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A Strasbourg Perspective on the Autonomous Development of Fundamental Rights in EU Law: Trends and Implications

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A STRASBOURG PERSPECTIVE ON THE AUTONOMOUS DEVELOPMENT OF FUNDAMENTAL RIGHTS IN EU LAW: TRENDS AND IMPLICATIONS

By Camille Dautricourt*

Abstract

This paper analyzes how the European Court of Human Rights has reacted to the progressive developments by the European Union of its own human rights standards through the Charter of Fundamental Rights and an increasing number of secondary law instruments. These evolutions have been welcomed by ambivalent reactions from Council of Europe institutions. Voices in Strasbourg have denounced a risk that autonomous EU fundamental rights standards might create dividing lines in Europe and lead to a "multi-speed" Europe of human rights. Yet, addressing this concern through an alignment of the EurCourtHR case law on EU law developments might result in imposing majority value choices on the minority of Council of Europe members. The paper assesses the well-founded character of these apprehensions in light of two ongoing case law tendencies. First, the mechanisms established to reflect the specificities of EU law in assessing Member States' liabilities under the ECHR are increasingly being challenged, both in the Strasbourg case law and as a consequence of the evolution of EU law itself. Second, the Strasbourg Court has relied on EU law in the application of the consensus and margin of appreciation doctrines, with some separate opinions advocating for a more influential role for EU law. The "interoperability" between the EU and the ECHR legal order may, however, be questioned in light of the different methodologies followed by the two European supranational courts and the limited "consensual" value of EU law in the sense of the EurCourtHR case law. In order to avoid curtailing the consensus and subsidiarity foundations of the Convention, it is submitted that the Strasbourg Court should pay due attention to the exact consensual value of

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each specific provision of EU law. In that respect, the Luxembourg Court could provide valuable support in maintaining, where relevant, a visible link between the human rights developments initiated at EU level and the specific objectives of the EU integration project.

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I. Introduction

At the same time as the Lisbon Treaty is providing for the integration of the European Union within the European Convention Human Rights ("ECHR") legal order,[1] the EU is gradually developing its own human rights standards autonomously from Strasbourg and sometimes with a higher level of specificity. The growing affirmation of EU law in the human rights sphere has been welcomed by ambivalent reactions from Council of Europe institutions. While EU fundamental rights developments are generally perceived favorably, voices in Strasbourg have denounced a risk that autonomous EU standards in the human rights domain might create dividing lines in Europe. This might, according to certain views, result in a "multi-speed" Europe of human rights, with the EU Member States and the remaining Council of Europe States being subject to divergent standards. This concern seems to be driven by a fear of duplication of tasks in a scenario where the EU would take the lead and downgrade the Strasbourg Court to the status of a "court of the rest of Europe".[2]

The sources of this alleged risk of dividing lines are twofold. First, the specific needs of EU integration have induced Member States – occasionally followed by the Strasbourg case law – to exonerate themselves from some of their responsibilities under the Convention. The high standards of human rights protection prevailing in the EU have been mobilized to legitimate such departures. Second, the higher degree of specificity achieved by certain EU fundamental rights standards results in subjecting EU Member States to additional layers of obligations which do not bind other Council of Europe Members. Yet, attempts to remedy this duality in aligning the interpretation of the Convention on EU standards, where the latter appear to be more protective of the rights of individuals, could result in EU law indirectly setting the human rights standards in the 47 Council of Europe Members. This would risk marginalizing the non-EU minority Members. The European Court of Human Rights ("EurCourtHR") therefore faces the challenge of seizing the opportunities offered by these EU law developments for its human rights

[1] Article 6(2) TEU.

[2] Lord Russell-Johnston, President of the Parliamentary Assembly of the Council of Europe, cited by Lord Goldsmith Q.C., *A Charter of Rights, Freedoms and Principles*, 39 CMLREV. 1201, 1210 (2001). See also Parliamentary Assembly of the Council of Europe, Recommendation 1744(2006), *Follow-Up to the Third Summit: The Council of Europe and the Fundamental Rights Agency of the European Union*, at 4 and 5, *available at* http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta06/EREC1744.htm.

promotion agenda, while avoiding to impair the coherence, legitimacy and integrity of the Strasbourg system.

This paper aims at assessing the well-founded character of the apprehensions concerning the risks of duplication of tasks and double standards on the one hand, and of majority hegemony on the other. It analyzes the ongoing case law tendencies designed to address these concerns and explores alternative attitudes to remedy them. For that purpose, two aspects of the EurCourtHR case law will be examined. First, the mechanisms established to reflect the specificities of EU law in assessing the Member States' liabilities under the Convention (the so-called "European exceptionalism") raise questions with respect to the risk of double standards and disconnection of EU law obligations from the general framework of the Convention. Second, the reception of EU standards by the Strasbourg Court to influence its own substantive case law has particular implications regarding the risk of majority hegemony and curtailment of the "consensus doctrine" underlying the Convention system. Divergent approaches have been sustained on these two fronts, which are arguably underpinned by different conceptualizations of the status of the EU and the positioning of the Court of Justice of the EU ("CJEU") vis-à-vis its Strasbourg cousin.

II. Human Rights as a Factor of Integration in the EU

In spite of the lack of a specific human rights competence,[3] the EU has progressively pervaded the field of human rights. This occurred both through the case law reviewing EU secondary law and national measures falling within the scope of EU law with "general principles of EU law",[4] and through secondary legislation accompanying the exercise of its ever-expanding attributed competences. These legislative developments largely aimed at creating a climate of mutual trust facilitating free movement and cooperation. For that purpose, it appeared necessary to accompany "negative integration" (the removal of any obstacles to interstate trade or

[3] Opinion 2/94 on the Accession of the EU to the ECHR stated that *"no Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field"* (Opinion 2/94 on Accession by the Community to the Convention, [1996] ECR I-1759, para. 27).

[4] This case law was initiated with the *Internationale Handelsgesellschaft* ruling (Case 11/70 *Internationale Handelsgesellschaft*, [1970] ECR 1125), although prior judgments such as *Stauder* had already made reference to the role of human rights in the EU legal order (Case 29/69 *Stauder v. City of Ulm*, [1969] ECR 419).

cooperation) by "positive integration" of certain fundamental rights guarantees.[5] In the internal market, harmonization of certain national human rights standards addressed the tension between fundamental freedoms and fundamental rights. An EU level-playing field appeared necessary to avoid the establishment of obstacles to free movement based on national constitutional values. A certain level of harmonization was also intended to prevent regulatory competition and the ensuing race to the bottom that would arise as a result of competitive pressures.[6] For example, Directive 95/46 adopted under the EU internal market competence harmonizes the standards of protection of personal data within the Member States and provides for a higher level of protection than the one guaranteed by Article 8 ECHR.[7] With a view to establishing a climate of fair competition promoting the transnational provision of services, Directive 96/71 obliges Member States to ensure that undertakings posting workers in another Member State respect a "core nucleus" of minimum protection of social rights.[8] Internal market competence has also impacted on the sphere of personal and family life, since the encouragement of the free movement of economic actors[9] – and, subsequently, of all EU citizens[10] – required a reinforced protection of the right to live with one's family in the host Member State.[11] A certain level of harmonization to ensure adequate and comparable fundamental rights guarantees EU-wide also appeared as a prerequisite for the development of police and judicial cooperation on the basis of

[5] Olivier De Schutter, *The emerging division of tasks between the Council of Europe and the European Union promoting Human Rights in Europe*, 14 COLUM. J. EUR. L. 509, 517 (2007-2008).

[6] Olivier De Schutter, *A New Direction for the Fundamental Rights Policy of the EU*, 33 Working Paper Series REFGOV (2010), 14-16, *available at* http://refgov.cpdr.ucl.ac.be.

[7] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281 31-50, Nov. 11, 1995. This instrument operates full harmonization of the national laws, since the Court stated that the directive also applies to purely internal situations (Joined Cases C-465/00, C-138/01 and C-139/01, *Rechnungshof v. Österreichischer Rundfunk*, [2003] ECR I-4989). On Strasbourg side, see *Leander v. Sweden*, judgment of 26 March 1987, App. No. 9248/81, Series A 116-22; *Amann v. Switzerland*, judgment of 16 February 2000, App. No. 27798/95, EHRR 2000-II; *Halford v. United Kingdom*, 25 June 1997, App. No. 20605/92, EHRR 1997-III and *Rotaru c. Roumanie*, judgment of 30 November 2006, App. No. 29683/02, EHRR 2000-V.

[8] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18 1-6, Jan. 21, 1997 (the "Posted Workers Directive"), para. 5 of the preamble.

[9] Regulation 1612/68/EEC of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ L 257 2-12, Oct. 19, 1968, Articles 10 to 12.

[10] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158 77-123, April 30, 2004.

