# CJEU AND ECtHR: TWO SIDES OF THE SAME COIN OR DIFFERENT CURRENCIES ?

*ABAD ve AİHM: Bir madalyonun iki yüzü mü yoksa iki farklı para birimi mi?*

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**ABSTRACT**

The protection of fundamental human rights across Europe reminds the issue of the European Union (EU) accession to the European Convention on Human Rights (ECHR). The analysis of the interaction between the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) is essential for a better understanding of the multi-layered human rights architecture in Europe.

With reference to multi-level components, this study focus on the following issues in order to find out whether the CJEU and ECtHR consist two sides of the same coin - meaning that they adjudicate human rights in the same way - or if they constitute different currencies – meaning that they have different impacts in human rights protection. An overall appraisal of the cohabitation of these two judicial powerhouses will be made by reference to the state of human rights protection within the regional mechanisms and their impact at national level.

**Keywords:** preliminary ruling; principle of subsidiarity; the margin of appreciation doctrine; European Convention on Human Rights; Charter of Fundamental Rights; Council of Europe, European Union

**ÖZET**

Avrupa genelinde temel insan haklarının korunması, Avrupa Birliği'nin (AB) Avrupa İnsan Hakları Sözleşmesi'ne (AİHS) katılımı konusunu akla getirmektedir. Avrupa'daki çok katmanlı insan hakları mimarisinin daha iyi anlaşılabilmesi için Avrupa Birliği Adalet Divanı (ABAD) ile Avrupa İnsan Hakları Mahkemesi (AİHM) arasındaki etkileşimin analizi gereklidir.

Mevcut farklı bileşenlere ilişkin olarak, bu çalışma kapsamında ABAD ve AİHM'nin bir madalyonun iki tarafını mı oluşturdukları (insan haklarını aynı şekilde yargıladıkları varsayımı) – ya da iki farklı para birimini mi teşkil ettikleri (insan haklarının korunmasında farklı yaklaşım ve etkilere sahip oldukları varsayımı) – konularına odaklanılmakta ve değerlendirmede bulunulmaktadır. Sözkonusu iki yargı organının birlikte varoluşunun genel değerlendirilmesi, insan haklarının bölgesel mekanizmalar dâhilinde korunmasının ulusal seviyedeki etkileri referans alınarak yapılacaktır.

**Anahtar Kelimeler:** ön karar; ikincillik ilkesi; takdir yetkisi doktrini; Avrupa İnsan Hakları Sözleşmesi; Avrupa Birliği Temel Haklar Bildirgesi; Avrupa Konseyi; Avrupa Birliği

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**Introduction**

Upholding human rights is the collective responsibility of the Court of Justice of the European Union (CJEU), the European Court of Human Rights (ECtHR) and national authorities. However, in a world of multiple resources and competing values, adjudication of human rights is a major challenge for both domestic and European judges. The multilevel human rights architecture in Europe consists in the coexistence of the national legal orders, the legal order of the European Union and the framework of the Council of Europe.

With regard to this European multi-layered human rights architecture, this paper will examine the interaction between regional mechanisms for human rights protection and will point out their impact on national protection of human rights. It will refer extensively to the prospective accession of the European Union (EU) to the European Convention for Human Rights[2] (ECHR).

The interplay between the two European courts for the protection of human rights is undeniable both in process and content. In their rich variety and diversity, and in the reciprocal influences they exert on one another, the case law of both the CJEU and the ECtHR constitutes the basis for the protection of human rights within Europe. The purpose of this essay is to identify implications for the best allocation and exercise of authority within multi-level human rights regimes.

The ECHR and the case law relating thereto had constituted the main reference among the national constitutions and traditions of the EU member states before the entry into force of the Charter of Fundamental Rights[3] (CFREU). By introducing a preliminary ruling mechanism on the model of that existing EU law, Protocol No. 16 to the ECHR aims to extend the jurisdiction of the ECtHR and thus to create a constructive dialogue with the national courts. On the other hand, in the aftermath of Opinion 2/13[4] of the CJEU, the level of protection of fundamental rights seems to be challenged by undermining the dialogue between supranational and domestic judicial systems.

This paper will discuss whether cohabitation of the two judicial powerhouses would strengthen further the level of protection of fundamental rights by providing substantial guidance to national courts or lead to inaccuracies.

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[2] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, [hereinafter ECHR].

[3] Charter of Fundamental Rights of the European Union, 2010 O.J. C 83/02, [hereinafter CFREU].

[4] Opinion pursuant to Article 218(11) TFEU — Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties.

Furthermore, the multilevel human rights architecture in Europe will be appraised from the perspective of both descending and ascending interpretations of fundamental rights in order to evaluate national permeability and or impermeability vis-à-vis to ECHR and to CFREU in order to explore the interface between nationally protected values and supranational fundamental rights protection.

This paper is structured as follows:

The first section evaluates the impact of the CFREU and of the ECHR on the level of protection of fundamental rights within the member states. The next section outlines the interaction between the CJEU and the ECtHR. To this end, it is important to appraise the impact of the principle of subsidiarity and of the doctrine of margin of appreciation. This last section will adhere to an empirical method but will not claim to offer a systematic account of the relevant case law. Rather, the framework for this will be an evaluation of the semantic problem related to the dichotomy that exists between uniformity and diversity.

## 1. The Recognition of Fundamental Rights

### 1.1. The ECHR and The CFREU

Regarding both the ECHR and the CFREU, it is essential to comprehend the relationship between the ECtHR to the CJEU and their national counterparts in the area of human rights.

Admittedly, "member States are faced with two « layers » of European fundamental rights which are similar in some respects and dissimilar in others"[5], which could theoretically lead to confusion and imply legal uncertainty.

While the ECHR establishes the basis for a common recognition of fundamental rights within the Council of Europe[6], the CFREU is based on the common traditions of the Member States as they are already deeply rooted in their constitutions. [7]

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5 J.Callewaert*, The accession of the European Union to the European Convention on Human Rights*, (COE 2013), 11.

6 Preambule of the ECHR: "(…) by a common understanding and observance of the Human Rights upon which they depend; (…) the governments of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law, (...) take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration".

