



FUNDAMENTAL RIGHTS IN EUROPE: “CONSTITUTIONAL” DIALOGUE BETWEEN THE COURT OF JUSTICE OF THE EU AND THE EUROPEAN COURT OF HUMAN RIGHTS

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Abstract:

This paper is based on a socio-legal research which evaluates the impact of the Treaty of Lisbon on the area of fundamental rights within the EU. The project’s central core is on the relationship between the Court of Justice of the EU (CJEU, as it might be termed the Luxembourg Court) and the European Court of Human Rights (ECtHR, as it might be termed the Strasbourg Court) in the pre and post EU’s accession to the European Convention of Human Rights (ECHR). The work, as informed by empirical findings, questions whether the two Courts’ dialogue in the fundamental rights sphere could be analysed using the language of constitutional pluralism, doctrine elaborated by scholars to describe the multiple claims of authority between the CJEU and the national courts. The after accession era offers interesting features to revisit the constitutional pluralism doctrine, challenging its appropriateness when granting final authority to the Strasbourg Court in the European human rights field.

Keywords:

Europe, Legal plurality, Constitutional Law, Human Rights, Courts.

1. Introduction: coexistence of a plurality of jurisdictions dealing with fundamental rights in Europe

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In Europe, a plurality of legal systems dealing with fundamental rights coexists within the same geographical territory: two supranational orders (the EU and the Council of Europe) including two Courts and the national jurisdictions of the respective contracting parties, of which 27 are party to both entities. Although each order adheres to different Treaties, Conventions or national Constitutions a clear overlap between them is evident as all adjudicate over the same issues. At the time of their inception, the focus of each of the two European entities was different: the EU on the common market and the Council of Europe mainly on civic and political rights. However, this has expanded over the years. The EU has enlarged its scope transforming its nature. From an Economic Community it became a Union, covering several areas in the field of fundamental rights ranging from the European citizenship to social policy, migration law, equality and non-discrimination. Over the years, its nature has fluctuated from an international organisation to a form of constitutional state-based entity in relation to specific subject-areas. As a supranational legal system the EU claims to be autonomous, on an equal footing with the State, or even trumping it by asserting equally plausible ultimate legal authority. This type of autonomy has been defined as “*autonomy without [...] exclusivity*”, implying no comprehensiveness of jurisdiction over its territory and subject population.

By contrast, Member States (MSs) claim that the two attributes of “autonomy and exclusivity” cannot be separated³ and yet they have limited their sovereign rights, albeit in restricted fields⁴ conferring sovereignty to the EU. However, as established by the constitutional principle of conferral recognised by art 5 TEU, the EU can act only within the limits of the competences conferred upon it by the MSs in the Treaties. Despite not having the formal power to determine the limits of its own competence, the teleological interpretation adopted by the EU legislator, has determined “spill over” effects in areas which the Member States believed to have retained their competences.

Whilst the solution adopted by international organisation lies in the interpretation based on the historical will of the founders as a way of preserving state sovereignty, within the EU legal system, the legislator has rather adopted a teleological reading⁵, autonomously interpreting the scope of its competences beyond the legal text and questioning the *telos* of a rule in search for a legal solution to a social problem.

Thus, the EU has evolved from an entity using the international logic⁶ to a body adopting the constitutional technique of teleological interpretation.⁷ The CJEU has accepted all but one⁸ of EU legislator’s teleological interpretations and has itself

² N. Walker, ‘Late Sovereignty in the European Union’ in Neil Walker, (ed), *Sovereignty in Transition* (Oxford: Oxford University Press, 2003), 23.

³ M. Avbelj, ‘Theory of European Union’ (2011) ELR 821.

⁴ Case 26/62 *Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

⁵ N. MacCormick, ‘The Maastricht-Urteil: Sovereignty now’ (1995) 1 ELJ 259-66.

⁶ Case 8/55, *Federation Charbonniere de Belgique v High Authority of the European Coal and Steel Community (Fedchar)* [1955] ECR 245.

⁷ The problematic around this technique was illustrated in the controversy on the adoption of the Working Time Directive. See the Case C-84/94 *UK v Council of the European Union* [1996] ECR I-5755.

⁸ Case C-376/98 *Germany v Parliament and Council (Tobacco Advertising)* [2000] ECR I-8419.

interpreted Union law in a teleological manner, maximising the useful effect behind legislation.⁹

Thus, the EU became a hybrid entity presenting a mixture of supranational and intergovernmental elements and employing a diversity of approaches in accordance with the area of competence in line with the teleological reading. The European Union is likely to continue *“its strange career: it started as a political dream of European federalists, then became an unidentified legal object at Maastricht, then gradually was acknowledged as the overarching organization of the European integration process, and has now entirely absorbed the European Community but without realizing the federalists’ dreams, nor Altiero Spinelli’s vision of the EU as a step change towards a more integrated and federal-state like Europe”*¹⁰.

Also the Council of Europe, an international organisation regulated by international law, has undergone some expansion. In addition to political and civic rights included in the Convention, the Social Charter comprising economic and social rights was introduced to promote the social well-being of the Contracting Parties’ populations.

Thus, the presence of multiple agents claiming legal authority within the same geographical area has raised questions around the legitimacy and supremacy of these competing autonomous legal systems.

In an attempt to understand this complex phenomenon, the resources of legal theory have been enhanced proposing “solutions to the difficulties for practice implicit in the very idea of pluralism”¹¹ referring to different actors, entities, legal systems co-existing in the same geographical space within the state confines. The European order has developed beyond the traditional state borders overcoming the Westphalian dimension. Thus, a number of competing theories within the sphere of legal pluralism at transnational level have been suggested to assist with the challenges and implications of European integration.

This paper discusses whether the theory developed by the adherents to the ‘pluralist movement’ in Europe¹² i.e. the constitutional pluralism doctrine, adopted to regulate the relationship between the CJEU and the national constitutional courts, could be exported to explain the pluralistic normative authorities in the fundamental rights domain within the European territory¹³. This theory describes *“the existence and the relationship between the many different kinds of normative authority - functional, regional, territorial and global - in the transnational context”* having a *“particular*

⁹ An example of this is the Case 9/75 Casagrande v Landeshauptstadt München [1974] ECR 773.

¹⁰ B. de Witte, ‘The European Union as an international legal experiment’, in G. De Burca and J. Weiler (eds), *The worlds of European Constitutionalism* (Cambridge: Cambridge University Press, 2011), 31.

¹¹ N. MacCormick, ‘Juridical Pluralism and the Risk of Constitutional Conflict’, in N. MacCormick (ed), *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999), 102. See for a more detailed discussion on classical pluralism B. Tamanaha ‘A Non-essentialist Version of Legal Pluralism’ (2000) 27 *Journal of Law and Society* 296; J. Griffiths ‘What is Legal Pluralism?’ (1986) 24 *Journal of Legal Pluralism* 1.

¹² J. Baquero Cruz, ‘The Legacy of the Maastricht-Urteil and the Pluralist Movement’ (2008) 14 *ELJ* 389-420.

¹³ The European territory in this paper refers to the overlapping territory of the EU and ECHR. The European territory covers the 27 EU Member States’ territory, ie the whole European Union.

*traction, however, in relation to the EU, a political and legal entity which has long defied easy categorization in the language of constitutional law or of international organisations”.*¹⁴

There is paucity of research on whether it could be evocated to regulate the interplay between the two legal orders of the EU and Council of Europe, which extends beyond the traditional boundaries of the state and engages with the transnational level.

The extent to which the national and supranational jurisdictions in Europe coexist within a single unity is debatable. The concurrence of overlapping orders employing a plurality of sources of law raises concerns around their interactions. Hence, depending on how the relationship between these legal systems is shaped, conflicts between these legal orders could exist or be avoided. Thus, constitutional pluralism is a common grammar in a pluralistic order for making claims of authority acceptable; it is the idea of limited collective self-governance¹⁵.

This paper considers in turn a range of competing theories of constitutional pluralism¹⁶, regulating the interplay between the CJEU and national constitutional courts, and reflects on whether each of them could be exported to legitimise the relationship between the Luxembourg and the Strasbourg Courts in the pre-accession phase. Then, the research proposes, by means of theoretical and empirical inquiries, a sui generis construction regulating the new European architecture on fundamental rights in the post-accession era, i.e. “monism (quasi) federal system” based on constitutional consensus between the courts. It argues that the interaction between the two European Courts has been so far based on dialogue and mutual respect, echoing the complete autonomy and equality of the two legal systems. Though, their autonomy is challenged by the EU’s accession to the ECHR, as the Strasbourg court will be called to exercise an external scrutiny over EU legislation, expressing a final view on the compliance of EU law with the Convention.