[11] As developed below, the CJEU *Ruiz Zambrano* judgment has disconnected the right of residence under Article 21 TFEU – and its family reunion corollary – from the previously imposed requirement of cross-border movement, in such a manner that static nationals of the Member States now also benefit from the reinforced protection in their Member State of origin (Case C-34/09 *Ruiz Zambrano*, judgment of 8 March 2011).

mutual trust and recognition.[12] Accordingly, the legislative proposal for developing information exchanges based on the principle of availability has been accompanied by a framework decision harmonizing the level of protection of personal data.[13] Along the same line, the proper operation of the Dublin system of allocation of asylum applications[14] entailed a need to harmonize the criteria to qualify for international protection,[15] the procedural standards[16] and the conditions of reception of asylum seekers.[17] The surrender of suspects under the European Arrest Warrant has similarly triggered a Commission's proposal for minimal standards of criminal procedure.[18]

Progressively however, human rights developments have emancipated from the direct objective of economic integration, free movement and interstate cooperation. Fundamental rights became, in themselves, a new vector for European integration. Most notably, the Charter of Fundamental Rights of the EU recognizes some new rights which are not listed within the European Convention[19] and broadens the scope of some of the rights contained therein.[20] Secondary legislation has also started to disconnect from free movement or interstate cooperation objectives, as illustrated by the anti-discrimination directives adopted in the last decade under

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[12] Susie Alegre and Marisa Loaf, *Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – the European Arrest Warrant*, 10:2 ELJ 201 (2004). The 1999 Tampere Program placed mutual recognition at the "cornerstone" of judicial cooperation in criminal matters. This statement was reiterated in the 2004 Hague Program. For a critical overview of the development of mutual recognition in criminal matters, see Valsamis Mitsilegas, *The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU*, 43 CMLREV. 1277-1311 (2006).

[13] Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, OJ L350 60-71, Dec. 30, 2008.

[14] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50 1-10, Feb. 25, 2003.

[15] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted OJ L 304 12-23, Sept. 30, 2004 (the "Qualification Directive").

[16] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326 13-34, Dec. 13, 2005 (the "Procedure Directive").

[17] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L 31 18-25, Feb. 6, 2003 (the "Reception Directive").

[18] Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM (2004) 328 final, April 28, 2004.

[19] Most of these new provisions are intended to adapt the EU Bill of Right to technological changes and present day conditions, most of which had already been recognized by the EurCourtHR. For example, the wording "correspondence" in Article 8 ECHR (the right to privacy) is replaced by the term "communications" in Article 7 of the EU Charter.

[20] In particular, Article 9 of the Charter suppresses the reference to "men and women" for the purpose of the right to marry, and Article 47 departs from the conventional limitation to "civil rights" of "criminal charges" to define the scope of the right to an effective remedy. Article 49(1) of the Charter expressly provides, unlike Article 7 ECHR, for the right to retroactive application of milder criminal penalties.

Article 19(1) TFEU (ex-Article 13 EC).[21] Directive 2003/86 on the family reunification of third country nationals similarly harmonizes the protection of fundamental rights of aliens without apparent connection to free movement.[22]

EU standards have therefore reinforced the protection of individual rights, notably with respect to the right to family life of EU citizens (as well as, increasingly, of various categories of third country nationals), the prohibition of various types of discriminations or the protection of personal data. However, EU law is not more protective of the rights of individuals than the ECHR *as a general matter,*[23] and when it is, this often derives from EU-specific motivations. EU fundamental rights, even where they are emancipated from free movement considerations, still remain EU integration-oriented, albeit more indirectly, as a way to bring citizens closer to the Union and to promote a sense of common identity to a European demos.[24] In addition and more fundamentally, assessment of human rights in a democracy generally requires complex balancing exercises either between individual rights (for example, where the protection of the rights of the unborn conflicts with the women's freedom to abort,[25] or where the freedom of expression infringes on the right to privacy[26]) or between the rights of the individual and the collective interest (for instance, the procedural rights of suspects may conflict with the general

[21] Admittedly, the first anti-discrimination directives adopted on the basis of the prohibition of discrimination on grounds of gender (Article 157 TFEU) aimed at coordinating the Member States' employment policies (Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ L 45 19-25, Feb. 19, 1975). However, the more recent instruments have distanced themselves from this integrationist goal and are more broadly intended to foster the general objectives of a high level of employment, social protection and standard of living in the EU (Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303 16-22, Dec. 2, 2000; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180 22-26, July 19, 2000).

[22] Recitals 1, 3 and 4 of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251 12-18, Oct. 3, 2003.

[23] For example, some provisions of the Qualification Directive go beyond the Member States' international obligations, while others entail a risk of regression (see Hélène Lambert, *The EU Asylum Qualification Directive, its Impact on the Jurisprudence of the United Kingdom and International Law*, 55 INT'L & COMP. L.Q. 161 (2006)).

[24] Joseph Weiler suspects, however, that even though European human rights have contributed to the creation of a shared identity, *"adding new rights on the list, or adding lists of new rights"* would have little effect for that purpose. Instead, conceptualizing European citizenship around needs and rights would amount to *"an end-of-millenium version of bread-and-circus politics"* (Joseph H. H. Weiler, *To be a European citizen: Eros and civilization, in* THE CONSTITUTION OF EUROPE: 'DO THE NEW CLOTHES HAVE AN EMPEROR?' AND OTHER ESSAYS ON EUROPEAN INTEGRATION, 334-335 (1999)).

[25] See, at EU side, Case C-159/90 *Grogan*, [1991] ECR I-4685, and in Strasbourg, *Open Door Counselling v. Ireland*, Plenary Court judgment of 29 October 1992, App. No. 14234/88 and 14235/88, Series A-246-A.

[26] *Lingens v. Austria*, judgment of 8 July 1986, App. No. 9815/82, Series A 113 and *von Hannover v. Germany*, judgment of 24 June 2000, App. No. 59320/00, EHRR 2004-VI.

interest in the administration of justice, and the public interest may warrant some limitations to individual property rights). The vocabulary of divergent balance and value preferences will therefore be preferred to the categories of "higher" *versus* "lower" human rights standards, which fail to encompass the complexity of these societal choices.[27]

Whichever the motivations may be for the increasingly proactive stance of the EU in the human rights field, these developments question the relationships between the EU and the ECHR legal orders. They influence both the Strasbourg Court's consideration of the constitutional arrangements established between the EU and its Member States (III), and the EurCourtHR substantive case law itself (IV).

III. The Scope of the "European Exception" under the Convention

The Council of Europe and the European Union, both being rooted on the ruins of post-war Europe, share a common historic goal of reconstruction and maintenance of the peace on the continent. In Strasbourg, EU integration is therefore logically perceived as a laudable objective that should not be undermined by the EurCourtHR case law. Accordingly, the Strasbourg Court recognized some special arrangements where the developments of EU integration challenged the normal application of the Convention. First, the EurCourtHR in *Moustaquim* and *C. v. Belgium* considered that the specific EU legal order with its own citizenship justified Member States to treat citizens of other Member States more favorably than other migrants. This legitimated the creation of differential treatments on the sole basis of nationality.[28] Second, the *Bosphorus* judgment addressed the consequences of the lack of EU membership to the Convention in a context where the extension of EU competences in human rights-related areas enables it to commit impairments of fundamental rights on its own. The EurCourtHR established a transitional arrangement to limit Member States' liability for acts of the EU institutions. *Bosphorus* provides for a presumption that, where they implement EU law without being left any margin of discretion, Member States comply with the Convention in so far as the EU legal order ensures a level of human rights protection that is "equivalent" to their obligations under the

[27] In that respect, see Joseph H. H. Weiler, *Eurocracy and Distrust: Some questions concerning the role of the European Court of Justice in the protection of Fundamental Human Rights within the legal order of the European Communities*, 61 WASH. L. REV. 1128 (1986).

[28] *Moustaquim v. Belgium*, judgment of 18 February 1991, App. No. 12313/86, Series A 193 and *C. v. Belgium*, judgment of 7 August 1996, App. No. 21794/93, [1996] EHRR III.

Convention.[29] However, the deference ceases where human rights protection at EU level is "manifestly deficient" (in which case the presumption is rebutted)[30] or where Member States do in fact benefit from a margin of appreciation when they implement EU law (in which case the presumption is simply not applicable).[31] Recent case law developments have emphasized the EurCourtHR's firm determination to limit the extension of the *Bosphorus* presumption (A). Moreover, the general evolution of EU law regarding the treatment of third country nationals suggests that the "citizenship exception" may have lost some of its relevance and legitimacy (B).