7 Case 11/70 *International Handelsgesellschaft* [1970], ECR 01125 (Opinion of AG de Lamotte, 1125, 1146: "The fundamental principles of national legal systems contribute to forming that philosophical, political and legal substratum common to the Member States from which, through the case law, an unwritten Community law emerges, one of

As to the hierarchy between CFREU and ECHR in a given Member State's legal order, both form an integral part of domestic legal order. In other words, the supremacy of EU law does not equate to a hierarchical supremacy of the CFREU over ECHR, which could in turn lead to a conflict between a rule of EU law and the ECHR.[8]

The CFREU sets out its scope of application in Article 51 (1), which states that the CFREU is "addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law". Thus, purely domestic law is not governed by the CFREU as affirmed by a recent decision, *Anton Vinkov v Nachalnik Administrativno-nakazatelna deynost*.[9]

When it comes to the implication of a prospective accession of the EU to the ECHR over the latter's effect over the legal order of Member States, the CJEU clearly stated in the *Fransson* decision that in case of "a conflict between national law and the ECHR, it is to be remembered that while, as Article 6(3) TEU[10] confirms, fundamental rights recognised by the ECHR constitute general principles of the European Union's law and while Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law. Consequently, European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law".[11]

Nonetheless, following Article 52 (3) CFREU, CJEU refers both to the ECHR and in a great extent to the ECtHR's case law in order to maintain EU fundamental rights in line with the latter.[12] Indeed, pursuant to Article 1 ECHR,

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the essential aims of which is precisely to ensure the respect of fundamental rights of the individual". See also Joint Declaration on Fundamental Rights by the European Parliament, the Council and the Commission of 27 April 1977, OJ C 103, and cases BVerfGE of 29 May 1974, *Sollange I* and Corte Costituzionale Italiana n°183 of 18 December 1973, *Frontini*.

8 Callewaert (1) 30.

9 Case C-27/11, *Anton Vinkov v Nachalnik Administrativno-nakazatelna deynost* [2012] *ECR-326.*

10 Consolidated Version of the Treaty on European Union [2008] OJ C115/13.

11 Case C-617/10, Åklagaren v Hans Åkerberg Fransson, [2013] ECR-105, para 44. See also Case C-571/10 *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and others* [2012] ECR-233, para. 62.

12 T. Lock, "The ECJ and the ECtHR : The Future Relationship between the Two European Courts", The Law and Practice of International Courts and Tribunals 8 (2009) 375-398, 382.

governments committed themselves to bringing forward measures that would ensure at least an equivalent level of protection of human rights as it pertains to the ECHR. In this regard, the ECHR defines the minimum standards of human rights protection that neither the Member States nor the EU must not afford a level of human rights protection lower than that, but they remain free to exceed it.[13]

Moreover, it also follows that the coexistence of two human rights catalogues appears in a normative parallelism and interconnectedness due to their overlapping membership but remain essentially distinct as it pertains to their scope of application.

### 1.2. National Human Rights and European Human Rights

In ratifying the ECHR, Contracting States have committed themselves to human rights protection. It must be emphasized that "the Convention does not purport to impose uniform approaches to the myriad different interests which arise in the broad field of fundamental rights protection; it seeks to establish common minimum standards to provide an Europe-wide framework for domestic human rights protection".[14]

The rank assigned to the ECHR in the national hierarchy of norms may serve as an indicator in order to determine if the level of the protection of human rights in this given legal order is stronger or weaker than the one provided by the Convention. Clearly, "the ECHR can be said to be effective domestically to the extent that national officials recognize, enforce, and give full effect to Convention rights and the interpretive authority of the Court in their decisions"[15]. In this regard, it is necessary to take note of the fact that "the Convention (…) does not determine the internal mechanisms by which member states secure that its organs will observe the Convention; its imperatives are output-oriented. Accordingly, the different states party to the Convention have chosen different ways of integrating it into their national legal systems".[16]

At the same time, however, a "source of tension lies in the diversity of laws, practices and constitutional cultures in the forty-seven Convention states

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13 K. Naumann, "Art. 52 Abs. 3 GrCh zwischen Kohärenz des europäischen Grundrechtsschutzes und Autonomie des Unionrechts", Europarecht (2008) 424, 426.

14 L. Wildhaber, A Constitutional Future for the European Court of Human Rights ? 23 Hum, Rts. L.J. 161 (2002)

15 H. Keller/ A. S. Sweet, Assessing the Impact of the ECHR on National Legal Systems, in A Europe of Rights, The Impact of the ECHR on National Legal Systems, (OUP 2008), 677-712, 682.

16 G. Lübbe-Wolff, ECtHR and national jurisdiction – The Görgülü Case, Humboldt Forum Recht 12/2006 138-146, 139.

combined with the potential of a Strasbourg judgment to impose uniform standards".[17]

When it comes to the influence of the CFREU over the domestication of the ECHR, the supranational and highly integrated nature of the EU law should be highlighted. A prominent feature is to be found in Article 6 (3) TEU, which provides that fundamental rights, as guaranteed by the ECHR, constitute general principles of the EU's law. Again, while promoting a higher level of protection, Article 52 (3) and Article 53 CFREU refer explicitly to the ECHR, stating that the protection of fundamental rights is equal to one as it is enshrined in the latter. However, it should be noted that, for the time being, "as the EU has not acceded to the ECHR, the latter does not constitute a legal instrument which has been formally incorporated into the legal order of the EU".[18] Notwithstanding these reluctances[19], the same will remain true for the EU's accession to the ECHR, which will enhance the direct effect of the ECHR and of the judgments of the ECtHR within the Member States[20].

At this point, the importance of consistent interpretation[21] that permits a harmonization of States' international obligations with national legislation should be recalled. Interpreting national law in conformity with relevant rules of supranational law conforms the "internal" norm to the "external" one. Pollicino points out that the principle of consistent interpretation "represents the real *trait d'union* between the domestic impact of the two European legal orders".[22] Actually, "consistent interpretation is a typical doctrine of multilevel systems, since it guarantees some flexibility in the relationship between laws of different orders and entrusts judges with the role of gatekeepers [and] makes it possible to neutralize or soften constitutional conflicts, where this is possible, of course".[23]

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17 L. R. Glas, Dialogue in the European Convention on Human Rights System : inspiration, added-value and means, EJHR, 2015/3, 247-277, 256.

18 Opinion 2/13 of 18 December 2014, [2014] ECR-2454 para. 179. See *Kamberaj*, para. 60 and Åkerberg Fransson, para. 44.

19 See Opinion 2/13 which declares the agreement of the EU to the ECHR incompatible with Article 6 (2) TEU.

20 Opinion 2/13 para. 180.

21 Concerning EU Law, *see* C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135.

22 O. Pollicino, "Conclusions, In Search of Possible Answers", in G. Martinico and O. Pollicino (eds) *The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective*, (ELP 2010), 510.

23 G. Martinico, "Is the European Convention Going to be « Supreme » ?", EJIL 23 (2012), 401-424, 409.

**2. Two European Courts : CJEU and ECtHR**

The ECtHR and the CJEU are two supreme jurisdictions, operating each with a specific catalogue to ensure respect for fundamental rights in Europe. Even though the two exist without a hierarchical link between them, they are nevertheless interconnected.

Pursuing the same overall objective – ensuring the protection of human rights - they have, however different approaches.

The ECtHR shall ensure that the minimum level of protection set by the ECHR is respected. As for the CJEU, it ensures the coherent application of the EU law in respect to the CFREU, which "embodies the maximum standard on human rights".[24]

While both the ECtHR and the CJEU are international courts in terms of composition and status, there is a crucial difference between their functions. As far as CJEU is the supreme court of the legal order of the European Union, since CJEU is the judicial body of the EU, it is inconceivable that the latter could ensure an external supervision.[25] Quite the opposite is true for the ECtHR, which, "as a completely external, independent and uninvolved institution"[26] is the "supreme court" to ensure the compliance of Contracting Parties with their obligations under the ECHR.