The paper is structured into three sections. The following one summarises the several doctrinal views within the constitutional pluralism discourses to contextualise this research within this widely discussed theme of EU legal scholarship. The third section reflects on the debate concerning the relationship between CJEU and the National Constitutional Courts, focusing in particular on the fundamental rights dimension of their dialogue. In trying to learn some lessons from the latter judicial exchange, the fourth section reflects on the working of CJEU and the ECtHR over the years and then, informed by empirical findings collected during the project, it conceptualises a new theoretical framework based on “constitutional dialogue”, which could also work in the post-accession era.

2. The doctrines of Legal Pluralism, Constitutionalism and their variations

¹⁴ G. De Burca and J. Weiler, *The worlds of European Constitutionalism* (Cambridge: Cambridge University Press, 2011), 3.

¹⁵ D. Halberstam, ‘Local, global and plural constitutionalism: Europe meets the world’, in G. De Burca and J.H.H. Weiler (eds), *The worlds of European Constitutionalism* (Cambridge: Cambridge University Press, 2011), 163.

¹⁶ *Ibid* 12-13.

This section begins introducing the concepts of legal pluralism, constitutionalism and constitutional pluralism. In particular it focuses on the “constitutional pluralism” model summarising its evolving nature as presented in the EU literature. The classical legal pluralism theory has been defined as a concept which refers to legal systems, networks or orders co-existing in the same geographical space.¹⁷ The revisited model applicable to the EU dimension and consequently to the present study, follows the classical legal pluralism in its view that the State is not the only source of law. It nevertheless takes a completely different position from it, focusing on the macro-level (the supranational) not the micro-level dimension (i.e. the plurality of private actors such as network, family and others that in different informal, semi-formal and formal environments allegedly also create law).¹⁸

The notion of ‘constitutionalism’ is dominant in legal literature. Constitutionalism can have many meanings¹⁹. Five are the forms of constitutionalism identified by Craig. The first refers to the questions surrounding the existence of a constitution, such as why the constitution is legitimate, authoritative and how it should be interpreted. The second tries to understand the extent to which a system possesses such features associated with a constitution. The third represents the shift to a polity based on the constitution which assigns ultimate power to the people. The fourth, common in the public law sphere, refers to the extent to which legal systems beyond the constitution itself satisfy noble precepts of good governance such as accountability of governments, good administration and mainstreaming human rights. The last form describes the debate around the constitutionalisation of private law: a discussion on whether norms that applies between citizens and the states should also apply between individuals such as the horizontal application of European Convention of Human Rights.²⁰ For Kirsch the ‘constitutionalist’ model is the order as a whole “*subject to a unified set of norms governing the political system a ‘constitution’, whether written or not in reference to which disputes about authority are decided. This does not mean there could not be different interpretations of those norms by different actors in classical, domestic constitutional orders such different interpretations are frequent but at least the norms on which the argument centres are shared and unity constitutes a common regulative ideal*”.²¹ The use by Kirsch corresponds to a thick sense of constitutionalism, which is arguably absent within the EU sphere.

A novel idea suggested by Sabel and Gerstenberg, proposes a concept of constitutionalism beyond the home territory based on the reciprocal recognition and acceptance of the decisions of each overlapping and concurrent order considering that

¹⁷ W. Twining, *Globalization and Legal Theory* (London, Edinburgh, Dublin: Butterworths, 2000), 83; B. Tamanaha ‘A Non-essentialist Version of Legal Pluralism’ (2000) 27 *Journal of Law and Society* 296; J. Griffiths ‘What is Legal Pluralism?’ (1986) 24 *Journal of Legal Pluralism* 1.

¹⁸ M. Avbelj, ‘The EU and the Many Faces of Legal Pluralism: Toward a Coherent or Uniform EU legal order?’ (2006) *CYELP* 2, 382.

¹⁹ For an explanation and critics to the modern constitutionalism see N. Walker, ‘The Idea of Constitutional Pluralism’ (2002) 65 *MLR*, 319.

²⁰ P. Craig, ‘Constitutions, Constitutionalism and the European Union’ (2001) 7 *ELJ*, 127-128.

²¹ N. Krisch, ‘The Open Architecture of European Human Rights Law’ (2008) 71 *MLR* 183, 185.

all are members of a constitutional family²². This model has been named the “coordinate constitutionalism” concept, based on the idea that the emergent constitutional order in Europe is polyarchic being disputes resolved by exchanges among coordinate bodies, in absence of a final decider.²³ This doctrine has been applied to the clash of jurisdictions in Europe where Member States, the CJEU, the ECtHR and other international courts or organisations “*defer to each other’s decisions, provided those decisions respect mutually agreed essentials*”²⁴. The concept of the overlapping consensus proposed by this model is very relevant to the present study as reflects on the solution for the clash of jurisdictions in Europe.

In an endeavour to design a model which could find its application within the EU discourse, there were attempts to merge constitutionalism and pluralism.²⁵ An adaptation of the legal pluralism concept within the EU is represented by the concept of constitutional pluralism as introduced by MacCormick in his path-breaking research. His original position considered that “*there is a plurality of institutional normative orders, each with a functioning constitution (at least in the sense of a body of higher-order norms establishing and conditioning relevant governmental powers)*” each acknowledging “*the legitimacy of every other while none asserts or acknowledges constitutional superiority over another*”.²⁶

Constitutional and international law scholars have sought to provide a model which could try to accommodate the constitutional claims of final authority within the EU sphere. These conflicts, triggered by the the Bundesverfassungsgericht (BVerfG – Federal Constitutional Court), questioned the supremacy of EU law and the ultimate competence of the CJEU²⁷. The challenges raised evidence not just the presence of a plurality of adjacent orders coexisting within a single unity, but the emerging idea of “constitutional pluralism”, i.e. the very representation of the relationship between autonomous and distinct constitutional sites outside a monistic unity.

The debate animating the academic discourse around the EU sphere can be summarised in two main schools of thoughts²⁸. The line between the two approaches is difficult to draw, however their main difference lies in the hierarchical and heterarchical dimensions. Both approaches aim at solving claims of authority, supranationality and sovereignty emanating from the EU and/or the Member States.

The first school of thoughts²⁹ resolves the conflicts between the EU supra-national and the MSS’ authorities relaying on two hierarchical approaches: the classical and well-

²² C. F. Sabel and O. Gerstenberg, *Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order* (2010) ELJ, 511-550.

²³ Ibid 513.

²⁴ Ibid 511.

²⁵ See in particular N. Walker, ‘The Idea of Constitutional Pluralism’ (2002) 65 MLR 317.

²⁶ N. MacCormick, ‘Beyond the Sovereign State’ (1993) 56 MLR 1.

²⁷ See following section.

²⁸ This categorisation has been borrowed by M. Avbelj, (n 18) 385.

²⁹ T. Schilling, ‘Who in Law is the Ultimate Umpire of European Community Law?’ Jean Monnet Working Paper 10/9; J. Fischer, ‘From Confederacy to Federation: Thoughts on the Finality of the European Integration’ (Speech given at Humboldt University, Berlin, 12 May 2000); J. Habermas, ‘Why Europe Needs a Constitution?’ (2001) 11 *New Left Review* 5.

known expression of “monism under international law” and the “federal state doctrine”. The “monism under international law” approach views the supranational legal order, the EU, as a polity, which cannot plausibly claim ultimate legal authority, since its origin has to be traced back to the common international accord of the Member States who remain the ultimate arbiters of the validity of EU law.³⁰ This theory is based on the idea of a monistic unity between EU and MSs and the resolution of conflicts/claims in favours of MSs for their self-binding commitments to the founding treaties, i.e. *pacta sunt servanda*.

By contrast the “federal state” doctrine considers the EU as already, or on the way to becoming, a fully-fledged federation where EU law has its own foundations, trumps the legal rules emanating from the Member States’ legal orders in the event of contravention³¹. This is based on the Eurocentric notion of supremacy and direct effect³². Conflicts between the different units are accommodated conferring final authority to the EU. The landmark decision of the CJEU in *Van Gend en Loos*³³ is the declaration of independence of EU law from the authority of the national level³⁴.

Numerous are the critics to the latter approach, which views a federal-style model as “*likely [creating] serious friction in a world in which this primacy is heavily contested*”³⁵. Whilst in a normal federal state, the authority of the federal *demos* would trump that of constituent units, *demoi*, at least in the sphere of competence allocated to the federation. In Europe, there is incommensurability of authority and the rationale being the absence of an European constitutional *demos*³⁶ in the meaning of the federal state³⁷.