A. The Limits of Mutual Trust: Member States' Individual Responsibilities under the Convention

The development of interstate cooperation in asylum, police and judicial matters based on mutual trust has triggered an alignment of national laws on human rights standards that go beyond a lowest common denominator and often present a higher level of specificity than the standards laid down in Council of Europe Conventions and EurCourtHR case law.[32] Indeed, Council of Europe standards generally require national implementing measures that happen to diverge in such a way as to impede mutual trust. This generates a need for more uniformity at EU level.[33] In view of this harmonized framework deemed to guarantee EU-wide compliance with a set of human rights standards, a "disconnection" scenario where Member States would be exempted from their conventional obligation to verify that their counterparts comply with their human rights obligations before initiating cooperation had appeared defensible. EurCourtHR Judge Françoise Tulkens herself suggested that in the name of mutual trust, Member States could be allowed to operate some presumptions of fundamental rights compliance facilitating

[29] *Bosphorus v. Ireland*, judgment of 30 June 2005, App. No. 45036/98, [2006] 42 EHRR 1, paras. 152-155.
[30] *Id*., para. 156
[31] *Id.*, para. 157. In that case, the situation remains governed by the *Wait and Kennedy* jurisprudence, setting out the general rule that where Member States cooperate in an area where there exist possible implications as to the protection of fundamental rights, they may not be absolved from all responsibility under the Convention in the said area (*Wait and Kennedy v. Germany*, Grand Chamber judgment of 18 February 1999, App. 26083/94, EHRR 1999-I, para. 67).
[32] See Recital 10 of the Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, OJ L 350 60-71, Dec. 30, 2008.
[33] Conny Rijken, *Re-balancing security and justice: Protection of fundamental rights in police and judicial cooperation in criminal matters*, 47 CMLREV. 1455, 1473 (2010).

cooperation.[34] This view has, as developed below, been undermined by the recent *M.S.S.* judgment.

Under the EurCourtHR case law, Contracting Parties may incur liability for the act of another State when they indirectly contribute to a violation committed by the latter. In particular, a party to the Convention is responsible under Article 3 ECHR (the prohibition of torture, inhuman and degrading treatment) not only when it expels[35] or extradites[36] a person to a *third country* where this person faces a substantial risk of incurring treatments contrary to that provision, but also where it sends a person to *another Contracting Party* which will likely treat her in a manner prohibited by Article 3 or in turn send her to such a "suspect" country.[37] This rule challenges, in particular, the Dublin system of allocation of asylum applications among EU Member States. In the same manner, the EurCourtHR case law on recognition and enforcement of judgments holds the receiving State responsible for verifying the conformity of the State of origin's judgment with the due process guarantees before recognizing and enforcing it, whether the judgment emanates from a third party[38] or from another Contracting Party.[39]

The claim that Member States' obligations under the Convention should be relaxed in view of the existence of a framework of harmonized EU standards of human rights protection that is "at least equivalent" to the Convention standards, is reminiscent of the mechanism of the disconnection clause inserted in some Council of Europe conventions.[40] Through disconnection clauses, Member States have asserted to apply their EU obligations, rather than the relevant

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[34] Olivier De Schutter and Françoise Tulkens, *Confiance mutuelle et droits de l'homme. La Convention européenne des droits de l'homme et la transformation de l'intégration européenne*, 32 Working Paper Series REFGOV, at 16 (2010).

[35] *Crus Varaz v. Sweden*, judgment of 20 March 1991, App. No. 15576/89, Series A 201; *Vilvarajah and others v. United Kingdom*, judgment of 30 October 1991, App. No. 13163-5/87 et 13447-8/87, Series A 215 and *Salah Sheekh v. Netherlands*, judgment of 11 January 2007, App. No. 1948/04.

[36] *Soering v. United Kingdom*, judgment of 7 July 1989, App. No. 14038/88, Series A 161.

[37] *T.I. v. United Kingdom*, inadmissibility decision of 7 March 2000.

[38] *Pellegrini v. Italy*, judgment of 20 July 2001, App. No. 30882/96, EHRR 2001-VIII.

[39] *H.P.L v. Austria*, E. Commission H.R. inadmissibility decision of 5 July 1994, App. No. 24132/94 and *Sommer v. Italy*, E. Commission H.R. inadmissibility decision of 17 January 1996, App. No. 25336/94.

[40] Disconnection clauses in international agreements aim at protecting the autonomy of the EU legal order in providing that the relationships between the Member States will be governed by the relevant provisions of EU law rather than the international agreement at stake, without prejudice to the full application of the agreement with the other parties. For an overview of the theory and practice of disconnection clauses, see Marise Cremona, *Disconnection Clauses in EU Law and Practice, in* MIXED AGREEMENTS REVISITED - THE EU AND ITS MEMBER STATES IN THE WORLD 160, 160-186 (Christopher Hillion and Panos Koutrakos eds., 2010).

conventions, in their mutual relations. In the same manner, EU law would allow them, in some instances, to apply their obligations of cooperation on the basis of mutual trust – with the accompanying fundamental rights guarantees – instead of their ECHR obligations to verify in each individual case that the other State would comply with its human rights commitments. The analogy with the disconnection mechanism is, however, imperfect. Whereas the disconnection clause impedes Member States to *"invoke and apply the rights and obligations deriving from the [relevant international agreement] directly among themselves"*,[41] EU cooperation mechanisms based on mutual trust generally reserve Member States the possibility to rely on their human rights obligations to refuse cooperation.[42] There are, however, a few isolated loopholes denying Member States any possibility to refuse cooperation even on human rights grounds.[43]

1. The Strasbourg rejection of the "disconnection" claim in interstate cooperation

The recent EurCourtHR ruling in *M.S.S. v. Belgium and Greece*[44] addressed the interaction between the principle of mutual trust under EU law and the Member States' obligations pursuant to the Convention. The *M.S.S.* case concerned the operation of the Dublin II Regulation establishing interstate cooperation in the allocation of asylum claims. The Dublin II system rests on mutual trust and is accompanied by a network of harmonized obligations concerning the treatment of asylum seekers.[45] An Afghan asylum applicant had entered the EU territory at the Greek maritime border and further traveled into Belgium where he had filed an asylum request. In accordance with the Dublin II Regulation designating the Member State of first entry as responsible for the treatment of the application, Belgian authorities had transferred the applicant to Greece. Subsequently, Greece sent the applicant back to Afghanistan, after having detained him in conditions found inhuman and degrading by the Court. Not only was Greece condemned

[41] Explanatory Report of the Council of Europe Convention on Action against Trafficking of Human Beings, March 16, 2005, Council of Europe Treaty Series No. 197, para. 375.

[42] For example, Article 14(1)(d) of the Proposal for a Council Framework Decision on the Exchange of Information under the Principle of Availability (COM(2005)490 final) and Article 7(1)(c) of the Framework Decision 2003/577/JHA on the execution in the EU of orders freezing property or evidence.

[43] Such as, in particular, Article 42 of Regulation 2201/2003 as interpreted in *Aguirre Zarraga* (analyzed below, Section III. A. 2).

[44] *M.S.S. v. Belgium and Greece*, Grand Chamber judgment of 21 January 2011, App. No. 30696/09.

[45] Recital 5 of the Dublin II Regulation makes clear that the process of harmonization of the status of asylum seekers (through the Reception, Procedure and Qualification Directives) was triggered by the implementation of the Dublin Convention of 15 June 1990 (the predecessor of the Dublin II Regulation).

for having expelled the applicant to Afghanistan, where he would be exposed to a substantial risk of torture or maltreatments, and detained him in conditions contrary to Article 3 ECHR. Belgium was also found to have breached that same provision in transferring the applicant to Greece.[46] According to the Court, Belgian authorities should have known that if sent back to Greece, the applicant would face a substantial risk of being detained in inhumane conditions and expelled to Afghanistan.[47] Straight away, the Court rejected the application of the *Bosphorus* presumption since Belgium had a margin of discretion to refuse the operation of the Dublin mechanism through the invocation of the "sovereignty clause" of the Dublin II Regulation.[48] The Court admitted that as a general matter, Contracting Parties may presume that their counterparts will comply with the Convention (without recognizing any special status for EU Member States' interactions in that respect). It considered, however, that Belgium should have rebutted this presumption in the circumstances of the case. According to the Court, Belgium could not ignore, in view of the numerous NGO reports and a letter from UNHCR, that the applicant would face a substantial risk of violation of his fundamental rights should he be expelled to Greece. Yet, as pointed out by Judge Bratza in his dissent, Belgium had based its transfer decision on the prior *K.R.S.* judgment, predating the Belgian decision of only six months. In *K.R.S.,* the Court had considered that the United Kingdom could legitimately have presumed that Greece would respect its conventional obligation and accordingly transfer the applicant there.[49] Moreover, the Court itself had refused to grant interim measures under Article 39 of the Convention in the *M.S.S.* case as well as in dozens of other cases concerning the return of Afghan nationals to Greece from other EU Member States. Finally, most of the NGO reports invoked in the Court's decision either postdated the Belgian transfer decision, or predated the *K.R.S.* decision itself.[50]

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[46] Strikingly enough, Belgium was condemned to pay more than 30,000 EUR to the applicant, while Greece's compensation obligation only amounted to less than 6,000 EUR (paras. 15 and 16 of the dispositive part of the judgment).

[47] *M.S.S.*, paras. 345-352.

[48] Article 3(2) of the Dublin II Regulation provides that *"[b]y way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation"* (see *M.S.S.*, paras. 338-340).

[49] *K.R.S. v. United Kingdom*, judgment of 2 December 2008, App. No. 32733/08, EHRR 2008.