Thus, charged with building up a coherent legal system[27], the CJEU has the duty of "ensuring the uniform interpretation and application of Union law across the Member States".[28] Especially as it regards the principle of uniform application of EU law, "the supranational integrated nature of the EU legal order" should not be underestimated.[29]

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[24] S. Andreakadis, "The European Convention on Human Rights, the EU and the UK : Confronting a Heresy : A Reply to Andrew Williams", EJIL 24 (2013), No.4, 1187-1193, 1190.

[25] Callewaert (1), at 17.

[26] J. Gerards, "The European Court of Human Rights and the national courts : giving shape to the notion of « shared responsibility »", in J. Gerards and J.Fleuren (eds) *Implementation of the European Convention on Human Rights and of the judgements of the ECtHR in national case-law, A comparative analysis*, (Intersentia 2014), 13-94, 15.

[27] A. Hinarejos, *Judicial Control in the European Union : Reforming Jurisdiction in the Intergovernmental Pillars* (OUP, 2009) 1-4.

[28] M. Claes and M. de Visser, "The Court of Justice as a Federal Constitutional Court : A Comparative Perspective" in E. Cloots, G. De Baere and S. Sottiaux (eds.), *Federalism in the European Union* (Hart 2012) 83, 102.

[29] F. J. Mena Parras, "From Strasbourg to Luxembourg ? Transposing the margin of appreciation concept into EU Law", ULB Working Paper No. 2015/7, 10.

The CJEU's claim to the supremacy of EU law over national law since its landmark case *Costa v ENEL*[30], reaffirmed in *Simmenthal*[31], combined with its growing engagement with human rights matters, has brought to light a potential source of jurisdictional conflicts between ECtHR and CJEU. While national judges are bound to set aside a piece of national legislation incompatible with the EU law, it is slightly different when it comes to incompatibility with the ECHR.[32]

The EU has been in serious competition with the Council of Europe's achievements in judicially monitoring human rights compliance. On the other hand, given the supremacy of the EU Law, the CJEU has an advantage when it come to protecting rights within the territories of the Member States, should rights be directly effective.[33] As Brun-Otto Byrde puts it, the jurisprudence of the CJEU constitutes "an impressive step in the development of a human rights culture in Europe".[34]

As long as pursuant to Article 51 (2) CFREU, the CFREU does not entail any extension of the powers of the Union and, in particular, does not extend the jurisdictional power of the CJEU. As such, the jurisdictional competence of the CJEU converges with that of the ECtHR only to a certain extent. As a result, there exists neither a competition nor a conflict of jurisdiction between the two European Courts. Thus, one might reasonably argue that CJEU and ECtHR have a "shared responsibility" in guaranteeing fundamental rights within Europe and that CJEU is just as responsible for safeguarding fundamental rights as the ECtHR. This results in a number of obligations on the CJEU, such as that of the obligation to adopt a uniform interpretation in line with the ECtHR's evolutive and autonomous interpretation. This should be done in order to reach a cooperation as equal partners in a shared project of protecting fundamental rights.

The final analysis of the different judicial techniques that create the current situation of "shared responsibility" shows that both Courts can make use of various techniques in order to strike a fair balance between ensuring a high level of human rights and respecting EU sovereignty.

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30 Case 6/64, *Flaminio Costa v E.N.E.L.* [1964] ECR-425.

31 Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR-629.

32 See for instance G. Bianco and G.Martinico, "Dialogue or Disobedience ? On the Domestic Effects of the ECHR in Light of the Kamberaj Decision", European Public Law 20, no. 3 (2014) : 435-450.

33 Article 288 TFEU, Consolidated version of the Treaty on the Functioning of the European Union OJ C 326, 26.10.2012, p. 47–390.

34 Brun-Otto Bryde, "The ECJ's Fundamental Rights Jurisprudence – A milestone in Transnational Constitutionalism" in M. Poiares Maduro and L.Azoulai (eds), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010), 119, 122.

### 2.1. Interaction between the CJEU and the ECtHR

The interaction between Luxembourg and Strasbourg existed long before the issue of accession of the EU to the ECHR was on the agenda. It consisted in "mutual cross-citation which reinforced their legitimacy and authority vis-a-vis the Member States".[35] Cross-citation also demonstrates the determination of both Courts to avoid conflict and to contribute to the creation of a uniform human rights standard. It is clear that any discrepancies in the interpretation of the same fundamental right by two Courts would have a negative impact on right holders.[36] Due to the limited space available it will only be possible to consider the most prominent of these.

#### *2.1.1. Cross-references from the CJEU to the ECtHR*

Having adopted the ECHR as one of the main interpretation sources of EU fundamental rights, CJEU referred regularly to articles of the ECHR and also based its reasoning on specific ECtHR precedents.[37]

The very first specific reference to the ECHR was in 1974 in the *Nold* judgement, in which the CJEU held that : "the international treaties on the protection of human rights in which the Member States have cooperated or to which they have adhered can also supply indications which may be taken into account within the framework of Community law"[38] as an expression of common European values.

Following the advent of the CFREU as a legally enforceable bill, CJEU continues to refer to the ECHR and its related case law[39] as foreseen in Article 52 (3) CFREU.[40]

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35 A. Torres Pérez, "Too Many Voices ? The Prior Involvement of the Court of Justice of the European Union", in V.Kosta, N. Skoutaris and V.Tzevelekos (eds), *The EU Accession to the ECHR*, (Hart 2014), 29-44, 29.

36 J. Callewaert, "The European Convention on Human Rights and European Union Law : A Long Way to Harmony", EHRLR 6 (2009) 769.

37 For a compilation of cases where CJEU refers to the ECHR, see E. Guild and G. Lesieur, *The European Court of Justice on the European Convention on Human Rights, Who said what, when?* (Kluwer Law 1998).

38 Case 4/73 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities,* [1974] ECR-491 para. 13.

39 For instance, CJEU Case C-334/112 RX II *Arango Jaramillo and Others* v *European Investment Bank*, [2013] ECR-134 para. 42 – 43, the CJEU refers to ECtHR *Anastasakis v. Greece* App no. 41959/08, para. 24, to interpret Article 47 (2) CFREU, corresponding to Article 6(1) of the ECHR. Again in Case C-400/10 *J. McB. v L. E.,* [2010] ECR I-8965 paras. 53-54 the CJEU referred to the ECtHR precedent in ECtHR *Guichard v. France,* App No. 56838/00, in order to interpret Article 7 CFREU, corresponding to Article 8 of the ECHR.