The second school of thoughts is led by the heterarchical doctrines. A heterarchy can be defined as a formal structure, usually represented by a diagram of connected nodes, without any single permanent uppermost node³⁸. This position accepts no clear superiority either of the national or the supranational entity. Within this second model, different variations are present, providing a variety of pluralism competing theories.

MacCormick’s work has evolved into a position that can be defined as “legal pluralism under international law”³⁹ based on the idea of mutual recognition of the autonomous existence of national and supranational constitutional sites/units as are subordinated to the overall rules and principles of international law accommodating the incommensurability of authority claims. The proposed model is pluralistic and

³⁰ Ibid.

³¹ J. Fischer and J. Habermas, (n 29).

³² See Craig and De Burca *EU law* (Oxford: Oxford University Press, 2011), 180 and 256; R. Schütze, *European Constitutional Law* (Cambridge: Cambridge University Press, 2012) 305-310 and 346-352.

³³ Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen*, n 4 above.

³⁴ M.P. Maduro ‘Contrapunctual Law: Europe’s Constitutional Pluralism in Action’, in N. Walker (ed) *Sovereignty in Transition* (Oxford, Hart, 2003), 501-537.

³⁵ N. Krisch, ‘The Pluralism of Global Administrative Law’ (2006) 17(1) *EJIL*, 278.

³⁶ According to the definition reported by the free dictionary *demos* means “The people of a nation regarded as a political unit” available at <http://www.thefreedictionary.com/> (last accessed on 24th September 2012).

³⁷ J.H.H. Weiler in G. de Burca and J.H.H. Weiler, *The Worlds of European Constitutionalism* (Cambridge: Cambridge University Press, 2011), 13.

³⁸ See definition in *Collins dictionary* (Glasgow: HarperCollins, 2011).

³⁹ N. MacCormick, *Questioning Sovereignty? Law, State and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999), 117-121.

interactive. There is no subordination of MSs law to Union law (superiority of one system over another), no monistic no hierarchical dimension. The relationship between the legal orders of the Member States and the supranational EU legal order is one of heterarchy, of mutual recognition of the autonomous existence of both systems, which are, however, in the good old Kelsenian tradition, subordinated to the overall rules and principles of international law. This should provide a solution when the equally plausible claims to ultimate legal authority of both legal orders (ECJ and National Constitutional courts) conflict.⁴⁰

By contrast, the “liberal legal pluralism” theory, allocates supremacy to national constitutions in the case of the competing claims embodied in the so-called constitutional conflicts⁴¹ in an attempt to find a solution to the authority question between the national and supranational legal order. This theory is resolved in favour of the national constitutional courts’ claims, provided they base their review of EU law in accordance with a set of universal principles such as the principle of legality. Then, Kumm has evolved its conception, using the cosmopolitan paradigm to guide and structure debates in constitutional practice. He now believes that legitimate constitutional authority at the national level depends in part on its relationship with the international community, of which it is an integral part.⁴² His position moved away from constitutional pluralism toward a sort of global constitutionalism.

Another view of the heterarchical approach is proposed by the “epistemic pluralism” doctrine discussed by Walker⁴³. This doctrine considers both legal orders as equal, autonomous but with neither proposing an Archimedean point, nor a sure basis of historical knowledge in the event of conflicts. This theory, claiming equality of the national and supranational systems with no solution in favour of one or the other, is articulated following various empirical indices and normative criteria which facilitate its understanding. Originally shared by MacCormick, it accepts that each claim is equally plausible and the idea of a consensus between the different units is aspirational and its full realisation is unfulfilled by the authoritativeness of those sites, who might pursue it.

A further competing theory is the “contrapunctual model” developed by Maduro who envisages greater inclusion of various participants, ordinary courts, political actors, and individuals in the EU legal discourse to achieve a sort of harmony (counterpoint) between the competing legal orders⁴⁴. His view is based on the meaning of counterpoint, which is the musical method of harmonising different melodies that could be heard at the same time in an harmonic manner without a hierarchical relationship among them. The same can apply to the legal systems in a pluralist dimension, provided that the different participants or units base their interaction on a

⁴⁰ M. Avbelj (n 18) 385.

⁴¹ M. Kumm, ‘The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty’ (2005) 11(3) *ELJ*, 299.

⁴² M. Kumm, ‘The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State’ in Dunoff and Trachtman (eds) *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge: Cambridge University Press, 2009), 323-324.

⁴³ N. Walker (n 19) 338-339; H. Lindahl and B. van Roermund, ‘Law. Without a State? On Representing the Common Market’ in Bankowski and Scott (eds), *The European Union and Its Order: The Legal Theory of European Integration* (Oxford: Blackwell, 2000), 1.

⁴⁴ M.P. Maduro (n 34) 501-537.

set of shared principles to guarantee coherence and integrity of the European legal order, whilst respecting the competing claims of authority. The common basis for discourse is the set of shared principles which allow different legal systems to mutually adjust to each other to prevent conflicts.⁴⁵ This approach has already been adopted in the area of fundamental rights by the CJEU who has conferred a “wider margin of discretion”⁴⁶ to the national level, whilst claiming uniform application of EU law.

A similar method is also evident in the relationship between the Strasbourg regime and the national level characterised by a simultaneous form of pluralism through the doctrine of the “margin of appreciation”⁴⁷ and a hierarchal system stipulating a binding minimal norm⁴⁸. However, further reflections are required to understand the application of the “contrapunctual theory” to the EU legal order after the accession to the ECHR, due to a level of complexity added i.e. the implication of the final authority claim by the Strasbourg regime.

Based on mutual recognition of decisions by the national courts and the CJEU as a matter of disposition, the “constitutional tolerance” concept suggested by Weiler,⁴⁹ focuses on the underlying (sociological) ethos of a polity. Acceptance and subordination to the constitutional discipline demanded by the European legal order as a voluntary act, in his eyes, constitutes “*an act of true liberty and emancipation from collective self-arrogance and constitutional fetishism*”.⁵⁰ It is the expression of the ethics of political responsibility in Europe that should be founded on mutual recognition of and respect among the national and supranational authorities.⁵¹ This theory shows a high level of maturity based on overlapping consensus between legal orders by recognising each order’s self-determination and mutual deference in name of a superior integration goal.

Indeed, both accounts of pluralism (hierarchical and heterarchical) could be adopted with certain flexibility to regulate the relationship between the EU and its MSs. As Weiler has affirmed the EU has a dual character of supranationalism, a well-developed approach in relation to internal market and less developed in other areas. Intergovernmental bargains are the norm across wide-ranging aspects of economic integration and in some more limited aspects of market-correcting regulation. In certain areas (i.e. monetary union) where the EU has an exclusive competence or concurrent competence (i.e. environmental law) shifting the governance towards the EU, the approach follows a more hierarchal structure. In others areas of coordinating (i.e.

⁴⁵ Ibid.

⁴⁶ See Case C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I-9609 and Case C-112/00 Schmidberger [2003] ECR I-5659.

⁴⁷ The “margin of appreciation” doctrine considers and respects each Member State’s individual historical, cultural, religious, and socio economic circumstances allowing them an extent of discretion in the ECHR’s implementation (see for example *Handyside v United Kingdom*, (5493/72) [1976] ECHR 5 (7 December 1976). This represents an attempt to balance the need for uniformity with the national sovereignty and diversity.

⁴⁸ J.H.H. Weiler, ‘Prologue: global and pluralist constitutionalism – some doubts’, in G. De Burca and J. H. H. Weiler (eds) *The worlds of European Constitutionalism* (Cambridge: Cambridge University Press, 2011), 17.

⁴⁹ Weiler (n 48), 12-13.

⁵⁰ Ibid 13.

⁵¹ Ibid.

employment or social policy) or complementary competences (i.e. culture, education or health), a more heterarchical dimension is foreseeable.⁵²

Thus, the relationship between the CJEU and the national constitutional courts could be shaped on the recognition that allocation of competences between the two levels is established by the founding treaties holding constitutional nature and conferring different levels of authority to EU depending on the allocation of competences.

3. The relationship between CJEU and the National Constitutional Courts: a worked example of the accounts of the doctrine of constitutional pluralism

A The competence-competence (kompetenz-kompetenz) question

The interaction between the EU and national legal systems is understood in terms of dialogue between the respective judicial institutions, as the courts are the law's enforcers⁵³. The interplay between the CJEU and the National Constitutional Courts raises questions around the reciprocal constitutional authority and the supremacy of each legal system. The dilemma faced by the coexistence of these two courts, lies on their reciprocal claim of autonomy and ultimate legal authority of both the EU and national levels. Thus, the whole idea of "constitutional pluralism" was developed as a consequence of several jurisdictional challenges raised by national courts over the supranational claim evoked by the CJEU.

