and the sobering experience of a global economic crisis later, the European Commission's new 2020 Strategy sets out a vision of Europe's social market economy for the 21st century that "shows how the EU can emerge stronger from the economic crisis and how it can be turned into a smart, sustainable and inclusive economy delivering high levels of employment, productivity and social cohesion."[2] If somewhat more modest in its targets, Europe 2020 reiterates the guiding ambition to enhance the EU's economic performance in the internal and global market that already dominated the Lisbon strategy. The lesson learned from Europe's "lost decade" is that the EU needs to replace the "slow and largely uncoordinated pace of reforms" with a "sustainable recovery" in order to regain its competitiveness, boost its productivity, and put it on "an upward path of prosperity."[3] This is, then, the EU's first "Lisbon" agenda that heavily relies on the internal market and that depicts social inclusion and political stability as conditioned upon further European economic integration. The recipe to defy what has grown from a "merely" economic crisis into a social and political crisis of the Union and its Member States is a combination of "smart," "sustainable," and "inclusive" growth.

The Lisbon Treaty, which entered into force in December 2009, takes the European Union "into the 21st century" by promising EU citizens a more democratic Union "of rights and

[*] Daniel Augenstein is Assistant Professor of Legal Philosophy at Tilburg Law School.

[**] Bert van Roermund is Professor Emeritus of Political Philosophy at Tilburg Law School.

[1] Presidency Conclusions, Lisbon European Council (Mar. 23–24, 2000), *available at* http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00100-r1.en0.html.

[2] European Commission, *Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth*, at 5, COM (2010) 2020 final (Mar. 3, 2010).

[3] *Id*. at 8–9.

https://doi.org/10.1017/S207183220000256X Published online by Cambridge University Press

values, freedom, solidarity and security."[4] A cornerstone of this "Lisbon" agenda is the commitment on the part of the European Union to protect fundamental rights. If in the early days of the European Community fundamental rights did not play any significant legal or political role, and if their introduction into the EU legal order as "general principles of Community law" proceeded in an incremental and not entirely voluntary fashion,[5] the reforms brought about by the Lisbon Treaty seem to take seriously the EU's self-proclaimed status as a human rights polity. While Article 2 Treaty on European Union (TEU) provides that the EU is "founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights . . .," Articles 5(3) and 21 TEU task it with the promotion and protection of human rights in its external relations. Article 6(1) TEU endows the Charter of Fundamental Rights of the European Union (EU Charter)—the EU's own human rights instrument—with the same legal value as the Treaties, and Article 6(2) TEU provides for the Union's accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The essays collected in this Special Issue inquire into the relationship between these two "Lisbon" agendas, as reflected in the relationship between EU fundamental freedoms and EU fundamental rights. On the one hand, there is the EU's market-driven agenda to further deepen economic integration that remains inextricably interwoven with the protection of its fundamental freedoms—the freedom of movement of goods, capital, services, and people. On the other hand, there is the EU's broader political agenda of democratic and institutional (constitutional) reform in which the legal protection of fundamental rights play an integral role. The relationship between these two "Lisbon" agendas is anything but straightforward, and contributors to this Special Issue espouse different views that range from complementarity—between fundamental rights and fundamental freedoms—over contingency—of fundamental rights on fundamental freedoms—to sheer conflict. For instance, while the fact that the EU Charter has formally incorporated fundamental freedoms into the corpus of EU fundamental rights law may suggest that the differences between "freedoms" and "rights" should not be overstated,[6] It would appear that important differences remain between the freedom to move in order to pursue an economic activity as protected by the EU's internal market regime and the freedom of

[4] *See* European Union, *The Treaty at a Glance*, http://europa.eu/lisbon_treaty/glance/index_en.htm.

[5] For a more detailed and differentiated account of the historical evolution of human rights in the European Union *see* Grainne de Búrca, *The Road Not Taken: The EU as a Global Human Rights Actor*, 105 AM. J. INT'L L. 649 (2011).