40 Article 52 (3) CFREU reads as follows: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights

Even though the CJEU should be more formally constrained to follow the jurisprudence of the ECtHR regarding rights covered by the ECHR[41], it appears that the Court's practice is slightly changing.[42] Indeed, while still referring to the ECHR, in some cases the CJEU goes further, allowing a greater protection to a right than that allowed by the ECtHR's case law regarding human rights protection.[43]

This approach is in line with the minimum standards that ECHR ensures. As a matter of fact, "as long as domestic law differs from the Convention only by giving citizens more extensive rights without thereby restricting the rights of anyone else, a conflict cannot arise since Article 53 ECHR makes it clear that the Convention is not meant to prevent states from granting, by their domestic law, rights which go beyond those granted by the Convention".[44]

### *2.1.2. Cross-references from the ECtHR to the CJEU*

If the ECtHR case law refers regularly to the CFREU as well as to other EU law provisions, reference to the case law of the CJEU is rather rare.

The influence of the CFREU is of significant importance, since it represents a tool of interpretation and of reasoning for the ECtHR.

A prominent example is to be found in *Christine Goodwin*[45]*,* which is reaffirmed in *Schalk and Kopf v. Austria*, where the ECtHR held that : "Regard being had to Article 9 of the Charter, therefore, the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex".[46]

The ECtHR considers that : "in defining the meaning of terms and notions in the text of the Convention, [it] can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting

and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection".

41 J. L. Murray, "The Influence of the European Convention on Fundamental Rights on Community Law", 33 Fordham Int'L Journal, 5 (2011) 1388-1422, 1402.

42 *See* G. De Burca, "After the EU Charter of Fundamental Rights : The Court of Justice as a Human Rights Adjudicator ?", 20 MJ 2 (2013), 168-184.

43 A prominent example is C-69/10, *Diouf v Ministre du Travail, de l'Emploi et de l'Immigration*, [2011] ECR I-7151 para. 38-42.

44 G. Lübbe-Wolff, "ECtHR and national jurisdiction – The Görgülü Case", Humboldt Forum Recht 12/2006 138-146, 140.

45 ECtHR *Christine Goodwin v. The United Kingdom*, App no.28957/95.

46 ECtHR *Schalk and Kopf v. Austria,* App no. 30141/04, para.61.

their common values. The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases. In this context, it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments denote a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and show, in a precise area, that there is common ground in modern societies".[47]

Therefore, even adjudicating cases brought against a country that is not a member of the EU (a third country such as Switzerland), the ECtHR refers to the CFREU and/or other EU law provisions as an expression of the "broad consensus" in support of a narrow margin of appreciation.[48]

In sum, it cannot be denied that "the mutual influences and virtuous competition between the CJEU and the ECtHR have greatly contributed to the enhancement of and convergence between human rights standards at the transnational level".[49]

On another note, Protocol No. 16, which aims to introduce a constructive dialogue between national courts and ECtHR, was revealed to be one of the most problematic issues of the CJEU's Opinion 2/13 made on the compatibility of the Draft Agreement for EU Accession to the European Convention on Human Rights. It has been identified as critically being at the expense of EU law autonomy given the fact that would be in competition with its preliminary ruling mechanism as set in Article 267 TFEU[50]. Defined in Article 267 TFEU, Article 23 Statute CJEU and implemented in Article 93 to 104 RP CJEU, the referral for preliminary rulings is "an instrument of cooperation and coordination between the CJEU and the national courts and tribunals, based on a strict division of labour for the implementation of EU law".[51] Thus, references for a preliminary ruling establishes "direct cooperation between

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47 ECtHR, *Demir and Baykara v. Turkey*, App No. 24503/97, para. 85-86.

48 See ECtHR *Neulinger and Shuruk v. Switzerland*, App No. 41615/07, para, 135 ; *Tarakhel v. Switzerland, App No. 29217/12*.

49 F. Fabbrini, *Fundamental Rights in Europe, Challenges and Transformations in Comparative Perspective*, (OUP, 2014), 14.

50 The preliminary ruling procedure ensures the uniform application of EU law by enabling the CJEU to interpret EU legislation while also in certain cases striking down secondary EU legislation that conflicts with EU primary law.

51 B. Wägenbaur, *Court of Justice of the European Union, Commentary on Statute and Rules of Procedure*, (Beck 2013), ad Article 23, 67.

CJEU and the national courts".[52] Moreover, it is well established case law that "the CJEU does have jurisdiction to give the national court full guidance on the interpretation of European Union law in order to enable it to determine the issue of compatibility of a national measure with that law for the purposes of deciding the case before it".[53] By introducing a preliminary ruling mechanism on the model of that which exists in EU law, Protocol No. 16 to the ECHR – which has not yet entered into force[54] - aims to extend somewhat the jurisdiction of the ECtHR, which may provide a direct answer on the question of the interpretation or application of the Convention. Thus, the protocol tends to create a constructive dialogue between the ECtHR and national courts in light of the fact that the latter could refer to a given preliminary ruling by the ECtHR in another case for its own judgement. The main characteristic of dialogue between national and European courts is to "avoid any court having the final say (by ensuring that) the courts respect each other's position and, by means of their judgements, try to arrive at outcomes that are acceptable at both levels"[55]. The preliminary reference mechanism aims precisely at preventing conflict between national and European courts. Thus, "effective dialogue presupposes the existence and use of judicial instruments that can be used to bolster the cooperation and voluntary acceptance of interpretations and findings by both national courts and the ECtHR".[56] Therefore, to the contrary of what has been argued in opinion 2/13, Protocol 16 would reduce tension between courts instead of impeding the competencies of CJEU.

### 2.2. Fundamental Rights Adjudication between European and National Courts: The Principle of Subsidiarity and The Doctrine of Margin of Appreciation

The doctrine of margin of appreciation is a central component of the ECtHR's reasoning. It not only reflects the institutional subsidiarity of the Convention system but also gives way to the recognition of national particularities. In the same spirit, given that the ECtHR's role consists in supervision, the primary protection of fundamental rights lies with national authorities. In line with

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52 Case C- 402/98, *ATB and Others.* [2000] ECR I-5501, para. 29.

53 See among others, C-237/04 *Enirisorse*, [2006] ECR I-2843, para 24 ; C-118/08 *Transportes Urbanos y Servicios Generales*, [2010] ECR I-635 para. 23, C-140/09 *Fallimento Traghetti del Mediterraneo*, [2010] ECR I-5243, para 24.

54 Protocol 16 ECHR will enter into force once it has been concluded by at least ten contracting parties.

55 J. Gerards, "The European Court of Human Rights and the national courts : giving shape to the notion of « shared responsibility »", in J. Gerards and J. Fleuren (eds), *Implementation of the European Convention on Human Rights and of the judgments of the ECtHR in national case-law, A comparative analysis*, (Intersentia 2014), 13-94, 75.