During the 1970s and 80s, a number of Constitutional Courts⁵⁴ have challenged the CJEU competence of ultimately decide on human rights protection. Conflicts on the ultimate authority between the national and the EU legal order were based on the fact that the EU had no fundamental rights policy and yet claimed primacy over national law. In the Solange case-law⁵⁵, the Bundesverfassungsgericht (BVerfG - Federal Constitutional Court) reacted to compel to the CJEU's claim of authority and developed a principle, entrusting acceptance of CJEU decisions "so long as" do not violate the German constitutional essentials, a compromise mutually accepted by both Courts.

Then, in the 1990s, national courts retrieved the authority to decide on issues of the delimitation of powers between the national and the European levels, thereby again seriously challenging the CJEU on the issue⁵⁶. In fact, the catalyst triggering the

⁵² For a deeper analysis of the different categories of Union competences, see R. Schütze, *European Constitutional Law* (Cambridge: Cambridge University Press, 2012), 162-169.

⁵³ *Ibid* 410.

⁵⁴ O. Pollicino and G. Martinico (eds), *The National Judicial Treatment of the ECHR and EU Laws* (Groningen: Europa Law Publishing, 2010), 4. See Craig and De Burca (n 32), for a detailed discussion on the supremacy from the perspective of the national courts, 268-296.

⁵⁵ See German jurisprudence: *Internationale Handelsgesellschaft v. Einfuhr und Vorratsstelle für Getreide und Futtermittel* (BVerfGE 37, 271) (so-called Solange I) [1974] 2 CMLR 540; *Case 345/82 Wünsche Handelsgesellschaft GmbH & Co. v Federal Republic of Germany* (so-called Solange II) [1984] ECR 1995; *Brunner v The European Union Treaty* [1994] 1 CMLR 57; 2 BvR 2661/06, 6th July 2010 and 2BvE, 2/08, 30 June 2009 in Craig and De Burca, (n. 32) 272-282;

⁵⁶ A.M. Slaughter, A. Stone Sweet, and J.H.H. Weiler (eds), *The European Court and National Courts Doctrine and Jurisprudence* (Oxford: Hart Publishing, 1998).

academic debate around the notion of “constitutional pluralism” within the EU legal order was attributed to the Maastricht decision of the BVerfG⁵⁷. Lacking a thick constitutionalism, the German Constitutional Court raised concerns in relation to the increasing competence of the (then) EC and the EU and the diminishing of core national competences⁵⁸.

Considerations over the EU democratic constituency were made by the BVerfG who contended the superiority of the national over the European system, thus re-addressing the question of ultimate authority and balancing accountability to the different constituencies⁵⁹ while allowing for smooth functioning.⁶⁰ The competence-competence (kompetenz-kompetenz) question raised by the Maastricht decision represented “a *wake-up call*” evidencing not just a plurality of adjacent orders coexisting within a single unity, but the emerging idea of “constitutional pluralism”⁶¹. Whilst the BVerfG tolerated the Union’s expansion of powers, it retained the ultimate control over German constitutional space⁶², questioning the autonomy of Community (now Union) law and its validity in Germany, depending upon the act of accession and ultimately upon the German Constitution.

Thus, Germany remains a sovereign state and the EU has no kompetenz-kompetenz (no competence to determine its own competences) and its powers were enumerated and limited by the principle of conferral. Hence, if interpretation of EU law occurs ‘*in a way that was no longer covered by the Treaty in the form that is the basis for the Act of Accession*’, ‘*the resultant legislative instruments would not be legally binding within the sphere of German sovereignty*’.⁶³ This decision raised issues going to “the root of sovereignty” calling into place national constitutions and national constitutional courts⁶⁴.

On the kompetenz-kompetenz question, the BVerfG required in its Lisbon Treaty judgment⁶⁵ that increases in the competence of the Union institutions through the use of “*passarelle* (little bridge) clauses⁶⁶” and the use of the enhanced flexibility both require the prior approval of the German Parliament in order for the country to agree to them. This Court asserted its own jurisdiction to determine the matter of competence. Also the constitutional courts of a number of other Member States, including both old and

⁵⁷ BVerfGE 2134/92, 155; (Maastricht Decision- Brunner v European Union Treaty) English translation of the decision: [1994] 1 CMLR 57.

⁵⁸ Ibid 10-11.

⁵⁹ M.P. Maduro, ‘Europe and the Constitution: What If This is as Good as it Gets?’, in J.H.H. Weiler and M. Wind (eds), *European Constitutionalism Beyond the State* (Cambridge: Cambridge University Press, 2003), 81-86.

⁶⁰ N. Krisch, ‘The Pluralism of Global Administrative Law’ (2006) 17(1) *EJIL*, 267.

⁶¹ M. Avbelj and J. Komarek, ‘Four vision of constitutional pluralism’, (European University Institute Department of Law, EUI Working Paper no. 21, 2008), 10.

⁶² N. MacCormick, *Questioning Sovereignty* (Oxford: Oxford University Press, 1999), 104.

⁶³ (1994) 69(2) *Common Market Law Reports* 89.

⁶⁴ N. MacCormick (n 11), 100.

⁶⁵ Lisbon, Judgement of the second senate of 30 June 2009 – Bundesverfassungsgericht, Case 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09, available in German, English and French at <http://www.bverfg.de>. The decision is also published in the official reports of the German Constitutional Court *Entscheidungen des Bundesverfassungsgerichts (BVerfGE)* vol. 123, 267.

⁶⁶ These are clauses which provide the European Council with a partial competence-competence. For further detail see R. Schütze (n 32) 103.

new members of the Union, expressed similar reservations to an absolute, unqualified statement of the supremacy of Union law.⁶⁷

Consequently, the mutual recognition of the validity of the interlocking legal systems based on different grounds for that recognition has triggered discussions impacting on “*the frontier of the problem of legal pluralism to reflect on solutions to the difficulties for practice implicit in the very idea of pluralism.*”⁶⁸ The first scholar introducing the terminology of “constitutional pluralism” was McCormick, who suggested that legal theory needed to be enhanced to assist with the challenge of authority’s recognition based on diverse grounds for the successful continuation of European integration⁶⁹.

B. Fundamental rights within the EU: the Solange case-law & the General principle of law

The CJEU has since the beginning adopted “a rights-centred approach”, having constructed the treaty obligation to establish an internal market and the four freedoms “*not as a programmatic goal to be realised thorough political legislation but as a set of directly enforceable individual rights*”⁷⁰. It has conceived its jurisdictional boundaries “*in highly open-ended terms curtailed neither by express restrictions in the Treaties nor by any recognition of the superior normative autonomy of any other legal site but only by the shifting boundaries of an increasingly “holistic” conception of market integration*”.⁷¹ In the absence of a proper Bill of rights and Treaty legal basis to adhere to the ECHR⁷², the CJEU guaranteed protection through the general principles of EU law. Since earlier on, in *Internationale Handelsgesellschaft*⁷³ the Court confirmed the existence of an “*analogues guarantee inherent in [European] law*”.⁷⁴

The *Nold* decision, at para 13, the ECJ stated that respect of fundamental rights forms an integral part of the general principles of Union Law drawing “*inspiration from constitutional traditions common to the Member States*”⁷⁵. It then affirmed “*it cannot therefore uphold measures which are incompatible with fundamental rights recognised and protected by the Constitutions of those States.*”⁷⁶

The ingenious stratagem of constructing autonomous Union principles drawing inspiration from constitutional traditions common to the Member States was a clear

⁶⁷ See (n 54).

⁶⁸ N. McCormick (n 64) 102.

⁶⁹ *Ibid.*

⁷⁰ N. Walker, ‘The place of European Law’, in G De Burca and J. Weiler (eds) *The worlds of European Constitutionalism* (Cambridge: Cambridge University Press, 2011), 90.

⁷¹ *Ibid.* 92.

⁷² As affirmed in the Opinion 1/94 [1994] ECR I-5281. On this decision, see J. Baquero Cruz ‘Disintegration of the Law of Integration in the External Economic Relations of the European Community’ (1997) 3(2) *Columbia Journal of European Law* 257.

⁷³ Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

⁷⁴ *Ibid.* 4.

⁷⁵ Case 4/73 *Nold v Commission of the European Communities* [1974] ECR 491, 507 at [13].

⁷⁶ *Ibid.*

attempt to solve possible conflicts without ceding ground on the more fundamental question of final authority⁷⁷.