[6] Article 15(2) EU Charter provides that "[e]very citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State"; pursuant to Article 45 EU Charter, "[e]very citizen of the Union has the right to move and reside freely within the territory of the Member States." Charter of Fundamental Rights of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 398, 404. *See also* L. Besselink, *The Protection of Fundamental Rights Post-Lisbon: The Interaction Between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions*, 1 REPORTS OF THE XXV FIDE CONGRESS 1, 1 (2012), *available at* http://www.fide2012.eu/index.php?doc_id=94.

movement as protected by human rights instruments. Or, to collapse the relationship between fundamental rights and fundamental freedoms into a European "common market ideology" risks overlooking the constitutional significance of "having a market in common" for a supra-national European polity that needs to carve out its discrete identity in relation to its Member States national constitutional human rights traditions. In sum, one of the guiding concerns that runs through the contributions collected in this Special Issue is what is entailed in, and what are the consequences of, the fundamental rights commitments of a European polity that was founded on a market and whose main driver remains economic integration.

**B. Contributors and Contributions**

*I. Engaging the Fundamentals*

The first three contributions to this Special Issue set the scene by inquiring into the role of, and relationship between, fundamental freedoms and fundamental rights in the European integration process. In his contribution, Daniel Augenstein argues that given the economic and supra-national nature of the European polity, the internal market is not simply a constraining factor in the effective realization of fundamental rights but provides the very foundation of their autonomous interpretation in the European legal order.[7] What renders the interpretation of EU fundamental rights autonomous in relation to Europe's diverse national constitutional traditions are precisely the formal (jurisdictional) and substantive (proportionality) constraints imposed upon them by the fundamental market freedoms. Analyzing the CJEU's definition of an "embryo" in *Brüstle v Greenpeace*,[8] Bert van Roermund shows how the Court's reasoning oscillates between a teleological discourse about fundamental rights and a technological discourse about fundamental freedoms, with the latter dominating the former.[9] Van Roermund's proposal to comprehend the Court's "rights discourse" from a first person plural perspective reorients the debate from the marketability of biotechnology towards a concern with the protection of nascent life. One of the main contentions by Mark Dawson and Elise Muir is that EU fundamental rights protection can thrive on the back of the "market force" of fundamental freedoms.[10] Whereas in the traditional realm of internal market regulation the protection of fundamental rights remains contingent on the exercise of fundamental freedoms, recent EU policies in other areas are evidence of a more freestanding concern for fundamental

[7] Daniel Augenstein, *Engaging the Fundamentals: On the Autonomous Substance of EU Fundamental Rights Law*, 14 GERMAN L.J. 1917 (2013).

[8] Case C-34/10, Brüstle v. Greenpeace, 2011 E.C.R. I-09821, para. 38 (Oct. 18, 2011).

[9] Bert van Roermund, *The Embryo and its Rights: Technology and Teleology*, 14 GERMAN L.J. 1939 (2013).

[10] Mark Dawson & Elise Muir, *Hungary and the* Indirect *Protection of EU Fundamental Rights and the Rule of Law*, 14 GERMAN L.J. 1959 (2013).

https://doi.org/10.1017/S207183220000256X Published online by Cambridge University Press

rights that relies on the market for their enforcement. Taking the EU's efforts to safeguard fundamental rights and the rule of law in Hungary as an example, Dawson and Muir show that such an indirect protection of fundamental rights via market instruments—including harmonization, standard setting, and infringement actions—can be more successful than their direct enforcement which is likely to provoke political controversy.