[50] For these reasons, dissenting Judge Bratza considered that Belgium was legitimately entitled to rely on the presumption that Greek would comply with the Convention.

As a result of this particularly heavy burden imposed on EU Member States, the *M.S.S.* judgment is likely to undermine the very foundation of the principle mutual trust. Indeed, this principle rests on the idea that Member States should abstain from verifying in each individual case, before cooperating with another Member State, whether the latter actually complies with all the relevant fundamental rights standards.[51] The Strasbourg Court's uncompromising attitude imposing a strict obligation to actively screen out all existing reports, despite comforting EurCourtHR case law, raises the question whether the presumption that the responsible Member State would comply with its human rights obligations may still have more than a rhetorical value in the Dublin II context. Furthermore, the general underlying reasoning of the Court suggests that the *M.S.S.* finding could be extended, beyond the Dublin context, to all police and judicial cooperation mechanisms to the extent Member States retain a margin of discretion to refuse cooperation on grounds of fundamental rights. EU cooperation instruments generally allow or even compel Member States to refuse cooperation where this would result in a violation of fundamental rights.[52] However, lacunas exist and allow for the intrusion of "blind mutual trust" in the application of EU law.[53] For example, Regulation 804/2004 creating a European enforcement order for uncontested claims,[54] whilst subjecting the certification of judgments by the State of origin to certain procedural conditions, does not provide for any mechanism allowing the receiving State to verify compliance of the certified judgment with these conditions.[55] Along the same line, the risk of violation of fundamental rights by the requesting State is not expressly mentioned among the grounds for refusal of surrender under the European Arrest Warrant

[51] It may still be questioned whether the Court would eventually be inclined to recognize a wider scope of operation to the presumption of compliance when Member States mutually cooperate, if the EU were to establish reliable monitoring mechanisms (for example, through the Fundamental Rights Agency). The Court's *M.S.S.* judgment, however, does not suggest any possibility for Member States to benefit from a special treatment in so far as their mutual cooperation under EU law is concerned.

[52] For example, Article 14(1)(d) of the Proposal for a Council Framework Decision on the Exchange of Information under the Principle of Availability (COM(2005)490 final) allows Member States to refuse to provide information to protect the fundamental rights of the persons whose data are being protected. Article 7(1)(c) of the Framework Decision 2003/577/JHA on the execution in the EU of orders freezing property or evidence considers the non observance of the principle of *ne bis in idem* as a ground for non-recognition. The fact that cooperation in police and judicial matters is generally accompanied by a margin of discretion for Member States may explain why the Court took care of limiting its *Bosphorus* finding to the previously called "first pillar" or "community" instruments.

[53] The expression "blind mutual trust" was used by Olivier De Schutter in *The two Europes of Human Rights: The emerging division of tasks between the Council of Europe and the European Union promoting Human Rights in Europe*, 14 COLUM. J. EUR. L. 509, 543 (2007-2008).

[54] Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ L 143 15-39, April 30, 2004.

[55] See FABIEN MACHADIER, LES OBJECTIFS GÉNÉRAUX DU DROIT INTERNATIONAL PRIVÉ A L'ÉPREUVE DE LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME, 590 (Bruylant, 2007).

Framework Decision.[56] Another obligation of "blind mutual trust" is contained in Article 42 of Regulation 2201/2003 on jurisdiction and enforcement of judgments in matrimonial and parental responsibility matters. That provision was at stake in a CJEU judgment adopted a month before the *M.S.S.* ruling.

2. A contrasting understanding of mutual trust in Luxembourg

Regulation 2201/2003 precludes recognition of judgments rendered in violation of the receiving State's public policy or of the basic guarantees of due process including the right for the child to have an opportunity to be heard.[57] However, that instrument provides for an exception in so far as judgments ordering the return of an abducted child are concerned. In view of the urgency of the return procedures in child abduction cases, Article 42 of the Regulation rules out any possibility for the receiving State to oppose the recognition of the judgment, provided that the judge of the Member State of origin has certified that the parties and the child were given an opportunity to be heard.[58] The Court had already considered in previous cases that a decision so certified is automatically enforceable and admits no opposition to its recognition.[59] In *Aguirre Zarraga*, a German judge requested the CJEU to clarify whether a receiving judge may nonetheless exceptionally refuse to recognize a judgment certified under Article 42 on the grounds that the obligation to hear the child has not been fulfilled, in particular in light of Article 24 of the Charter recognizing children's procedural rights.[60] The Court replied negatively, stating that the principle of mutual trust implies that the courts of the Member State of origin have the exclusive authority to ensure that their judgments comply with Articles 24 of the Charter[61] and, consequently, Article 42 of the Regulation.[62] This limitation was justified by

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[56] Articles 3 and 4 of the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190 1-20, July 18, 2002. See Rijken, *supra*, 1475, pointing out that several Member States have included the risk of fundamental rights violation within the list of refusal grounds in the national implementing legislations.

[57] Article 23 of Regulation 2201/2003.

[58] Article 43 of the Regulation precludes any appeal against the issuing of the certificate.

[59] Cases C-195/08 PPU *Rinau*, [2008] ECR I-5271, paras. 84 and 109 and C-211/10 PPU *Povse*, judgment of 1 July 2010, para.70.

[60] Case C-491/10 PPU *Aguirre Zarragua*, 22 December 2010.

[61] Article 24(1) protects the right of the child to have an "*opportunity to be heard in any procedure concerning him*".

[62] The Court considered that Article 24(1) merely requires that an opportunity be given to the child to express his or her views freely and that these views be obtained by the Court. The obligation to hear the child under Article 24(1) of the Charter is thus not absolute, and the appropriateness of a hearing must be determined by the judge according

the assumption that Member States' respective national systems are *"capable of providing an equivalent and effective protection of fundamental rights"*.[63] As construed by the Court, the principle of mutual trust thus amounts to a non-rebuttable presumption of equivalent and effective human rights protection.

The Strasbourg *M.S.S.* ruling casts doubt on the continuing validity of this EU case law under the Convention.[64] Yet, Article 24 of the Charter does not find an equivalent in the ECHR as interpreted in Strasbourg in so far as the children's right to have an opportunity to be heard in proceedings affecting them is concerned. Under the current state of the case law, only the right of *parents* to have their child heard by a court has been recognized (albeit in limited circumstances).[65] However, it has been argued that children should be granted a right to be heard in custody and contact proceedings pursuant to an evolutive interpretation of the Convention.[66] Furthermore, the general finding in *Aguirre Zarraga* would also preclude the receiving State from refusing recognition of a return judgment on the grounds that the parties themselves were deprived from due process guarantees (the second indent of Article 42). The Luxembourg approach would then raise questions in light of the EurCourtHR established case law holding receiving States responsible, under Article 6 ECHR, for verifying the conformity of a State of origin's judgment with the fair trial guarantees before recognizing and enforcing it within their own legal orders (whether the judgment emanates from a third country[67] or from another

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to the circumstances of each specific case. This individual assessment is considered to be exclusively entrusted to the judge of the Member State of origin (*Aguirre Zarragua*, paras. 63-65).

[63] *Aguirre Zarragua*, paras. 69-70.

[64] Any objection that the *M.S.S.* and the *Aguirre* situations should be distinguished on the ground that the German judge had no margin of discretion to refuse recognition and enforcement of the return judgment of the Spanish Court under Article 42 of the Regulation, whereas it is always possible to trigger the "sovereignty clause" and abstain from transferring an applicant under the Dublin II Regulation, is of limited relevance. The *Bosphorus* presumption indeed purports to limit the individual liability of the Member States under the Convention, but should not have any incidence on the interpretation of EU law by the CJEU.

[65] The Court recognized in *Elzholz* the right of parents to have an expert analysis on the wish of their young children concerning custody and access (*Elsholz v. Germany*, judgment of 13 July 2000, App. No. 25735/94, EHRR 2000-VIII, para. 53). In *Sahin v. Germany* (judgment of 8 July 2003, App. No. 30943/96, EHRR 2003-VIII) and *Sommerfeld v. Germany* (judgment of 8 July 2003, App. No. 31871/96, EHRR 2003-VIII), the Grand Chamber protected a parental right to have their children heard where the interest of the child commands it, which depends on a set of circumstances (among which the willingness of the child is not mentioned).

[66] Aoife Daly, *The right of children to be heard in civil proceedings and the emerging law of the European Court of Human Rights*, 15:3 THE INTERNATIONAL JOURNAL OF HUMAN RIGHTS 441-461 (2011).

[67] In *Pellegrini v. Italy*, the Court concluded to a violation of Article 6 on the ground that the Italian courts had failed to ensure that the applicant had benefited from a fair hearing in the ecclesiastical proceedings before issuing an authority to enforce a judgment of the Tribunal of the Roman Rota. Machadier proposed, however, to establish the responsibility of the requested state on the basis of Article 13 ECHR (Machadier, *supra,* 585-593).

Contracting Party).[68] The *Aguirre* ruling contains the seeds for a possible conflict of loyalty for Member States. A receiving State might be obliged to cooperate "blindly" under EU law, while the Strasbourg approach would prescribe an individual assessment followed by a refusal to cooperate if it appears that the Member State of origin cannot be presumed to comply with its conventional obligations.