56 *Ibid*, 75.

this, "the principle of subsidiarity and the margin of appreciation pursue an analogous constitutional function, embodying the criteria through which multi-layered regimes allocate the exercise of powers between overlapping levels of government". [57]

In the European Union framework, subsidiarity can be described very briefly within this context as the obligation of the CJEU to limit its intervention into national courts and to deal with the issue only in respect of facts that national authorities cannot accomplish for themselves without assistance.[58] Again, subsidiarity is the recognition of the importance of diversity, which in turn denies uniformity, as can be observed in its ambiguous preamble: "The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States and the organisation of their public authorities at national, regional and local levels".[59]

### *2.2.1. The Principle of Subsidiarity*

Subsidiarity, a well-known principle of federalism, can also be taken as a general principle of mediation between supranational harmonization and local pluralism[60]. Akin to federal constitutions[61], "both the margin of appreciation doctrine and the principle of subsidiarity accommodate and temporize the tensions that exist between the demands of the lower levels of government for self-rule and identity and the pressure of the higher-tier jurisdiction toward shared-rule and equality". [62]

In this regard, "the diverse political, social and legal circumstances of various nations may encourage states to seek different standards which they deem most relevant to their own conditions".[63] The rights and freedoms secured both by the ECHR and by the CFREU represent a common understanding and observance of human rights within European countries. They stem from a

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57 F. Fabbrini, The Margin of Appreciation and the Principle of Subsidiarity: A Comparison", iCourts Working Paper Series No.15, 2015, 7.

58 P. G. Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law", 97 AJIL (2003) 38, 44.

59 *See* P. G. Carozza, "The Charter and the Member States", in S. Peers and A.Ward (eds) *The European Union Charter of Fundamental Rights : Context and Possibilities* (2003).

60 Carozza (58), 40.

61 Article 3 of Federal Constitution of the Swiss Confederation; Article 30 of Basic Law for the Federal Republic of Germany; Article 31 of the Belgian Constitution; Article 15 of Austrian Federal Constitution.

62 Fabbrini (52), 6.

63 D. Weissbrodt/ F. N. Aolain/ J. Fitzpatrick/ F. Newman, *International Human Rights: Law, Policy, and Process*, (LexisNexis 2009), 70.

common heritage of political traditions, ideals, freedom and the rule of law.[64] However, given the diversity of "the cultural and legal traditions embraced by each Member State, it [is] difficult to identify uniform European standards of human rights. Therefore, the ECHR [is] envisaged as the lowest common denominator".[65] As to its counterpart, Article 53 CFREU indicates minimum standards covering international standards as ratified by all Member States.

With regard to the ECHR, it is commonly admitted that "subsidiarity has a mirror-image effect, it is two sides of the same coin (…) with the role of the national authorities first and that of the Convention mechanism second".[66]

Thus, "in its simplest form, subsidiarity as expressed in the Convention comprises two elements: an obligation for the States to implement the Convention guarantees, this being an obligation of result rather than means, and an obligation for the Court to allow the national authorities to have the fullest opportunity to address a Convention complaint, however grievous, before it can examine the matter itself".[67]

The principle of subsidiarity is also reflected in the CFREU as enshrined in its Article 51.[68] This has served as the formal extension of the subsidiarity principle of EU law within the arena of human rights.[69]

However, it is well established case law that "the ECHR is intended to guarantee rights that are not theoretical or illusory, but rights that are practical and effective".[70] As the principle of effectiveness applies to all the provisions in the Convention and the Protocols,[71] the ECtHR seeks to give them the "fullest weigh and effect".[72]

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64 Preamble of the ECHR and of the CFREU.

65 F.G. Jacobs, *Jacobs & White – The European Convention on Human Rights* (OUP 2006) 52-54.

66 J. Laffranque, *Subsidiarity: from Roots to Essence*, Speech held to mark the opening of the judicial year of the ECtHR, 2.

67 *Subsidiarity : a two-sided coin ?* Seminar to mark the official opening of the judicial year Background paper 30 January 2015, 1.

68 Article 51 § 1 of the CFREU reads as "The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers."

69 P.G. Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law", American Journal of International Law, 2003, 38-79, 39.

70 ECtHR *Airey v. Ireland*, App No. 6289/73 para. 24; ECtHR *García Manibardo v. Spain*, App no. 38695/97, para. 43.

71 ECtHR *Armoniene v. Lithuania*, App no. 36919/02, para. 38 : " (…) like any other provision of the Convention or its Protocols, must be interpreted in such a way as to guarantee not rights that are theoretical or illusory but rights that are practical and effective".

72 J.G. Merrills, The development of international law by the European Court of Human Rights, (Manchester University Press 1993), 85.

Similarly, the duty of sincere cooperation laid down in Article 4(3) TEU recalls a mutual legal obligation for the EU and the Member States «to assist each other in carrying out the tasks which flow from the Treaties» and to maintain the coherence of EU law.

### *2.2.2. Substantive subsidiarity: Margin of appreciation*

The margin of appreciation doctrine reflects the substantive subsidiarity and as such "can be seen as a sort of '*lex specialis*' in relation to the general principle of subsidiarity".[73]

According to the well established case law, one of the main arguments of the ECtHR is that "the national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight."[74]

Likewise, the respect for national identity as enshrined in Article 4(2) TEU, combined with Article 52 (4) CFREU, is one of the arguments in support of the use of the margin of appreciation by the CJEU.

The CJEU adopted a similar approach to the margin of appreciation in *Schmidberger*[75], *Viking Line*[76], *Laval*[77] and *Omega* and held that "the specific circumstances which may justify recourse to the concept of public policy may vary from one country to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty."[78] The main argument put forward for deference to national authorities in those cases consists in the fact that they involved both fundamental rights concerns and free movement objectives.[79]

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73 J. Christoffersen, "Fair balance : Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights", International Studies in Human Rights, vol 99, (Martinus Nijhoff 2009).

74 ECtHR *S.A.S. v. France*, App no. 43835/11, para. 129; ECtHR *Buckley v. The United Kingdom*, App No. 20348/92, para. 75. See also the preamble of Rec (2004) 6 of the Committee of Ministers of 12 May 2004 on the improvement of domestic remedies.

75 Case C-112/00 *Schmidberger* v *Austria* [2003] ECR I-5659.

76 Case C-438/05 *International Transport Workers' Federation* v *Finnish Seamen's Union* [2007] ECR I-10779.

77 Case C-341/05 *Laval un Partneri* [2007] ECR I-1167.

78 Case C-36/02, *Omega* [2004] ECR I-9609, para.31.

79 Parras (25) ; O. Ichim, "ECHR and ECJ : The Peer to Peer Perspective Review", Jean Monnet Working Papers, Université de Genève, 20/2016 ; N. Nic Schuibhne, "Margins of Appreciation : National Values, Fundamental Rights and EC Free Movement Law",

Although it is not strictly speaking a conflict of fundamental rights, in the specific case of the EU law, such a deference seems even more questionable.