*II. Workers*

Section II comprises two essays that address the relationship between market liberalization as propelled by fundamental freedoms and social protection as associated with fundamental rights from two rather different perspectives. Mijke Houwerzijl and Terry Wilkinson develop a decision-theoretical model that should guide the EU's approach to wage liability in the context of cross-border subcontracting.[11] They set out by analyzing two different regimes of wage liability found in the Member States that both claim to foster economic freedom while at the same time protecting the fundamental rights of (posted) workers: Germany's chain liability regime and Austria's joint and several liability regime. The authors develop a strategic game model to resolve the ensuing EU unity in national diversity conundrum and argue that the chain liability model is better suited to achieve the EU's twofold objective of facilitating trans-national market transactions and protecting the rights of cross-border workers. As with Dawson and Muir, the emphasis is on complementarities and synergies rather than conflict between fundamental rights and fundamental freedoms. If for Houwerzijl and Wilkinson, economic rationality holds out the promise of resolving conflicts between Europe's diverging national social models, Emilios Christodoulidis' analysis of *Laval* and *Viking* diagnoses a form of European "total market thinking" where everything is for sale but nothing of value.[12] Taking up Christian Joerges query ("Why are the Welfare state traditions of European democracies not visible in the legal theories of European integration?")[13] Christodoulidis argues that under the "harmonic" and "harmonizing" guise of proportionality and subsidiarity, European integration progressively demolishes Europe's national welfare traditions. Social protection becomes redefined as regulatory competition, and the clash between social inclusion and neo-liberal economics is cast in terms of different constituencies seeking market access. Drawing on Karl Polanyi's influential work on the relationship between politics and economics,[14] Christodoulidis contends that European economic integration driven by the fundamental market freedoms subverts constituent political power by delivering the

[11] Mijke Houwerzijl & Terry Wilkinson, *The Effects of EU Law on the Social and Economic Goals of Europe 2020: A Decision-Theoretical Approach to Wage Liability Regimes in Modern Europe*, 14 GERMAN L.J. 1981 (2013).

[12] Emilios Christodoulidis, *The European Court of Justice and 'Total Market' Thinking*, 14 GERMAN L.J. 2005 (2013).

[13] Christian Joerges, *Will the Welfare State Survive European Integration?*, 1 EUROPEAN JOURNAL OF SOCIAL LAW 4, 10 (2011).

[14] KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME (1944).

https://doi.org/10.1017/S207183220000256X Published online by Cambridge University Press

political distinction between public and private goods to the market, and the protection of workers' collective rights to the logic of price.

*III. Citizens*

Chiara Raucea's contribution analyzes the more recent CJEU citizenship case law that appears to detach rights attributed to the status of being a European citizen from the exercise of fundamental market freedoms.[15] Her starting point is the Court's well-known formula, according to which EU citizenship can come to the help of static—and economically dependent—citizens and their third-country national family members provided the national measure at stake would "deprive citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizen of the Union."[16] While the status of being a European citizen thus takes on a life of its own, Raucea points out that it remains unclear whether the CJEU's rationale is to protect the present exercise of fundamental rights —the right to family life, for example— or rather the potential future exercise of fundamental freedoms. Her analysis suggests that the Court leans towards the latter, which casts doubts on the central role of fundamental rights in and for European citizenship. The contribution by Morag Goodwin and Roosmarijn Buijs takes the discussion of European citizenship to a more socio-cultural plane by scrutinizing the underlying assumptions and real-life ramifications of the EU's market-driven attempt to make "good European citizens of the Roma."[17] Taking their cue from the EU's 2011 Framework for the National Roma Integration Strategies,[18] they challenge the European mantra of the mutually beneficial, if not mutually conditional, relationship between economic and socio-cultural integration. The authors criticize the one-sidedness of the definition of integration provided by the framework; its a-historical and a-cultural approach to social cohesion; and the absence of any explicit reference to Charter-based fundamental rights, especially the right to cultural diversity. Their underlying concern is with an elementary tension between a vision of social integration that is in the service of the market and a vision of living together in cultural diversity that is premised on the respect of fundamental rights—a tension that, the authors conclude, the 2011 Framework resolves in favor of the former.

[15] Chiara Raucea, *Fundamental Rights: The Missing Pieces of European Citizenship?*, 14 GERMAN L.J. 2021 (2013).

[16] *See* Case C-34/09, Zambrano v. Office national de l'emploi, 2011 E.C.R. I-01177, para. 42.

[17] Morag Goodwin & Roosmarijn Buijs, *Making Good European Citizens of the Roma: A Closer Look at the EU Framework for National Roma Integration Strategies,* 14 GERMAN L.J. 2041 (2013).

[18] The Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, *An EU Framework for National Roma Integration Strategies Up to 2020*, COM (2011) 173 final (Apr. 5, 2011).