In Member States' asylum, justice and police cooperation, mutual trust aims at creating a situation "as close as possible" as the one prevailing within one and the same Member State.[69] Unlike the Strasbourg case law, EU law therefore tends to treat the sum of its Member States as an integrated entity in so far as cooperation on the basis of mutual trust is concerned. This does not, however, always result in attenuating Member States' responsibilities as was at stake in *Aguirre* or in the Belgian transfer decision in *M.S.S.* It may also, as a flipside to the mutual trust and recognition obligations, reinforce the protection of individual rights and the corresponding responsibilities of the States. Notably, the *ne bis in idem* principle – as a general principle of EU law – applies not only within each Member State but also between the jurisdictions of several Member States,[70] whilst the scope of the principle in international law is traditionally limited to one and the same State.[71] Contrasted to the *M.S.S.* ruling, the *ne bis in idem* principle under EU law leads to the result that whereas EU law treats the Union as an integrated entity for the purpose of Article 7 ECHR, the EurCourtHR uncompromisingly regards it as a disintegrated organization for the purpose of the Member States' individual responsibilities under the Convention. This asymmetric outcome seems to reveal a deeper divergence in the "constitutional" conceptualization of the EU, which is increasingly regarded as a quasi-federal

[68] *H.P.L v. Austria*, E. Commission H.R. inadmissibility decision of 5 July 1994, App. No. 24132/94 and *Sommer v. Italy*, E. Commission H.R. inadmissibility decision of 17 January 1996, App. No. 25336/94.

[69] Conclusions of Advocate General Bot, delivered on 7 December 2010, para. 98 in Case C-491/10 PPU *Aguirre Zarragua*, judgment of 22 December 2010.

[70] Article 54 of the Convention of 19 June 1990 implementing the Schengen Agreement (CISA), as interpreted in the CJEU abundant case law (Cases C-187/01 and C-385/01 *Gözütok and Brugge*, [2003] ECR I-1345; C-469/03 *Miraglia*, [2005] ECR I-2009; C-436/04 *Van Esbroeck*, [2006] ECR I-2333; C-150/05 *Van Straaten*, [2006] ECR I-9327; C-367/05 *Kraaienbrink*, [2007] ECR I-6619; C-288/05 *Kretzinger*, [2007] ECR I-6441; C-491/07 *Turansky*, [2008] ECR I-11039; C-297/07 *Bourquain*, [2008] ECR I-9425 and C-261/09 *Mantello*, judgment of 16 November 2010). In the competition law area, the principle also applies to the relationship between national law and EU law: see *Walt Wilhem* (Case 14/68, [1969] ECR 1), *Boehringer* (Case 45/69, [1970] ECR 769), and *Graphite Electrodes* (Cases C-289/04 P *Showa Denko* [2006] ECR I-5859 and C-308/04 P *SGL Carbon* [2006] ECR I-5977).

[71] See BAS VAN BOCKEL, THE *NE BIS IN IDEM* PRINCIPLE IN EU LAW 213 (2010).

State in development on EU side whereas it is still primarily viewed as a disaggregated international organization in Council of Europe circles (see below, Section IV. D. 1).

3. An opportunity for clarification and further harmony?

The potential point of friction between the Strasbourg *M.S.S.* and the Luxembourg *Aguirre Zarraga* rulings illustrates the contradictions that may occur when the Luxembourg Court is seized of a human rights-related issue on which the EurCourtHR has not yet ruled. These happen infrequently [72] and have been described as "misunderstandings" rather than true disagreements.[73] As Judge Rosas stated, *"the thesis, often put forward in the literature, that there is a tension or even conflict between Luxembourg and Strasbourg case law [is] somewhat exaggerated, to put it mildly. Harmony, rather than conflict, is a much more likely scenario".*[74] In these circumstances, the CJEU has traditionally appeared concerned with the coherence of its judgments with the Strasbourg approach, and accordingly aligned its case law at the earliest occasion.[75] The issue of individual responsibility of Member States to verify that their counterparts effectively comply with human rights before initiating cooperation has been brought anew to the Court in the pending *NS* case.[76] As it specifically concerns the Dublin system, this

[72] The main illustration is provided by the contradiction between the CJEU *Hoechst* ruling, confining the right to inviolability of the home under Article 8 ECHR to private dwellings, and the EurCourtHR *Niemitz* judgment extending it to the professional office of a lawyer. The EU approach was promptly rectified in *Roquettes Frères,* where the Court extended the Article 8 protection to business premises (Joined Cases 46/87 and 227/88 *Hoechst v. Commission,* [1989] ECR 2859, para. 18; *Niemitz v. Germany,* judgment of 16 December 1992, Serie A 250-B and Case C-94/00 *Roquettes Frères* [2002] ECR I-9011, para. 29). Another point of divergence concerned the privilege against self-incrimination, the CJEU having excluded the right not to provide evidence against oneself from the scope of Article 6 ECHR (Case 374/87 *Orkem v. Commission* [1989] ECR 3283, para. 30) while such a right was subsequently included in Strasbourg (*Funke v. France,* judgment of 25 February 1993, App. No. 10828/84, Series A No. 256-A). The apparent contradiction between the CJEU *Emesa* and the EurCourtHR *Kress* rulings on the independence of the Advocate General has also been pointed out (Case C-17/98 *Emesa Sugar,* [2000] ECR I-665 and *Kress v. France,* judgment of 7 June 2001, App. No. 39594/98, EHRR 2001-VI). For a detailed overview of the relationships between the two courts, see TAKIS TRIDIMAS, GENERAL PRINCIPLES OF EU LAW 342-348 (2006).

[73] Jean-Pierre Puissochet and Jean-Paul Costa, *Entretien croisé des juges français,* 96 POUVOIRS: LES COURS EUROPÉENNES DE LUXEMBOURG ET STRASBOURG 161, 165-166 (2001).

[74] Allan Rosas, *Fundamental Rights in the Luxembourg and Strasbourg Courts, in* THE EFTA COURT: TEN YEARS ON 170 (Carl Baudenbacher, Per Tresselt and Thorgeir Örlygsson eds., 2005).

[75] For example, the CJEU in *Roquettes Frères* modified its prior *Hoechst* case law in light of the EurCourtHR *Niemietz* ruling (*Roquettes Frères,* para. 29).

[76] Case C-411/10 *NS*, reference made on 18 August 2010, OJ C 301/57, Nov. 6, 2010. On October 1st, 2010, the President of the Court rejected the United Kingdom Court of Appeal's request for application of the accelerated procedure. On November 9, 2010, the President of the Court ordered a joinder of Case C-411/10 with Case C-493/10 *M.E.* Another reference had been introduced to the Court regarding the compatibility of the mechanisms of transfer pursuant to the European Arrest Warrant mechanism (Case C-105/10 PPU, *Gataev and Gataeva*, reference lodged on 25 February 2005, OJ C 100/32, April 17, 2010). This case has however been removed from the registrar by Order of the President of the Third Chamber of the Court on 3 April 2010.

case provides an ideal opportunity for the CJEU to assess the effects of the *M.S.S.* judgment for the EU legal order. The British judge essentially questions whether Member States may be compelled, under their human rights obligations laid down in Article 6 TEU and Article 51 of the Charter, to exercise of the "sovereignty clause" under the Dublin II Regulation. The referring judge also questions the validity, under EU human rights obligations, of a conclusive presumption of compliance with the Charter and the asylum directives. The CJEU is thereby invited to decide whether to transpose the *M.S.S.* approach not only to situations where a transfer under Dublin II would put the applicant's rights under the ECHR at risk, but also where it would endanger secondary law guarantees going beyond Member States' conventional obligations.[77] Finally, the British judge also questions whether the Charter provisions protecting asylum seekers (in particular, Articles 1, 18 and 47)[78] are wider than Article 3 of the Convention. The reference will thus likely induce the Court to elaborate on the relationships between the two European legal orders.

The potential conflict of loyalty resulting from the *M.S.S.* and *Aguirre* judgments also strengthens the case for accession of the EU to the ECHR, which is now mandated under Article 6(2) TEU.[79] The main advantage of accession would consist in ensuring an external control over EU acts, which would prevent the eventual confusion arising when a Strasbourg judgment contradicts a previous CJEU jurisprudence.[80] *Aguirre Zarraga* illustrates the discrepancy that may occur where a Luxembourg judgment fits uneasily with the Strasbourg posterior case law, while further recourse to Strasbourg (against the Member States collectively) would have little chance of success given the operation of the *Bosphorus* presumption and the overly demanding

[77] As explained below (Section IV. A. 3), the EurCourtHR has incorporated some of the Member States' obligations under the Reception Directive into their obligations of Article 3 of the Convention. In condemning Greece for maltreatment of the applicant in *M.S.S.*, the Court considered that Greece's obligations under EU secondary law had the effect of broadening its duties under the Convention too.