Thus, within the EU law framework, conflicts are resolved by the CJEU claiming that the systems are founded on the same fundamental legal values which are based on national constitutional values and also now expressed in art 6 TEU.⁷⁸ In theoretical terms, this idea resembles the “federal-like state doctrine” considering the EU in its evolving nature aiming at becoming a fully fledged federal state.

However, the BVerfG has rejected this reading of supremacy as expressed by the CJEU and replaced it by with “*a counter-theory of the relative supremacy of European Law*”⁷⁹. It declared that it would ‘disapply’ European law that conflicted with the fundamental rights guaranteed in the German legal order, so long as the European legal order had not developed an adequate standard of fundamental rights.⁸⁰ This formula was indeed a limitation developed by the national court but it was also relative as it depended on the development of EU equivalent human rights’ guarantees. No more challenges would have occurred in case of an equivalent protection. Reflecting on this from a theoretical standpoint, the BVerfG argument is pluralist or perhaps “dualist” given its focus on constitutional identity in Lisbon.

Then, in the *Solange II* and *Banana* cases⁸¹ the BVerfG recognised an equivalent protection and promised to respect the supremacy of European law, “*as a result of the Court’s own relative supremacy doctrine having been fulfilled*”⁸². Theoretically, this evolving approach to the question of ultimate authority by the German Constitutional Court is based on its acceptance of a form of supremacy of the EU based on mutual recognition of each other’s decisions as evoked by the constitutional tolerance doctrine. The Maastricht decision, in relation to fundamental rights, upheld the position of *Solange II* codified in Article 23 of the German Constitution that the Federal Constitutional Court will not intervene as long as the protection guaranteed by European Community law generally is of an equivalent protection.

Thus, in response to the national constitutional courts’ assertion of having final authority on human rights, the CJEU readjusted its jurisprudence on that matter, without, however, ceding ground on final authority and stated that protection was assured within the EU.

⁷⁷ Internationale Handelsgesellschaft, n 73 above; Nold, n 75 above and Case 44/79 Hauer v Land Rheinland-Pfalz [1979] ECR 3727.

⁷⁸ See also AG M.P. Maduro Opinion in Case C-127/07 Arcelor [2008] ECR I-9895 at [15].

⁷⁹ R. Schütze (n 32) 359-360.

⁸⁰ Internationale Handelsgesellschaft, BVerfGE 37, 271, [1974] 2 CMLR 540 (*Solange I*) at [23-24].

⁸¹ Wünsche Handelsgesellschaft (*Solange II*) of 1986 (BVerfGE 73, 339; English translation in A. Oppenheimer (eds), *The Relationship Between European Community Law and National Law: The Cases*, (Cambridge: Cambridge University Press, 1994, Vol 1), 385, 399 and 712., at 462); The *Banana* case BVerfGE 102, 147 – Bananenmarktordnung. See also the Federal Constitutional Court Concedes Applicability of European Community Law in *Banana Case*, 1 *German Law Journal* No. 2 (01 November 2000), at <http://www.germanlawjournal.com/article.php?id=9> (last accessed on 24th September 2012).

⁸² R. Schütze, (n 32), 361.

None of the fundamental rights' cases⁸³, including the Maastricht and the Lisbon decisions⁸⁴, produced serious friction. Although national courts “*mostly signalled potential non-compliance in the future*” they “*did not follow through with it, due largely to the pragmatic steps of European authorities to accommodate their concerns*”.⁸⁵ This evokes the idea of “constitutional tolerance” which reflects on the motive of mutual respect as intrinsic in the EU’s integration aim.

A selective doctrine of fundamental rights emerged at EU level across Schmidberger, Omega, Laval and Viking line and more recently the Ilonka Sayn-Wittgenstein⁸⁶, confirming the constitutionalisation process and distinguishing between (at least) two categories of rights: “absolute” rights (admitting no restrictions) and “relative” rights (subject to an assessment of the proportionality principle implying possible restrictions).⁸⁷

The CJEU approach on those cases, in particular in the Omega case (C-36/02)⁸⁸ about the laser sport being banned as an affront to human dignity in Germany, was to instil some subsidiarity with regards to the conditions imposed to Member States under the EU fundamental rights’ mandate. The Court has left a large margin to national specificities such as cultural and societal differences and affirmed that the German measure banning the laser sport as a “human dignity” measure and thus limiting “freedom of services” within the EU, was justified and needed not to correspond to a conception shared by all MSs as regards to the precise way in which fundamental rights could be protected. This is entirely in line with the exceptions justifying restrictions to fundamental freedoms included in the CJEU case law⁸⁹. This approach has been defined as the reverse Solange jurisprudence of Schmidberger and Omega as potential clash of jurisdiction are solved through an agreement “*to defer to one another’s decisions, provided those decisions respect mutually agreed essentials*”⁹⁰.

It is the core of the “coordinate constitutionalism theory” elaborated by Sabel and Gernstenberg, based on the assumption that potential clash of jurisdiction between the MSs, the CJEU, the ECtHR and other international tribunals or organisations is resolved by each other’s deference.⁹¹ This doctrine aims at preventing conflicts between competing orders through a jurisprudence of mutual monitoring and peer review. It is similar to the “constitutional tolerance” theory as far as the dialogue and respect is

⁸³ Internationale Handelsgesellschaft, BVerfGE 37, 271, [1974] 2 CMLR 540 (Solange I); Wünsche Handelsgesellschaft, BVerfGE 73, 339, [1987] 3 CMLR 225 (Solange II); Brunner v. European Treaty, BVerfGE 89, 155, [1994] 1 CMLR 57.

⁸⁴ Bundesverfassungsgericht (1993) 89 BVerfGE 155. Lisbon Treaty Case, BVerfG, 2 be 2/08. For academic commentary on the Lisbon Treaty judgment, see, eg A. Steinbach, ‘The Lisbon Judgment of the German Federal Constitutional Court – New Guidance on the Limits of European Integration?’ (2010) 11(4) GLJ 367-390.

⁸⁵ N. Krisch, ‘The Pluralism of Global Administrative Law’ (2006) 17(1) EJIL 267

⁸⁶ C-112/00 Schmidberger, n 46 above; Case C-36/02 Omega Spielhallen, (n 46); Case C-438/05 Viking [2007] ECR I-10779-10840; Case C- 341/05 Laval [2007] ECR I-11767-11894; Case C-208/09 Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien [2010] OJ 2011/C 63/06.

⁸⁷ This is the categorisation also followed by the ECtHR, see O. Pollicino, (n 54) 5.

⁸⁸ Case C-36/02 Omega Spielhallen, (n 46).

⁸⁹ See also C-112/00 Schmidberger (n 46) and C-208/09 Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien (n 86).

⁹⁰ C. F. Sabel and O. Gerstenberg (n 22) 512.

⁹¹ Ibid.

concerned but differs from the latter which focuses more on the motives behind such tolerance, i.e. moral responsibility towards the European project still in a pluralistic dimension.

The dilemma about the content of each fundamental right still persists, as there might be differences in the interpretations between the national and the EU legal system over the meaning of these constitutional values, but this discussion, although challenging, is beyond the scope of the present paper which explores the relationship between the two different European Courts. The EU's accession to the ECHR will confer authority to the Strasbourg court to address compliance of EU legislation with the Convention.

4. The relationship between CJEU & ECtHR

Drawing on the debate concerning the relationship between CJEU and the National Constitutional Courts, this section, divided into two sub-sections, focuses on the dialogue between the CJEU and the ECtHR. The first sub-section aims at an understanding of the constitutional consensus between the judicial institutions as inspired by empirical findings. The second offers some reflections on whether any of the competing doctrines of constitutional pluralism could be exported to shape the relationship between the CJEU and ECtHR in the pre-accession stage.

Both Courts perform functions comparable to constitutional courts in Europe and, as suggested by the project's empirical findings, their mutual recognition and respect is based on the superior aim of guaranteeing individuals' protection. The CJEU is the constitutional court of the EU and the ECtHR has already become (or is becoming) a sort of 'constitutional court' for Europe insofar as human rights are concerned⁹² as both *'the Convention and the Court perform functions that are comparable to those performed by national constitutions and national constitutional courts in Europe'*⁹³.

The post-accession phase triggers a more acute reflection on the appropriateness of pluralism as the ECtHR will act as the court of final authority in the European human rights sphere.

A Empirical findings

As part of a project funded by the British Academy, research was undertaken to investigate the relevance of the post-Lisbon era to shape the new architecture of the European Union. The project was structured into two overlapping phases: a theoretical and an empirical. The first phase has focused on the interplay between the CJEU and

⁹² W. Sadurski 'Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and Eastern European States to the Council of Europe and the Idea of Pilot Judgments' (2009) 9(3) Human Rights Law Review, 397-398.