*IV. Security and the EU Public Order*

The two contributions to the final section of this Special Issue analyze the impact of the growing significance of security matters in the EU legal order on the relationship between fundamental rights and fundamental freedoms. Both contributions, albeit in different ways, pose the question whether this development could indicate a maturing of the European polity from "private" market organization, driven by fundamental freedoms, into a "public" and "political" order constituted by fundamental rights. Matej Avbelj analyzes the implications of the CJEU's well-known *Kadi* ruling[19] for the relationship between security and fundamental rights in the twofold context of the EU's internal market and its public order.[20] Similar to Augenstein, Avbelj draws on Joseph Weiler's distinction between fundamental rights and fundamental boundaries to conceptualize the relationship between the values inherent in fundamental rights, fundamental freedoms, and collective security.[21] He contends that rather than strengthening fundamental rights protection, the introduction of the value of security in the EU public order may result in their further marginalization. If the fundamental rights of individuals were originally subordinated to the value of having a common market, *Kadi* may indicate that this process will repeat itself with regard to the value of collective security. Michiel Besters and Milda Macenaite take public policy/security exceptions to the free movement provisions of Directive 2004/38/EC[22] as their starting point to trace the putative transition from an "economic" to a "political" Europe.[23] They argue that while the determination of public security and public policy was initially left to the discretion of the Member States, the constraining effects of this national discretion on the internal market progressively led the CJEU to enhance scrutiny. At the same time, they interpret the Court's focus on the level of integration of the individual to be expelled from the host Member State as a political concern with the protection of her fundamental rights that is not reducible to internal market considerations. Moreover, discussing the CJEU's interpretation of Directive 64/221/EEC (the predecessor of Directive 2004/38/EC)[24] in *Commission v Spain*,[25] they

[19] Joined Case C-402/05 P and C-415/05 P, Kadi v Council and Comm'n, 2008 E.C.R. I-06351.

[20] Matej Avbelj, *Security and the Transformation of the EU Public Order*, 14 GERMAN L.J. 2057 (2013).

[21] *See* J.H.H. Weiler, *Fundamental Rights and Fundamental Boundaries: On the Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space*, *in* THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION 102 (J.H.H Weiler, 1999).

[22] Directive 2004/38 of the European Parliament and of the Council of 29 April 2004 on the Right of Citizens and Their Family Members to Move and Reside Freely Within the Territory of the Member States, 2004 O.J. (L 158) 77.

[23] Michiel Besters & Milda Macenaite, *Securing the EU Public Order: Between an Economic and Political Europe*, 14 GERMAN L.J. 2075 (2013).

[24] Council Directive 64/221/EEC of 25 February 1964 on the Co-ordination of Special Measures Concerning the Movement and residence of Foreign Nationals Which Are Justified on Grounds of Public Policy, Public Security or Public Health, 1964 O.J. (L 56) 117.

https://doi.org/10.1017/S207183220000256X Published online by Cambridge University Press

contend that this approach, which embeds EU fundamental rights in the internal market, fares better in protecting individuals against expulsion on national public policy/security grounds than the one provided for by the Schengen Convention. Nevertheless, because the relationship between security and fundamental rights protection remains mediated by fundamental freedoms, it would be premature to interpret the Court's approach as the harbinger of a genuine transition from an "economic" to a "political" Europe.

**C. Acknowledgements**

The publications collected in this Special Issue are the result of a collaborative research project conducted at Tilburg University during the 2012–2013 academic year with the financial support of the Royal Netherlands Academy of Arts and Sciences, the Tilburg School of Humanities and its Department of Philosophy. The aim of the project was to assist promising young researchers to prepare an academic publication in an interdisciplinary research environment under the guidance and supervision of an experienced colleague. The preliminary research outcomes of the project were presented at an international workshop in Tilburg in August 2012. We are grateful to all workshop participants for their valuable input. Our special thanks to those external participants who agreed to contribute an essay to this collection, as well as to our colleagues at Tilburg for their excellent supervision of students' research projects.

[25] Case C-177/06, Comm'n v Spain, 2007 E.C.R. I-07689.