[78] Article 1 of the Charter protects the right to human dignity; Article 18 the right of asylum; and Article 47 the right to a judicial remedy and the fairness of the proceedings.

[79] The new Article 6(2) represents the Treaty amendment to which Opinion 2/94 subordinated the competence of the EU to accede to the Convention (*Opinion 2/94, supra,* para. 35).

[80] On the risk of conflicting case law, see Vassilios Skouris, *Introducing a Binding Bill of Rights for the European Union: Can Three Parallel Systems of Protection of Fundamental Rights Coexist Harmoniously?, in* VERFASSUNG IM DISKURS DER WELT, LIBER AMICORUM FÜR PETER HÄBERLE, 261-273 (2004). For a general overview of the benefits of accession from a Strasbourg viewpoint, see Hans Christian Krüger and Jörg Polakiewicz, *Proposals for a Coherent Human Rights Protection System in Europe,* 22 HRLJ 1-13 (2001).

threshold of "manifest deficiency" to rebut it.[81] Accession of the EU to the Convention would put an end to this legal uncertainty as to which rule should prevail in any conflicting situation. Moreover, the *Bosphorus* presumption would probably disappear altogether at the same time as its *raison d'être.*[82] The presumption was indeed designed to address the need, absent EU membership to the Convention, to relax Member States' responsibilities where an EU measure for the operation of which they had no margin of discretion was held to breach fundamental rights.[83]

B. Increasing pressure against the 'EU citizenship exception' under Article 8 of the Convention

In the aftermath of the Maastricht Treaty, the specificities of the EU legal order and its integrationist objective had been recognized by the Strasbourg Court in the context of differential treatments between EU citizens, benefiting from a set of rights going beyond ECHR standards, and third country nationals deemed to fall outside the personal scope of these EU law rights. It is commonly reminded that while EU citizens' rights exclusively benefit the nationals of EU Member States, human rights are universal in scope.[84] However, the fundamental right to nondiscrimination introduces some tension in this simple proposal, since granting preferential rights to EU citizens by definition generates exclusion and unequal treatment. This raises issues under the ECHR in so far as EU citizens' rights impact on the enjoyment of some of the rights protected by the Convention, thereby triggering the application of the nondiscrimination clause of Article 14 ECHR. In *Moustaquim* and *C. v. Belgium*, the Court resolved this tension in considering that the creation of the EU as a "*special legal order"* with its own citizenship in itself justified such differential treatments.[85] Therefore, the exclusion of third country nationals

[81] In the scenario where a case would be brought against all the Member States jointly following the CJEU *Aguirre* judgment, the Court would indeed likely be reluctant to rebut the presumption in view of this high threshold.

[82] Alternatively, the view has been submitted that the Court might maintain its deferential attitude towards the CJEU and review Member States measures more strictly than EU acts, thereby leading to a dual line of case law (Frederic van den Berghe, *The EU and Issues of Human Rights Protection: Same Solutions for More Acute Problems?*, 16:2 *ELJ* 112, 149 (2010).

[83] Sionaidh Douglas-Scott, *Case note under* Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland, *Application No 45036/98, judgment of the European Court of Human Rights (Grand Chamber) of 30 June 2005*, (2006) 42 EHRR 1, 43 CMLREV. 252 (2006).

[84] See House of Lords, Selected Committee on the European Union, *EU Charter of Fundamental Rights with Evidence*, Session 1999-2000, 8th Report, HL Paper 67, 22, at 75.

[85] *Moustaquim v. Belgium*, , judgment of 18 February 1991, App. No. 12313/86, Series A 193 para. 49 and *C. v. Belgium*, judgment of 7 August 1996, App. No. 21794/93, [1996] EHHR III para. 38.

from the guarantees protecting EU citizens against expulsion (which are more protective than the conventional requirements under Article 8 ECHR)[86] did not violate the prohibition of discrimination. The *Moustaquim* exception collaterally gave blessing to the restriction of the scope of the EU prohibition of nationality discrimination under Article 18 TFEU (*ex*-Article 12 EC) to the exclusive benefit of EU citizens. However, the progressive equalization of the status of various categories of third country nationals with the EU citizens' condition – especially concerning the right to family life – raises increasing doubts on the continuing validity of the "citizenship exception".

1. The progressive equalization of the status of EU citizens and third country nationals

With the gradual extension of EU citizens' material rights to the benefit of third country nationals, free movement and nondiscrimination on grounds of nationality can no longer be considered the monopoly of EU citizens. International agreements and secondary law, with the help of audacious CJEU case law, have extended the benefit of the prohibition of nationality discrimination beyond the restricted circle of the nationals of the Member States and their family members. Nationals of third countries having entered into association or cooperation agreements with the EU (namely, the EEA countries as well as Algeria, Morocco, Tunisia and Turkey)[87] as well as long term residents,[88] highly qualified migrants[89] and researchers[90] benefit from specific

[86] There was accordingly no breach of Article 8 taken individually, but the question arose whether reserving a more favorable treatment for the exclusive benefit of EU citizens would breach Article 8 in conjunction with Article 14 of the Convention.

[87] Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation, signed on 2 May 1992, OJ L 1 3, Jan. 3, 1994; Agreement establishing an Association between the European Economic Community and Turkey, signed in Ankara on Sept. 12, 1963, OJ L217, 3687, Dec. 29, 1964; Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, OJ L 70 2-204, March 18, 2000; Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part, OJ L 265 2-228, Oct. 10, 2005; Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part, OJ L 97 2-183, March 3, 1998.

[88] See Sergio Carrera and Anja Wiesbrock, *Whose European Citizenship in the Stockholm Programme? The Enactment of Citizenship by Third Country Nationals in the EU*, 12 EJML 337 (2010).

[89] Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155 17-29, June 18, 2009.

[90] Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research, OJ L 289 15-22, Nov. 3, 2005.

sets of legislative protection against discrimination in a wide range of employment conditions and social security benefits.[91] These "privileged" categories of aliens are also recognized special guarantees against expulsion[92] and family reunification rights.[93] The extension of EU rights to the benefit of some groups of non-EU nationals was also directly asserted by the Luxembourg Court, which gradually transposed the principles governing the status of EU workers to that of Turkish workers.[94] With respect to the right to family reunification, the CJEU has shown willing to align some aspects of the rights of all third country nationals covered by Directive 2003/86 on the treatment of EU citizens. In *Chakroun*, the Court transposed its citizenship case law to the situation of third country nationals under the Family Reunification Directive 2003/86,[95] relying on the *Metock* judgment which involved EU citizens' rights to family reunification under Directive 2004/38. The *Metock* finding that the right of an EU citizen's family members to join

[91] Article 9 of the EEC-Turkey association agreement; Article 10 of Decision 1/80 on the association between the EU and Turkey; Article 3(1) and 9 of Decision 3/80 on the application of social security schemes to the benefit of Turkish workers moving between the Member States (Article 9 expressly extends the provisions of Regulation No. 1408/71 to the benefit of Turkish workers); Article 40 of the EC-Morocco Agreement; Article 11 of Directive 2003/109; Article 14 of Directive 2009/50; Article 12 of Directive 2005/71. Article 15(3) of the EU Charter of Fundamental Rights also emphasizes that nationals of third countries authorized to work in a Member States are entitled to the same working conditions as EU citizens. For a detailed overview of the status of these "privileged" immigrants, see Anja Wiesbrock, *Free Movement of Third-Country Nationals in the European Union: The Illusion of Freedom*, 35 ELREV. 455-475 (2010).

[92] Article 12 of Directive 2003/109, providing in particular that a long term resident can only be expelled if he or she represents an "*actual and sufficiently serious threat to public policy or public security*". On the right of Turkish migrants, see Bulent Cicekli, *The Rights of Turkish Migrants in Europe under International Law and EU Law*, 33:2 INTERNATIONAL MIGRATION REVIEW 300 (1999).

[93] Article 7 of Decision 1/80. Article 16 of Directive 2003/109 and 15 of Directive 2009/50 provide for family reunification rights going beyond the guarantees of the Family Reunification Directive 2003/86. Researchers do not benefit from additional family reunification rights beyond the scope of Directive 2003/86.

[94] A. P. van der Mei, *The* Bozkurt-*Interpretation Rule and the Legal Status of Family Members of Turkish Workers under Decision 1/80 of the EEC-Turkey Association Council)*, 11 EJML 367-382 (2009). In line with Article 12 of the EEC-Turkey Association Agreement providing that the Contracting Parties shall be guided by Article 45 TFEU (*ex*-Article 39 TEC) to secure the free movement of Turkish workers, the Court decided in *Bozkurt* to transpose the principles of free movement of workers in the EU to Turkish beneficiaries of Decision 1/80 (Case C-434/93 *Bozkurt*, [1995] ECR I-1474). Pursuant to the *Boskurt* decision, the Court decided *inter alia* to extend the guarantees of EU workers against expulsion (Case C-467/02 *Cetinkaya*, [2004] ECR I-1095) as well as the rights to family reunification (Case C-275/02 *Ayaz*, [2004] ECR I-8765, para. 47). More recently, the Court condemned a Dutch discrimination between Turkish workers and EU migrants in the charges attached to the obtaining of a residence permit (Case C-92/07 *Commission v. Netherlands*, 29 April 2010, paras. 68-75).