⁹³ See A. Stone Sweet and H. Keller, 'The Reception of the ECHR in National Legal Orders', in H. Keller and A. Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford: Oxford University Press, 2008), 7; S. Greer, 'Protocol 14 and the Future of the European Court of Human Rights' (2005) 83 Public Law, 96-104. See also S. Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge: Cambridge University Press, 2006), 165-174.

ECtHR in the fundamental rights sphere using the language of constitutional pluralism as a theoretical framework. The second phase has intended to test the theoretical construct elaborated in the first stage of the research exploring the main concerns in relation to the clash of authority between the EU and the Council of Europe through the means of empirical investigations. This stage has consisted of three rounds of interviews with CJEU judges, ECtHR judges and the EU and Council of Europe officials involved in the negotiation, drafting and signing of the Accession Treaty to the ECHR. Three sets of semi-structured interviews have been undertaken. The first round was held with 19 Judges and Advocates General of the Court of Justice; the second with 10 ECtHR's judges; the third round of interviews was conducted with the Commission, the Council and the Council of Europe's officials engaged in the drafting of the Accession Treaty to the ECHR. Key respondents from the European Parliament have also been involved in the research and have expressed their views on the accession process.

The interview templates have included questions set specifically for each category of respondents.

The Luxembourg judges were asked whether they experienced any change in the Court's approach after Lisbon considering the relevance given by this Treaty in relation to the fundamental rights protection; on the three layers of fundamental rights' protection (the Charter, the ECHR and the unwritten source of the general principles of EU law) and whether they followed an "internal" hierarchy of sources on a case by case basis; on the future EU's accession to the ECHR and the importance of the ECtHR's external scrutiny in the after accession stage, when individuals could challenge EU acts before them.

The Strasbourg judges were solicited to reflect on the EU's accession to the Convention, on the challenge of being a judicial body, external to the EU, and having the last word in human rights related issues and on their interpretative means such as the margin of appreciation doctrine.

Then, the EU and Council of Europe officials were interrogated about legal and procedural aspects of the negotiating process for the accession to the Convention.

The project's empirical investigations explored the main concerns of the clash of authority and the competence-competence question in relation to the Strasbourg and Luxemburg regimes. It was evident among the judges a clear divide between the responses of the judiciary not in relation to the court of reference i.e. the CJEU or the ECtHR but in accordance to their background. Those with an academic background approached the competence-competence question and theorised the future architecture of Europe after accession. By contrast, those who previously served in the judiciary at national level, revealed a more pragmatic approach to problem solving in case of clash between the two courts, offering a case by case solution.

Data collected responded to research questions investigating the dialogue between the two courts, on legal aspects of the judges' interpretative means i.e. the difference

between the margin of appreciation employed by the ECtHR and the wide margin of discretion used by the Court of Justice in the respect of national specificities and on case-law which had a fundamental rights perspective or contrasted fundamental rights and fundamental freedoms.

The analysis that follows is based on empirical evidence reflecting on the issues of authority, autonomy of the two regimes and on the dialogue between the Strasbourg and Luxemburg courts.

The interviewees reported that the courts have been mutually recognising and tolerating each other's decisions over the years for a sense of moral responsibility in the name of coherence, legal certainty and respect for the highest interest of the individuals in Europe. These judicial institutions are increasing their cooperation, as two levels of dialogue are in place now: the judicial and the informal dialogue between them and another form will be added after accession: the institutionalised dialogue⁹⁴.

It is indeed the judicial dialogue between the two Courts that according to the judges will bring coherence within the European human rights legal system. Each court is looking at the respective case law. Not just the CJEU but also the ECtHR responds to the CJEU increasing the protection of human rights when needed. An example is provided by the case *Sufi and Elmi*⁹⁵ where the Strasbourg court changed its interpretation of a provision of the Convention to favour a wider interpretation guaranteed by the CJEU in previous case-law. Other numerous instances range from the protection of privacy of individuals to the transparency of the activities of the administrative structure, related to the access to information.⁹⁶

According to the judges, consideration given to respective case-law minimises the risk of clash between the two courts.⁹⁷ This form of dialogue represents a feature of the pre-accession phase and will increase in the post-accession to avoid conflicts, and ultimately a condemnation from Strasbourg. As testified by one of the judges, a sentence of non-compliance “*should be always a possibility and hopefully never an actuality if we are doing our job correctly in both Courts*”⁹⁸

In case of a collision, the Luxembourg judges recognise the last word in the field of human rights as “*a logical consequence of the Convention on Human Rights. The Strasbourg court can ultimately impose interpretation of human rights standards. In this sense, we should recognise the superior position of the Court in this field, but it is not the same to say that the ECtHR is higher or more important.*”⁹⁹

⁹⁴ Interview IX. See also D. Spielmann, A Europe of Rights: the EU and the European Court of Human Rights, Keynote Address, University of Surrey School of Law Workshop, 8 June 2012, unpublished paper.

⁹⁵ In the case *Sufi and Elmi v The United Kingdom* (Applications nos. 8319/07 and 11449/07) at page 7 the ECtHR held that art 3 of the Convention needed to be interpreted in the more extensive manner established by the CJEU in the Case C-465/07 *N. Elgafaji v. Staatssecretaris van Justitie (the Deputy Minister of Justice)*, [2009] ECR I-00921. Here the CJEU held that the protection offered by article 15(c) of the Qualification Directive went beyond that of Article 3 of the Convention.

⁹⁶ Interview 17.

⁹⁷ Interview 17.

⁹⁸ Interview 9.

⁹⁹ Interview 17.

Through the second form of dialogue, the informal interchange the two courts have successfully created a forum of discussion on “*issues of common interests thus enhancing the relationship of trust*”¹⁰⁰ between them. Regular meetings between Strasbourg and Luxembourg courts are a feature of the working mode of these institutions and will continue after accession. The CJEU also practices it with the national constitutional courts and the supreme courts of the MSs. Internal working groups have been set up in each of the Courts to ensure an understanding of the reciprocal case law and basic core principles¹⁰¹.

The institutionalised dialogue will occur after accession. The co-respondent (or co-defendant) mechanism is the arrangement included in the Draft Accession Treaty which ensures that the EU and its MSs appear jointly as defendants before the Strasbourg Court in cases concerning EU law. It will apply when a complaint is lodged against one or more Member States or the EU who can be called as co-respondents. This can also happen when the application was not initially brought against them but they might have a potential joint responsibility for the alleged act.

The procedure might appear complicated, but this view is not shared by the negotiators: “*when you discuss in your working circle the correspondent mechanism, you are perfectly clear on what it is. You do not think it is complex, then you present it to someone else, you see its complexities. So probably being inside the negotiation I am not in the best position to say whether it is complex or not. It is certainly not easy, but at the same time it makes a lot of sense. The objective is clear - you want all the parties involved in the case to be able to present their views, and to be held responsible. You need to bring the parties to the case in full, and in this sense the third party intervention is not sufficient in some cases. Then a lot will depend on the impact and the way the mechanism will be used. This is relatively difficult to predict*”.¹⁰²

The policy makers¹⁰³ interviewed expressed their views on the principle of autonomy of the EU which will not be affected after accession, as also mentioned in the Draft Accession Treaty. However, the two Courts will not be completely independent in the after accession era. Concerns arise when a proper collusion is manifest, as articulated by one judge as follows: “*Problems resulting from the loss of CJEU’s position as equal brother could make this court little bit uneasy. This court will have the ‘last word’ and this is actually the problem. Of course, we can promise we will hardly use it, but if there is a proper collision, then the situation will be different than now*”.¹⁰⁴

¹⁰⁰ Interview 3.

¹⁰¹ Interview IX and IV.

¹⁰² Interview A.

¹⁰³ Interviews A and B.

¹⁰⁴ Interview I.

The principle established in the Bosphorus decision¹⁰⁵ that EU law did not breach the ECHR as the ECtHR held the system of safeguarding fundamental rights guaranteed at the EC level was comparable to that provided by the Convention is deemed to be replaced. The presumption would be incompatible with the principle of equality of all contracting parties which will be otherwise subject to full scrutiny by the ECtHR, raising questions as to its compatibility with the objectives of the Union's accession to the Convention.