It should be noted that "the domestic margin of appreciation thus goes hand in hand with a European supervision".[80] A similar supervisory authority of the CJEU is to be found in *Grogan* Advocate General Van Gerven's decision : "The individual States have a margin of appreciation, which they exercise, however, under the supervision of the courts".[81]

Concerning the reasoning behind the margin of appreciation ensuring national sovereignty, which reflects the diversity of Europe, it hinders the European ideal. In the case of a relation founded on a hierarchy of norms, the national order would be subordinated to the supranational order.[82]

By granting a certain margin of discretion to the Member States, the CJEU contradicts its opinion 2/3 in which the Court asserted that it was important to ensure primacy and direct effect of EU law, referring also to the EU's goal of an "ever closer union" as defined in Article 1 (2) TEU.[83]

"The margin of appreciation gives the flexibility needed to avoid damaging confrontations between the Court and the Member States and enables the Court to balance sovereignty of Member States with their obligations under the Convention".[84] In other words, the margin of appreciation doctrine consists in a compromise with the Contracting States, giving them a field of interpretation within the limits set by the evolutive and autonomous interpretations of the ECtHR.

With regard to EU law, it is worth pointing out that it is "based on two broad models of constitution: a hierarchy-based model, which stems from the 'autonomous' nature of EU law and the 'constitutional' role of the EU Treaties; and a value-based model, which considers the interaction of competing legal sources and their principled resolution".[85] Concerning this, an important

European Law Review (2009) vol. 32 No. 2, 230-256.

80 ECtHR *Handyside v. The United Kingdom*, App No 5493/72 para. 49.

81 Case C- 159/90, *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others,* , [1991] ECR I- 4685, Opinion AG Van Gerven para. 34.

82 M. Delmas-Marty, "« A reasoned » Conception of the Reason of State", in *The European Convention for the Protection of Human Rights, International Protection versus National Restrictions*, (Martinus Nijhoff 1992) 282.

83 Opinion 2/13 para. 167.

84 H. Fenwick, *Civil liberties and human rights,* (Cavendish 2005), 34-37.

85 L. Mason, "Labour Law, the industrial constitution and the EU's accession to the ECHR : the constitutional nature of the market and the limits of rights.based approaches to labour law" in K.Dzehtsiarou/T. Konstadinides/T. Lock/N. O'Meara, (eds) *Human Rights Law in Europe, The Influence, Overlaps and Contradictions of the EU and the ECHR* (Routledge 2014), 137.

element of divergence between the two mechanisms consists in the transfer of competence from the Member States to the EU where there exists no sovereignty issue. Put in other words, human rights adjudication under the EU law is not a problem of sovereignty but rather a problem of determining which authority is responsible according to its respective areas of competence.

According to Peers, "[the margin of appreciation] principle was designed for application by an international court where there are many different approaches to the regulation of matters such as morality and diverse legal and cultural traditions".[86] In line with this, as long as the CFREU applies to a single jurisdiction that lies with the EU, there is no room for the margin of appreciation doctrine[87]. Actually, given the respective size of the two Europes, one might consider that human rights are more integrated within the EU law.[88]

In this regard, the reasoning of the CJEU in *Melloni* is crucial. In that case, the Court held that the possibility for national law to exceed the standard of the CFREU as foreseen in its Article 53 is conditioned upon the preservation of the "primacy, unity and effectiveness of EU law.[89] Thus, "in so far as the essential interests of the EU are not adversely affected by national measures implementing EU law, the CJEU defers to the Member States the question of determining the level of protection of fundamental rights they consider consistent with their national constitution".[90] In sum, the uniformity and effectiveness of Union law alone will constitute a ceiling to the level of protection.

If the argument that "the national authorities are better placed than an international court" is valid for the ECHR mechanism in its intergovernmental nature, this should not apply to multi-level governance within the EU. Thus, the primary responsibility for adjudicating fundamental rights should rest with the CJEU in order to protect the coherent application of the EU law.

In *Kadi*, Advocate General Maduro described this distinction as follows: "It is certainly correct to say that, in ensuring the observance of fundamental rights within the Community, the Court of Justice draws inspiration from the

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86 S. Peers, "Taking Rights Away? Limitations and Derogations" in Steve Peers/Angela Ward (eds), *The EU Charter of Fundamental Rights: Politics, Law and Policy, Essays in European Law*, (OUP 2004), 168.

87 *Ibid*, 169. M. Forowicz, The Ricochets of Convergence in EU Law and the ECHR: Much Ado about the Margins of Appreciation?, in S.Besson/N. Levrat/ E. Clerc (eds), *Interpretation in European Law*, (Schulthess 2011), 101-120, 103.

88 *See for instance*, K. Gebauer, *Parallele Grund- und Menschenrechtsschutzsysteme in Europa?*, (Duncker und Humblot 2007), 298.

89 C-399-11, Melloni [2013] ECR-107.

90 K. Lenaerts and J. A. Gutiérrez-Fons, "The Place of the Charter in the EU Constitutional Edifice", in *The EU Charter of Fundamental Rights, A Commentary* (2014) 1560, 1587.

case law of the European Court of Human Rights. Nonetheless, there remain important differences between the two courts. (…) Although the purpose of the Convention is the maintenance and further realisation of human rights and fundamental freedoms of the individual, it is designed to operate primarily as an interstate agreement, which creates obligations between the Contracting Parties at the international level. This is illustrated by the Convention's intergovernmental enforcement mechanism. The EC Treaty, by contrast, has founded an autonomous legal order, within which States as well as individuals have immediate rights and obligations. The duty of the Court of Justice is to act as the constitutional court of the municipal legal order that is the Community. The European Court of Human Rights and the Court of Justice are therefore unique as regards their jurisdiction *ratione personae* and as regards the relationship of their legal system with public international law".[91] This is all the more valid since the CFREU operates only when implementing Union law.[92]

Having said that, one must bear in mind that a "European consensus operates on the edge of the margin of appreciation and evolutive interpretation".[93] This allows the ECHR to sweeten the deal when it comes to developing human rights standards that might be considered as bypassing the sovereign consent of the Contracting Parties[94]. Again, "[the] use of consensus analysis results in the Court's search for the lowest common denominator and resembles original intent interpretation".[95] Nonetheless, in human rights protection, the ECHR's position is definitely harder than the CJEU as long as the former's "legitimacy depend[s] on a reconciliation of minimum standards with a progressive reading of the Convention".[96]

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91 C- 402/05 *Kadi and Al Barakaat International Foundation / Council and Commission*, [2008] ECR I-6351 Opinion of AG Maduro delivered on 16 January 2008, para.37.

92 Article 51 (1) CFREU.

93 K. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights*, (CUP 2015), 129; K. Dzehtsiarou, "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights", German Law Journal, 12 (2011), 1730.

94 Among others, *see* P. Johnson, *Homosexuality and the European Court of Human Rights* (Routledge 2013), 77-78. *See also*, Separate opinion of Judge Fitzmaurice in *Golder v. The United Kingdom*, App No 4451/70 para. 30.

95 B. Petkova, The Role of Majoritarian Activism in Precedent Formation at the European Court of Human Rights, Eur. Univ. Inst., Working Paper, 2012.