[95] Conversely, interpretation of the Citizenship Directive 2004/38 in light of the Family Reunification Directive 2003/86 had been carried out by the CJEU in *Metock*, pointing out that since the wording of Directive 2003/86 prohibits Member States from attaching to the right to family reunification a condition of prior lawful residence in another Member State, a ruling permitting such a condition as far as family members of EU citizens are concerned would create the anomaly of granting more extensive rights to third country nationals than to EU citizens (Case 127/08 *Metock*, [2008] ECR I-6241, para. 69). For further commentaries on the *Metock* judgment, see *inter alia* Alina Tryfonidou, *Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach*, 15:5 ELJ 634 (2009) and Nathan Cambien, *Case note under Case C-127/08* Blaise Baheter Metock and Others v. Minister for Justice, Equality and Law Reform, 15 COLUM. J. EUR. L. 321, 321-341 (2008-2009).

the citizen in the host Member State may not be held contingent upon the time and place of creation of the family relationship[96] was therefore extended to the situation of third country nationals under Directive 2003/86.[97]

This progressive equalization of citizens and aliens in the enjoyment of their right to family life under EU law arguably affects the scope and relevance of the *Moustaquim* derogation under the Strasbourg case law. In past cases, the EurCourtHR has shown inclined to take account of the respondent States' obligations under their domestic laws – including EU law – for the purpose of assessing their responsibilities under the Convention.[98] A recent illustration is provided by the condemnation of Greece in *M.S.S.* under Article 3 ECHR for failing to comply with the requirements of the Reception Directive, even though the Strasbourg case law does not generally oblige Contracting Parties to go as far as these EU standards (see below Section IV. A. 3). The reasoning may be extended by analogy to situations where a Member State would treat third country nationals in contradiction with its obligations under EU law, thereby affecting their private and family life under Article 8 ECHR.[99] Its obligations under EU law would preclude that Member State from relying on the general right of the States to control the entry, residence and expulsion of non-nationals into their territory as recognized by the Strasbourg case law.[100] Likewise, any differential treatment between third country nationals and EU citizens induced by measures violating EU law could presumably no longer withstand a challenge under Article 14 ECHR by relying on the *Moustaquim* jurisprudence. In view of its potential internalization by the Strasbourg case law, the equalization of the status of ever-expanding categories of third country nationals with that of EU citizens may thus *de facto* restrict the material circumstances where the *Moustaquim* exception could operate.

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[96] *Metock*, paras. 87-90.

[97] The soundness of this reasoning has been questioned by Anja Wiesbrock on the basis that Directive 2003/109 on the status of long term residents (unlike the Family Reunification Directive) expressly permits such a distinction (Wiesbrock, *supra*, 464-465).

[98] *Dangeville v. France*, judgment of 16 April 2002, App. No. 36677/97, ECHR 2002-III; *Hornsby v. Greece*, judgment of 19 March 1997, App. No. 18357/91, EHRR 1997-II, paras. 42 and 44; *John v. Germany*, inadmissibility decision of 13 February 2007, App. No. 15073/03. For a more detailed examination, see below Section IV. A. 3.

[99] Such violations could consist, for example, in denying family reunification to a third country national in contradiction with Directive 2003/86 or in expelling a long term resident third country national in the absence of a "sufficiently serious threat to public policy or public security" as required by Article 12(1) of Directive 2003/109.

[100] *Abdulaziz, Cabales and Balkandali v. United Kingdom*, judgment of 28 May 1985, App. No. 9214/80 , 9473/81 and 9474/81, Series A 94, para. 67; *Amuur v. France*, judgment of 25 June 1996, App. No. 19776/92, EHRR 1996-II, para. 41; *Chahal v. the United Kingdom*, judgment of 15 November 1996, App. No. 22414/93, EHRR 1996-V, para. 73 and *Saadi v. United Kingdom*, Grand Chamber judgment of 29 January 2008, App. No. 13229/03, para. 64.

The above rationale, however, remains confined to situations where the rights of third country nationals and EU citizens have been aligned by virtue of EU law. Yet, there remain important differences in the respective status of EU citizens and third country nationals.[101] In addition, the less favorable status of the remaining "unprivileged" groups of aliens could also be challenged in so far as it involves unequal treatment between different categories of third country nationals without objective justification.

2. The increasing gap in the protection of "privileged" and "unprivileged" categories of aliens

The improvements in the status of most third country nationals widen the gap in protection separating the privileged categories of aliens from those third country nationals that are not covered by some form of EU law preferential treatment. It remains unclear under which circumstances the Strasbourg Court would recognize an "objective and reasonable" justification for treating different categories of third country nationals unequally. In *Koua Poirrez v. France,* it expressly condemned discrimination in the grant of social security benefits between French nationals and nationals of a country having signed a reciprocity agreement with France on the one hand, and other foreigners on the other. The difference of treatment was considered to be devoid of any "objective and reasonable justification" (referring *a contrario* to *Moustaquim*).[102] The issue has gained more compelling importance with the extension of the benefits of EU citizens' rights to third country nationals and the corresponding narrowing down of the categories of migrants deprived of such protection. In so far as important aspects of the right to family reunification are concerned, this category has been reduced to a minimum since the *Chakroun* ruling interpreted the Family Reunification Directive in parallel with its case law on the Citizenship Directive. In essence, the Family Reunification Directive extends its scope to all third country nationals legally residing in the EU, with the exception of asylum applicants and beneficiaries of the subsidiary or the temporary protection.[103] Only these few categories are therefore left disadvantaged in the enjoyment of their rights to family life. The *Moustaquim* exception would not provide any safe heaven, as it does not address the issue of unequal of

[101] See Mark Bell, *Civic Citizenship and Migrant Integration*, 13:2 EPL 311, 322-327 (2007).
[102] *Koua Poirrez v. France*, judgment of 30 September 2003, App. No. 40892/98, EHRR 2003-X, para. 49.
[103] Article 3(2) of Directive 2003/86.

treatment between different categories of aliens. It may well be, however, that these inequalities would withstand Strasbourg scrutiny in view of the traditional right of the States to control immigration within their borders.[104] Yet, the contrast between an ever-growing number of non-EU groups benefiting from equal treatment with EU citizens and the singling out of these few categories renders the perception of discrimination in the enjoyment of their fundamental rights more acute. This puts increasing pressure on the EU to equalize the guarantees concerning the right to private and family life, and to rationalize the *'géométrie variable'* of protection.

The progressive alignment of the status of increasing categories of third country nationals on that of EU citizens in the enjoyment of their right to private and family life arguably results in narrowing down the scope for the *Moustaquim* exception in two different ways. Regarding the "privileged" categories of aliens, the existence of their EU law obligations precludes Member States from justifying any derogation to the Convention that would also violate their commitments under EU law. As concerns those third country nationals who remain excluded from such favorable treatment, the citizenship exception would likewise appear irrelevant since a new discrimination then occurs – through the effect of EU law itself – between different categories of aliens. Therefore, the only situation where the citizenship exception could still eventually be invoked, concerns the remaining differences of treatments between EU citizens and "privileged" categories of aliens.

3. The remaining inequalities between EU citizens and "privileged" categories of aliens

Complete harmonization of the rights of third country nationals – including the "privileged" ones – on those of EU citizens remains far from accomplished.[105] In particular, Directives 2003/109 and 2003/86 both provide for restrictions to the right to private and family life that are not imposed on EU citizens.[106] Regarding Turkish workers, Advocate General Bot has recently

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[104] *Abdulaziz, Amuur, Chahal* and *Saadi, supra*.

[105] Sonja Boelaert-Suominen, *Non-EU Nationals and Council Directive 2003/109/EC on the Status of Third-Country Nationals who are Long-Term Residents: Five Paces Forward and Possibly Three Paces Back*, 42 CMLREV. 1011-1052 (2005).

[106] For example, Directive 2003/86 provides that Member States may subordinate the right to family reunification to a condition that the sponsor has resided for up to two years on their territory (Article 8) or that he can provide sufficient accommodation and resources for his family (Article 7). Directive 2003/109 allows for the expulsion of long term residents in case they represent a "threat to the public policy or public security" of the host State (Article

dismissed any assimilation of their status with that of EU citizens is so far as the reinforced guarantees against expulsion benefiting EU citizens under Directive 2004/38 are concerned.[107] It has been suggested that these subsisting inequalities be corrected through the generalization of the EU prohibition of nationality discrimination under Article 18 TFEU. Accordingly, the scope of Article 18 would be interpreted as extending, beyond the free movement rights of EU citizens, to all the material competences of the EU – thus including asylum and immigration matters.[108] Such a development would then possibly also be internalized by the Strasbourg case law in assessing Member States' liabilities, thereby outlawing the *Moustaquim* exception. This argument has however been somehow undermined since the Lisbon Treaty placed Article 18 TFEU under the heading "non discrimination and citizenship",[109] thereby suggesting that the provision exclusively benefits citizens. The CJEU *Vatsouras* judgment casts additional doubt on this line of argumentation, as it repeats that "*[Article 18 TFEU] is not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries"*.[110] This ruling is, however, less determinative since the *Vatsouras* case actually addressed a situation falling outside the scope of EU law (a refusal to extend to nationals of other Member States a benefit granted to third country national asylum applicants) rather than a difference of treatment favoring EU migrants over third country nationals.[111]

Although the validity of the citizenship exception in the Strasbourg case law may thus not be dismissed altogether, the evolution in the treatment of foreigners under EU law has seriously narrowed down its possible reach. Moreover, the legitimacy and the legality of advantaging EU

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12), while the expulsion of EU citizens is subject to the higher threshold of "threat to a fundamental interest of society" (Article 27(2) of Directive 2004/38).