The Strasbourg court, placed at the apex of the hierarchy, will exercise an external scrutiny on EU legal acts judging the compatibility between EU legislation and the Convention. From the interviews with the Luxembourg judges, it seems that they have accepted the ultimate authority of Strasbourg on issues of compatibility of EU law with the Convention. The CJEU echoed the need to express its “first word” on the interpretation of a contested EU act before the judgement of compliance by the ECtHR. Their main concern was not about the “last word”; they wish to be heard before the case reaches the ECtHR. The Presidents of the two European Courts in a Joint Statement have argued that ‘*a procedure should be put in place in connection with the accession of the EU to the Convention, which is flexible and would ensure that the CJEU may carry out an internal review before the ECHR carries out external review*’¹⁰⁶. As held in *Sufi and Elmi*¹⁰⁷, the ECtHR jurisdiction is limited to the interpretation of the Convention and it would not therefore be appropriate for this institution to express any views on the ambit or scope of any piece of EU primary or secondary legislation. Thus, the co-defendant procedure has been included in the Draft Accession and this represents the so-called institutionalised dialogue.

From a theoretical point, accounts of the doctrine of constitutional pluralism emerged from the empirical findings as judges compared the relationship between the CJEU and ECtHR with the one currently existing between the national constitutional courts and the CJEU. As affirmed by a judge who was a former magistrate of a national constitutional court “*I am convinced that I've never considered the relation with the CJEU as hierarchical, it was more a relation between different courts with different scopes, competences and prerogatives, each important in their field of competence. The CJEU can't ever replace the constitutional court in their competence and at the same time the ECtHR has a superior position in the field of human rights, but this is not sufficient to say that it is hierarchically superior to our court*”¹⁰⁸

The judges suggested that if we accept that there is still some pluralism in the interplay between the domestic jurisdictions and the Strasbourg court, than nothing will change in the relationship with the Luxembourg court. Yet, it might not be considered “pure

¹⁰⁵ *Bosphorus Hava Yollari Turizm v Ireland*, App. No. 45036/98 (Eur CtHR 30 June 2005), at <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=3666597&skin=hudoc-en&action=request> (last accessed on 24th September 2012).

For a discussion on the case see F. Schorkopf, ‘The European Court of Human Rights' Judgment in the Case of *Bosphorus Hava Yollari Turizm v Ireland*’ (2005) 6(9) *German Law Journal*, 1255-1264.

¹⁰⁶ See Joint Communication from Presidents Costa and Skouris 27 January 2011 available at http://www.echr.coe.int/NR/rdonlyres/02164A4C-0B63-44C3-80C7-FC594EE16297/0/2011Communication_CEDHCJUE_EN.pdf (last accessed on 24th September 2012).

¹⁰⁷ *Sufi and Elmi v The United Kingdom* (n 95).

¹⁰⁸ Interview I.

pluralism” or “epistemic pluralism” of clearly equal parties evoking no Archimedean point in case of conflict.

As suggested by one of the judges interviewed “*Theoretically the domestic courts are subordinated to the Strasbourg Court, but I do not think it is possible to say that this eliminates pluralism. It may not be pure pluralism of clearly equal partners, so if we accept that there is still some pluralism in this relation between domestic supreme jurisdictions and the Strasbourg Court then nothing will change if you add the Luxembourg Court. There will be pluralism based on three different systems, theoretically under the umbrella of the Strasbourg’s last word.*”¹⁰⁹

The national supreme or constitutional courts are subordinated to the “last word” of the Strasbourg regime which is a subsidiary system, as the ECtHR deals with a case after the available national remedies have been exhausted, i.e. when the national system has failed to address the individual concerns violating fundamental rights. Though, the Strasbourg Court does not have the power of annulling judgements and might not practically be able to impose its decisions.

Despite the high rate of compliance¹¹⁰, the linkage between the national and European levels of human rights is almost always antagonistic and often accompanied by reservations in many national legal systems. Following the BVerfG’s Görgülü judgment¹¹¹ in 2004, allowing national courts to defer to ECtHR judgments, as long as the latter provides, in general, equivalent protection of fundamental rights¹¹², the Strasbourg judges dropped their typical reserve and voiced their frustration in public.¹¹³ Then, recently they manifested their disappointment for the UK’s attitude in relation to prisoners’ rights to vote¹¹⁴.

Consequently, the ECtHR judges expressed their concerns about possible practical limitations of the Strasbourg enforcement system, signalling a difficulty in the recognition of the Court superior authority¹¹⁵. The classical domestic/international dichotomy which regards all parts of an integrated whole, neatly organised according to rules of hierarchy and a clear distribution of tasks¹¹⁶ might not work if the supreme courts and the CJEU after accession fail to respect the final authority of Strasbourg.

¹⁰⁹ Interview I.

¹¹⁰ For a comparative study, see R. Blackburn and J. Polakiewicz (eds), *Fundamental Rights in Europe: The European Convention on Human Rights and its Member States, 1950-2000* (Oxford: Oxford University Press, 2001).

¹¹¹ Bundesverfassungsgericht, Judgment of 14 October 2004, 2 BvR 1481/04, Entscheidungen des Bundesverfassungsgerichts 111, 307. An English translation is available at http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104en.html (last accessed on 24th September 2012).

¹¹² C.F. Sabel and O. Gerstenberg (n 22) 525.

¹¹³ N. Krisch (n 21) 183.

¹¹⁴ *Hirst v the United Kingdom (No 2)* [2005] ECHR 681 is a European Court of Human Rights case, where the court ruled that a blanket ban on British prisoners exercising the right to vote is contrary to the European Convention on Human Rights. The court did not state that all prisoners should be given voting rights. Rather, it held that if the franchise was to be removed, then the measure needed to be compatible with Article 3 of the First Protocol, thus putting the onus upon the UK to justify its departure from the principle of universal suffrage.

¹¹⁵ Interview I

¹¹⁶ N. Krisch (n 21) 184.

B. Constitutional consensus between the two European Courts before accession leading to a monist (quasi) federal system after accession.

Based on the project's empirical evidence, the final part of the paper aims at discussing the theoretical framework that could be exported to the pluralistic normative authority within the European human rights system. It considers the question of constitutional authority and conflict resolution for the two supranational courts in Europe. Then, based on data collected in the course of the project, submits that in the post-accession phase, elements of a "monist (quasi) federal system" in the human rights domain could emerge as the final arbiter on these issues will be the Strasbourg court in Europe.

The CJEU is the court of an autonomous legal order whose decisions are deemed to be supreme¹¹⁷ and directly effective for Member States and individuals.¹¹⁸ According to the constitutional view shared by the CJEU the Treaties are the constitutional bones, the constitutional skeleton of the EU legal system, and as such capable of directly creating individual rights¹¹⁹. Consequently the Court acts as the constitutional court of the EU system.

By contrast, the ECtHR is not part of a "self-sufficient" legal order. It is an international/regional tribunal that, in the context of the Council of Europe has the sole role of verifying compliance by ECHR State Members with the Convention. However, it has been submitted that this Court which started as an international tribunal now resembles "*a supranational constitutional court, with an ever stronger anchoring in the domestic legal orders of member states and general acceptance of its authority as the ultimate arbiter of human rights disputes in Europe*".¹²⁰ As also reinforced by the ECtHR in its jurisprudence, the Convention had become a constitutional instrument. Despite some isolated incidents of not compliance with the Court judgements, its story is generally successful and can be seen as part of the "constitutionalisation" of Europe.¹²¹ Thus, the two courts can be understood as two supranational constitutional courts which have their own constitutional tools and instruments.

However, the two Courts differ in their relationship with the national level. Whereas the ECtHR juxtaposes individual state variables of protection with the more general principles of the ECHR, the CJEU accommodates a whole range of fundamental rights' conflicts and relates them to additional competing demands of the EU internal market and free movement rules. Despite the absence in the Strasbourg Court of the twin doctrines of direct effect and supremacy of EU law, the ECtHR's margin of appreciation doctrine plays a role similar to that of the reverse Solange jurisprudence of Schmidberger and Omega. It allows the court to acknowledge and defer to national specificities in the understanding of common principles.

It has been argued that the ECtHR, since its origin, has gained remarkable authority and its judgments enjoy high rates of compliance and are now regularly cited by

¹¹⁷ Case 6/64 *Costa v Enel* [1964] ECR 585.

¹¹⁸ Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen*, (n 4).

¹¹⁹ R. Schütze (n 32) 311.

¹²⁰ N. Krisch (n 21) 184.

¹²¹ *Ibid.*

national courts in many member states.¹²² Though, the BVerfG's *Görgülü* judgment¹²³ and the non-compliance of the UK government have signalled limits to their loyalty to the Strasbourg Court¹²⁴.

The national judiciary, in the substance the BVG, in the *Görgülü* case¹²⁵ has allowed national courts to defer to judgments by the ECtHR, as long as the latter provides, in general, equivalent protection of fundamental rights.¹²⁶ This doctrine corresponds to *Solange* approach developed by this Court in the interplay with the CJEU.