96 B. Petkova, Three levels of dialogue in precedent formation at the CJEU and ECtHR, in K.Dzehtsiarou/T. Konstadinides/T. Lock/N. O'Meara (eds) *Human Rights Law in Europe, The Influence, Overlaps and Contradictions of the EU and the ECHR*, (Routledge 2014), 73-94, 83.

Finally, another theme of the CJEU in its recourse to the margin of appreciation is to avoid disparities with the jurisprudence of the ECtHR in terms of the protection of fundamental rights within Europe.[97] However, it is regrettable that the CJEU, having the "*imperium jurisdictionnel"*[98] on the basis of Article 260 TFEU, remains reluctant to exercise this power for a complete fundamental rights adjudication. This further reinforces the point that the ECtHR could refer to the CJEU's case law in assessing whether or not there is a "European consensus".

As to the jurisdictional competence of the ECtHR over the EU law, the ECtHR hold explicitly that the presumption of equivalence would only operate where the EU law at issue could be challenged before the CJEU, unlike the case in *Matthews* where the compliance of primary law of EU with the ECHR was at issue.[99] This would explain the reluctance of the ECtHR vis-à-vis cases directed against Member States of the EU concerning actions that had been determined by EU law. Thus, the ECtHR accommodates the autonomy of the EU legal order in order to prevent an overlapping jurisdiction with the CJEU.[100]

The judicial self-restraint of the ECtHR is driven by the cross-references that exists with the CJEU even though the CJEU's case law regarding fundamental rights are based mainly on the ECtHR's case law which appears to furnish evidence of equivalence. Therefore, a possible interpretation of the Bosphorus Doctrine[101] consists in the subsidiary role of the ECtHR, and as such, by the 'presumption of compatibility', it allows a margin of appreciation to the CJEU in its turn.[102]

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97 Y. Shany, "Toward a General Margin of Appreciation Doctrine in International Law ?", EJIL (2005) Vol. 16 no.5, 907-940.

98 E. Lambert, *Les effets des arrêts de la Cour européenne des droits de l'homme : contribution à une approche pluraliste du droit européen des droits de l'homme*, (Bruylant 1999), 159.

99 Lock (8), 379.

100 T. Lock, "Beyond Bosphorus: the European Court of Human Rights' Case law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights", HRLR, 10 :3 (2010) 529-545, 531.

101 It refers to the doctrine of equivalent protection as laid down in ECtHR's judgement *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, App no. 45036/98. Very briefly, under this doctrine, the ECtHR found out that the protection of fundamental rights by the EU law can be considered to be "equivalent" to that of the ECHR system. See para. 155 of the case.

102 *See* O. De Schutter, "Bosphorus Post-Accession : Redefining the relationships between the European Court of Human Rights and the Parties to the Convention", in V.Kosta, N. Skoutaris and V. P Tzevelokos (eds), *The EU Accession to the ECHR,* (Hart 2014), 177-198.

**Conclusion**

In this paper we described indicators of how courts operating at different levels look at the same issue – the protection of fundamental rights – from different perspectives.

The overall conclusion that emerges from our study is that Strasbourg and Luxembourg are having a productive and prosperous dialogue with the goal of promoting fundamental rights in Europe. We have reached this conclusion through the use of both case analysis and normative theorizing. On the methodological level, both cannot be firmly distinguished in order to explain and critically appraise the reasoning of the ECtHR and of the CJEU. As the CJEU former President Skouris puts it, "these two systems of protection, which are superimposed moreover on the national systems, are complementary in function and interdependent in terms of their rule-making powers".[103]

The current system does not lead to accomplishing the purpose stated in the preamble to the ECHR, which calls for a common understanding and observance of human rights given that a broad national discretion can lead to a narrow interpretation of Convention rights and obligations. A propos, one must bear in mind that rights and freedoms, which are subject to exceptions, must be narrowly interpreted and that the necessity for any restrictions must be convincingly established. In other words, exceptions to rights guaranteed by the Convention must be interpreted and applied strictly. The same applies to the CJEU, equally reluctant to exercise judicial activism for the adjudication of fundamental rights.

With regard to fundamental rights and freedoms, emphasis should be placed on individuals rather than on states or their sovereignty. This is particularly true with regard to the CJEU's recourse to the margin of appreciation doctrine. Given the context where "goods, persons, or services cross national borders, they are likely to cross value borders too".[104]

This outcome is neither the result of the primacy of national constitutions nor of the ECHR and/or of the CJEU but of prevailing human rights standards and their effectiveness within the Member States.

Even with the ECHR conceived as the lowest common denominator, it seems that, as of today, many Contracting States struggle in reaching this minimum level of human rights protection and fail to ensure effective remedies among others. The margin of appreciation doctrine and the principle of subsidiarity are mostly used as a shield against the ECtHR's compulsory jurisdiction.

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[103] Dialogue between judges, European Court of Human Rights, (COE 2009), 31.

[104] N. Nic Schuibhne, "Margins of Appreciation : National Values, Fundamental Rights and EC Free Movement Law", ELR (2009) vol. 32 No. 2, 230-256, 231.

Fundamental rights seem to be getting into the Procrustean bed of the States' sovereignty. It is within the jurisdiction of each and every Member State to set the rate above the minimum or at the minimum, but certainly not below the minimum delineated by the ECHR. However, the reality is that the accomplishment of that task is often hindered by a frequently reluctant approach on the part of the Member States. Indeed, it seems that human rights are considered purely national and variable on local issues and do not embrace a truly common understanding of protection. It is regrettable that the objective of harmonizing human rights protection within the European continent seems to be set aside by opting for the CFREU as the greatest common divisor.

In sum, while having the opportunity of being more valuable in the form of two different currencies, judicial self-restraints form two sides of the same coin.

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## BIBLIOGRAPHY

Andreakadis S., "The European Convention on Human Rights, the EU and the UK : Confronting a Heresy : A Reply to Andrew Williams", EJIL 24 (2013), No.4, 1187-1193.

Bianco G. and Martinico G., "Dialogue or Disobedience ? On the Domestic Effects of the ECHR in Light of the Kamberaj Decision", European Public Law 20, no. 3 (2014) 435-450.

Bryde B.-O., "The ECJ's Fundamental Rights Jurisprudence – A milestone in Transnational Constitutionalism" in M. Poiares Maduro and L.Azoulai (eds), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart 2010).

Callewaert J., "The European Convention on Human Rights and European Union Law : A Long Way to Harmony", EHRLR 6 (2009).

Callewaert J*., The accession of the European Union to the European Convention on Human Rights*, (COE 2013).

Carozza P. G., "Subsidiarity as a Structural Principle of International Human Rights Law", 97 AJIL (2003) 38-79.

Carozza P. G., "The Charter and the Member States"*,* in S. Peers and A.Ward (eds) *The European Union Charter of Fundamental Rights : Context and Possibilities* (2003).

Christoffersen J., "Fair balance : Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights", International Studies in Human Rights, vol 99, (Martinus Nijhoff 2009).