Regarding the relationship between the two supranational Courts, it can be affirmed that so far their interaction is smooth but the ultimate question of the *Kompetenz-Kompetenz*, has not yet been resolved in favour of one of the two Courts. Their rapport resembles a 'pluralist' model founded on the reciprocal recognition of each other's decisions in the assumption that the two entities are genuinely independent and autonomous. This approach has been functioning to date, as the two Courts reached an implicit prior 'constitutional' consensus as regards the core norms of constitutional governance itself, i.e. the presence of a uniform minimum standard and this consensus became more explicit following the inter-judicial dialogue between them. Based on these assumptions, in an attempt to avoid interferences with the ECtHR jurisdiction and stressing the autonomy between the two legal orders, the CJEU in a recent case¹²⁷ has concluded that Article 6(3) TEU¹²⁸ does not govern the relationship between ECHR and legal systems of Member States.

The CJEU has regularly considered, mentioned and found inspiration in the Convention, and in its case law has assigned a "special significance" to it. However, it held that the European Community (EC) was not bound by the ECHR, despite all its MSs ratified the Convention, as the EC lacked competence to accede to the ECHR.¹²⁹

In the landmark *Bosphorus* decision¹³⁰, the ECtHR has refused to review an EC regulation implementing a UN Security Council resolution, although the content of the EC regulation was restrictive of the applicant's property right. The decision was based on the presumption that EU law did not breach the ECHR as the ECtHR held the system of safeguarding fundamental rights guaranteed at the EC level was comparable to that provided by the Convention. The *Bosphorus* judgment acknowledged the

¹²² Ibid.

¹²³ *Görgülü v Germany* (Application no. 74969/01), judgment Strasbourg of 26 February 2004.

¹²⁴ For the reluctance of UK to comply with *Hirst v the United Kingdom (No 2)* [2005] ECHR 681. The ECtHR ruled that a blanket ban on British prisoners exercising the right to vote is contrary to the ECHR. The court did not state that all prisoners should be given voting rights. Rather, it held that if the franchise was to be removed, then the measure needed to be compatible with Article 3 of the First Protocol, thus putting the onus upon the UK to justify its departure from the principle of universal suffrage.

¹²⁵ *Görgülü v Germany* (n 123).

¹²⁶ C. F. Sabel and O. Gerstenberg (n 22) 525.

¹²⁷ Case C-571/10 *Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano*, judgement Luxembourg of 24 April 2012.

¹²⁸ Art 6 (3) TEU. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

¹²⁹ Opinion 1/94 [1994] ECR I-5281

¹³⁰ *Bosphorus Hava Yolları Turizm v Ireland* (n 105).

effort made by the Luxembourg Court in this field and represented the culmination of the constitutionalisation process which started following the challenges raised by some of the national Constitutional Courts.

This approach is reminiscent of similar rulings developed by the German Federal Court in the *Solange* and the *Görgülü* cases, regulating respectively the relationship between the CJEU and the ECtHR and their national courts. The Federal Constitutional Court would not exercise any control, as long as the protection of fundamental rights is equivalent to the level demanded by the Basic Law, declaring constitutional complaints and references concerning EU actions per se inadmissible.

By contrast, the ECtHR might provide for a case-by-case examination of EU law, reviewing whether the presumption of ECHR compliance by the respondent State has been rebutted. In 2009, a non-admissibility decision of the ECtHR, the *Kokkelvisserij* case¹³¹, contained a presumption that a contracting party, in the specific scenario the Netherlands, “*has not departed from the requirements of the Convention where it has taken action in compliance with legal obligations flowing from its membership of an international organisation, to which it has transferred part of its sovereignty, as long as protection of fundamental rights is considered at least equivalent to that for which the ECHR provides*”.

The Bosphorous assumption is confirmed but might be rebutted if protection results ‘manifestly deficient’. This scenario is indeed a tacit compromise to mutual respect of each of the autonomous systems and recognition of CJEU’s authority on the basis of the equivalence protection guaranteed by the EU regime. As such in line with the doctrine of “constitutional tolerance” elaborated by Weiler¹³² in the EU law context, the two Courts mutually agree on core norms of constitutional governance as part of their political responsibility to European human rights protection. The Strasbourg court is thus prevented, by a self-denying ordinance, from examining the procedure of the CJEU directly in the light of the requirements of the ECHR on the assumption of an equivalent protection.

Nevertheless, the *Kokkelvisserij* case raises concerns in relation to indirect Strasbourg reviews of the Convention compatibility when the ECtHR considers the CJEU procedures not providing ‘equivalent protection’. Contracting parties, who are also individual EU Member States, might be invested with the responsibility for procedures and proceedings before the CJEU over which, as individual States have no direct control.

The empirical data of this research has highlighted that before accession the two courts are cooperating through the judicial and informal dialogue, having individuals’ protection at the core of the judicial making process. The Bosphorous presumption and reference to mutual case-law by each of the two Courts have assured little conflicts

¹³¹ *Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v the Netherlands* (Application no. 13645/05) concerning the applicant association’s complaint about the unfairness of proceedings before the Court of Justice of the European Communities with regard to its right to dredge cockles in a tidal wetland area, the Wadden. See reference to the CJEU Case C-127/02 *Kokkelvisserij*, judgement Luxembourg of 7 September 2004.

¹³² J.H.H. Weiler (n 48) 8-18.

so far. The minimum common denominator is constituted by the Convention. The CJEU is committed to ensure a higher standard of protection of human rights through the Charter. Thus, in the pre-accession era, the constitutional dialogue between the two Courts tilts the balance towards a theoretical background resembling the constitutional tolerance doctrine at least in its ethos based on the deference to each other's decisions in the name of the ultimate telos of European integration.

The Bosphorous presumption will unlikely be upheld in the after accession era. Holding the presumption of equivalent treatment would undermine the accession's objectives of ensuring a coherent interpretation of human rights throughout Europe and enhancing the credibility of the EU's commitment to fundamental rights protection by submitting its legal order to the same external judicial control of its MSs.

Thus, the after accession era witnesses an expansion of human rights' legal protection as possible complaints can be lodged against EU institutions themselves and/or the MSs, for non-compliance of EU primary or secondary legislation with the Convention or for its wrong implementation at national level.

Going beyond the pluralism idea also evoked by the respondents, this research argues that establishing the ECtHR as the court of final authority on human rights, challenges the pluralism theory, albeit in relation to the specific issue of compatibility of EU law with the Convention. A singular approach named the "monist (quasi) federal approach" based on judicial, institutional and informal dialogues in the field of human rights under the umbrella of the Strasbourg court might emerge.

The claim that the relationship between the two systems will lead to a monist (quasi) federal approach placing the ECtHR at the apex of the hierarchy is legitimised by the EU being placed on an equal footing with other contracting parties, i.e. the principle of equality of all contracting parties to the Convention. The EU position as another state/high contracting party in the accession process is really crucial. The non-EU MSs would not appreciate to grant exceptions or specialties to the EU justified by its internal order. The principle of equal footing of all contracting parties needs to be respected and the accession treaty will contain just a small change in terminology referring to high contracting party instead of state.

However, the project's empirical findings have highlighted some judicial concerns in relation to the enforcement system of the Strasbourg regime. The functioning of the whole system might be jeopardised by non-compliance of national courts and, after accession, CJEU with Strasbourg decisions.

In conclusion, the EU will accede on an equal footing with other contracting parties to the Convention to fulfil the objective of the accession itself. Despite no radical change to the existing ECHR mechanism and to EU competences, the ECtHR will have the role of exercising an external scrutiny on the conformity of EU law with the Convention. A mechanism to guarantee the CJEU's prior involvement on issue of EU law has now been embraced by the Steering Committee in the first draft accession agreement¹³³. The CJEU judges are content to express their views on issues of EU law

¹³³ Steering Committee, Draft Explanatory report to the Agreement on the Accession of the EU to the ECHR, CDDH(2011)009

as a means of exhausting domestic remedies, before the ECtHR is called upon to examine any compliance of EU acts with the Convention.

The conflicts between the “first word” on EU issue expressed by the CJEU and the “last say” for the compliance scrutiny by the ECtHR will be minimal if the Courts will consolidate their consensus both through the judicial and informal dialogues.

It is indeed the “dialogue” between the two courts, having individuals’ protection at the core of the judicial making process, which represents the key for success of the new European human rights architecture. The CJEU, as a good brother, is expected to set the example showing compliance with the Convention, bringing Europe towards a “quasi” federal regime of human rights protection.