Claes M. and de Visser M., "The Court of Justice as a Federal Constitutional Court : A Comparative Perspective" in E. Cloots, G. De Baere and S. Sottiaux (eds.), *Federalism in the European Union* (Hart 2012) 83, 102.

De Burca G., "After the EU Charter of Fundamental Rights : The Court of Justice as a Human Rights Adjudicator ?", 20 MJ 2 (2013), 168-184.

De Schutter O., "Bosphorus Post-Accession : Redefining the relationships between the European Court of Human Rights and the Parties to the Convention", in V.Kosta, N. Skoutaris and V. P Tzevelokos (eds), *The EU Accession to the ECHR,* (Hart 2014), 177-198.

Delmas-Marty M., "« A reasoned » Conception of the Reason of State", in *The European Convention for the Protection of Human Rights, International Protection versus National Restrictions*, (Martinus Nijhoff 1992).

Dzehtsiarou K., "European Consensus and the Evolutive Interpretation of the European Convention on Human Rights", German Law Journal, 12 (2011).

Dzehtsiarou K., *European Consensus and the Legitimacy of the European Court of Human Rights*, (CUP 2015).

Fabbrini F., *Fundamental Rights in Europe, Challenges and Transformations in Comparative Perspective*, (OUP 2014).

Fabbrini F., The Margin of Appreciation and the Principle of Subsidiarity: A Comparison", iCourts Working Paper Series No.15, (2015).

Fenwick H., *Civil liberties and human rights,* (Cavendish 2005).

Forowicz M., The Ricochets of Convergence in EU Law and the ECHR: Much Ado about the Margins of Appreciation?, in S.Besson/N. Levrat/ E. Clerc (eds), *Interpretation in European Law*, (Schulthess 2011) 101-120.

Gebauer K., *Parallele Grund- und Menschenrechtsschutzsysteme in Europa?*, (Duncker und Humblot 2007).

Gerards J., "The European Court of Human Rights and the national courts : giving shape to the notion of « shared responsibility »", in J. Gerards and J.Fleuren (eds) *Implementation of the European Convention on Human Rights and of the judgements of the ECtHR in national case-law, A comparative analysis*, (Intersentia 2014), 13-94.

Glas L. R., Dialogue in the European Convention on Human Rights System : inspiration, added-value and means, EJHR, 3 (2015) 247-277.

Guild E. and Lesieur G., *The European Court of Justice on the European Convention on Human Rights, Who said what, when?* (Kluwer Law 1998).

Hinarejos A., *Judicial Control in the European Union : Reforming Jurisdiction in the Intergovernmental Pillars* (OUP, 2009) 1-4.

Ichim O., "ECHR and ECJ : The Peer to Peer Perspective Review", Jean Monnet Working Papers, Université de Genève, N°20 (2016)

Jacobs F.G., *Jacobs & White – The European Convention on Human Rights* (OUP 2006).

Johnson P., *Homosexuality and the European Court of Human Rights* (Routledge 2013).

Keller H./ Sweet A. S., Assessing the Impact of the ECHR on National Legal Systems, in *A Europe of Rights, The Impact of the ECHR on National Legal Systems*, (OUP 2008) 677-712.

Lambert E., *Les effets des arrêts de la Cour européenne des droits de l'homme : contribution à une approche pluraliste du droit européen des droits de l'homme*, (Bruylant 1999).

Lenaerts K. and Gutiérrez-Fons J. A., "The Place of the Charter in the EU Constitutional Edifice", in *The EU Charter of Fundamental Rights, A Commentary* (2014).

Lock T., "The ECJ and the ECtHR : The Future Relationship between the Two European Courts", The Law and Practice of International Courts and Tribunals 8 (2009) 375-398.

Lock T., "Beyond Bosphorus: the European Court of Human Rights' Case law on the Responsibility of Member States of International Organisations under the European Convention on Human Rights", HRLR, 10 :3 (2010) 529-545.

Lübbe-Wolff G., ECtHR and national jurisdiction – The Görgülü Case, Humboldt Forum Recht 12 (2006) 138-146.

Martinico G., "Is the European Convention Going to be « Supreme » ?", EJIL 23 (2012) 401-424.

Mason L., "Labour Law, the industrial constitution and the EU's accession to the ECHR : the constitutional nature of the market and the limits of rights. based approaches to labour law" in K.Dzehtsiarou/T. Konstadinides/T. Lock/N. O'Meara, (eds) *Human Rights Law in Europe, The Influence, Overlaps and Contradictions of the EU and the ECHR* (Routledge 2014).

Mena Parras F. J., "From Strasbourg to Luxembourg ? Transposing the margin of appreciation concept into EU Law", ULB Working Paper No. 7 (2015).

Merrills J.G., The development of international law by the European Court of Human Rights, (Manchester University Press 1993).

Murray J. L., "The Influence of the European Convention on Fundamental Rights on Community Law", 33 Fordham Int'L Journal, 5 (2011) 1388-1422.

Naumann K., "Art. 52 Abs. 3 GrCh zwischen Kohärenz des europäischen Grundrechtsschutzes und Autonomie des Unionrechts", Europarecht (2008).

Nic Schuibhne N., "Margins of Appreciation : National Values, Fundamental Rights and EC Free Movement Law", European Law Review vol. 32 No. 2 (2009) 230-256.

Peers S., "Taking Rights Away? Limitations and Derogations" in Steve Peers/ Angela Ward (eds), *The EU Charter of Fundamental Rights: Politics, Law and Policy, Essays in European Law*, (OUP 2004).

Petkova B., The Role of Majoritarian Activism in Precedent Formation at the European Court of Human Rights, Eur. Univ. Inst., Working Paper, (2012).

Petkova B., Three levels of dialogue in precedent formation at the CJEU and ECtHR, in K.Dzehtsiarou/T. Konstadinides/T. Lock/N. O'Meara (eds) *Human Rights Law in Europe, The Influence, Overlaps and Contradictions of the EU and the ECHR*, (Routledge 2014) 73-94.

Pollicino O., "Conclusions, In Search of Possible Answers", in G. Martinico and O. Pollicino (eds) *The National Judicial Treatment of the ECHR and EU Laws. A Comparative Constitutional Perspective*, (ELP 2010).

Shany Y., "Toward a General Margin of Appreciation Doctrine in International Law ?", EJIL (2005) Vol. 16 no.5, 907-940.

Torres Pérez A., "Too Many Voices ? The Prior Involvement of the Court of Justice of the European Union", in V.Kosta, N. Skoutaris and V.Tzevelekos (eds), *The EU Accession to the ECHR*, (Hart 2014), 29-44.

Wägenbaur B., *Court of Justice of the European Union, Commentary on Statute and Rules of Procedure*, (Beck 2013).

Weissbrodt D. / Aolain F. N. / Fitzpatrick J. / Newman F., *International Human Rights: Law, Policy, and Process*, (LexisNexis 2009), 70.

Wildhaber L., A Constitutional Future for the European Court of Human Rights ? 23 Hum, Rts. L.J. 161 (2002).