[107] Opinion of Advocate General Bot delivered on 14 April 2011 in Case C-371/08 *Ziebell*, paras. 53-54.

[108] Astrid Epiney, *The Scope of Article 12 EC: Some Remarks on the Influence of European Citizenship*, 13:5 ELJ 614 (2007); Chloé Hublet, *The Scope of Article 12 of the Treaty of the European Communities vis-à-vis Third-Country Nationals: Evolution at Last?*, 15 ELJ 757 (2009). See also Dimitry Kochenov, Ius Tractum *of Many Faces: European Citizenship and the Difficult Relationship between Status and Rights*, 15 COLUM. J. EUR. L. 229 (2009), suggesting that the CJEU might be led to extend the scope of Article 18 TFEU to long term residents third country nationals covered by Directive 2003/109. Groenendijk argued that such an interpretation was defensible in the aftermath of the Amsterdam Treaty which "communautarized" the competence in visa, asylum and immigration (Kees Groenendijk, *Citizens and Third Country Nationals: Differential Treatment or Discrimination?, in* THE FUTURE OF FREE MOVEMENT OF PERSONS IN THE EU 84 (Jean-Yves Carlier and Elseph Guild eds., Bruylant, 2006)).

[109] Article 12 EC figured under the general heading "principles", and was thus not compellingly limited to the rights of EU citizens.

[110] Joined Cases C-22/08 and C-23/08, *Vatsouras and Koupatanze*, [2009] ECR I-4585.

[111] This remains indeed a *purely national matter*, whilst depriving third country national migrants from an advantage benefiting EU migrants arises precisely as a result of the Member States' obligations under EU law.

over non-EU migrants in the enjoyment of their right to private and family life on the sole basis of their nationality can be challenged. In *Gayguzuz v. Turkey*, the EurCourtHR had adopted a particularly strict approach regarding nationality discriminations, considering that differences of treatment based exclusively on nationality could only be justified by *"very weighty reasons"*.[112] This case law fits uneasily with the *Moustaquim* jurisprudence[113] and the persisting nationality discriminations both between EU citizens and third country nationals, and between different categories of foreigners under EU law.

C. Conclusion: Towards a progressive erosion of the "European Exceptionalism"?

The recent evolutions described in this chapter, originating from both the EurCourtHR jurisprudence and the EU legislation and case law, firmly point out the limits of the "European exceptionalism" in the application of human rights. Both the *Bosphorus* presumption and the *Moustaquim* case law were open to criticism. The former was denounced for establishing a particularly low threshold of responsibility for Member States implementing EU law.[114] The latter was accused to tolerate a difference of treatment fitting uncomfortably with the subsequent EurCourtHR case law on nationality discrimination.

On a first front, the Strasbourg Court rejected in *M.S.S.* the invocation of EU mechanisms of interstate cooperation – despite the correlative harmonization of the Member States' human rights standards in the treatment of asylum applicants – to justify any derogation from the

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[112] *Gaygusuz v. Austria*, judgment of 16 September 1996, App. 17371/90, EHRR 1996-IV, para. 42 and *Koua Poirrez v. France*, judgment of 30 September 2003, App. No. 40892/98, EHRR 2003-X, paras. 46-47. These rulings departed from the previous *Agee* ruling, where the Commission of Human Rights had considered that the alien status in itself provided objective and reasonable justification to differential treatments in the field of immigration policies (*Agee v. United Kingdom*, decision of 17 December 1976, App. No. 7729/76). See also ANJA WIESBROCK, LEGAL MIGRATION TO THE EUROPEAN UNION, 227 (Martinus Nijhoff, 2010).

[113] See Jean-Yves Carlier, *La garantie des droits fondamentaux en Europe*, 13:1 REVUE QUÉBECQUOISE DE DROIT INTERNATIONAL 37, 54 (2000).

[114] Dissenting opinion of Judges Rozakis, Tulkens, Traja, Botoucharova, Zagrebelsky and Garlicki in *Bosphorus*. The dissenting judges were concerned that the presumption of "equivalent protection" subject to rebuttal only in case of "manifest deficiency" would be too lax a standard. It only allows the Strasbourg Court to review the conformity of EU law *in abstracto* and not in each particular situation. Moreover, some lacunae of the EU system, most notably the limited right of access of individuals to the EU Court of Justice, led the dissenting judges to doubt whether the EU level of human rights protection was truly "equivalent" to the ECHR benchmarks. A more general criticism against the *Bosphorus* ruling relates to the risk that Member States could escape their human rights liabilities by internalizing or Europeanizing certain matters (see Gernot Biehler, *Between the Irish, the Strasbourg and the Luxembourg Courts: Jurisdictional Issues in Human Rights Enforcement*, 28 DUBLIN UNIVERSITY LAW JOURNAL 325 (2006)).

individual liability mechanisms under the Convention. On a second front, EU legislative and case law developments, culminating in the recent *Chakroun* ruling, have extended the protection of EU citizens' family life to ever-increasing categories of third country nationals. These two trends present high potentials for interactions, cross-fertilization and mutual influences of the two European courts' case laws. The EurCourtHR *M.S.S.* ruling commands the EU to abolish any mechanism of "blind mutual trust" and to attenuate the degree of conclusiveness of human rights compliance presumptions. The EU developments regarding the status of third country nationals, as well as the Strasbourg approach towards nationality discriminations, question the continuing relevance and legitimacy of the *Moustaquim* citizenship exception.

IV. The influence of EU human rights developments on the Strasbourg substantive case-law

The European Union currently represents a majority of the Council of Europe in terms of both the number of Contracting Parties and the population size,[115] which may explain the particular significance of EU law – and in particular the Charter of Fundamental Rights – in the ECHR legal order. The status of EU law in the Strasbourg jurisprudence represents a delicate issue since EU standards result from value preferences and balancing exercises which are specific to the EU. Moreover, the EU developments in the human rights field do not all obey to the same underlying rationale. Some are driven by specific integration objectives while other embody "purer" value preferences regarding the rights of individuals. The question then arises to what extent the relevant EU developments ought to influence the EurCourtHR case law, in light of the Convention's general spirit of consensus and subsidiarity. Absent a consistent pattern of reference by the EurCourtHR to the EU Charter and human rights-related secondary law, any attempted general typologies and evaluations of the possible forms of EU influences on the Strasbourg jurisprudence can only be uncertain. Nonetheless, the methods to which the

[115] The Council of Europe was created in 1949 by 10 founding parties: Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom. An additional 12 Western European countries, plus Turkey, progressively joined the organization between 1949 and 1989. With the fall of the Berlin Wall in 1989, a wave of accessions of Central and Eastern European countries occurred, followed by former Soviet Republics. By the beginning of the decade, the Council of Europe had fully reunified Europe and effectively dwarfed the EU, as it included 46 members while the EU were still a club of 12. The balance was re-equilibrated in 2004 with the EU enlargement to Central and Eastern European countries, and the further accession of Bulgaria and Romania in 2007. The EU now represents 27 members, thus a comfortable majority of the 47 Council of Europe members (Montenegro having joined in the meantime).

EurCourtHR (majority or dissension) has recourse to integrate EU law within its jurisprudence can be generally identified, and some of their possible implications can be suggested.

A. The reception of EU law in the Strasbourg case law

Five years ago, Douglas-Scott noted that although the Strasbourg Court had sometimes referred to EU law and CJEU judgments, mutual influences occurred mostly the other way around.[116] With the entry into force of the EU Charter of Fundamental Rights[117] and the growing affirmation of the EU in the human rights sphere, the tendency appears to be shifting towards an increasing influence of EU law on EurCourtHR judgments. In the Strasbourg case law, EU law has been relied upon to contribute to the identification of a consensus, or "emerging consensus", enabling the Court to extend the scope of a right and to narrow down the corresponding margin of appreciation of the State. For that purpose, references to EU law more specifically occurred where the balance struck by EU law between the public interest and the rights of individuals was more favorable to the latter than what is required under ECHR standards. To date, there are no cases where EU law was invoked as the sole evidence of a consensus justifying a departure from previous case law, although it seems to have played a primordial role in some cases. A few separate opinions, analyzed below, advocate for a more influential role for EU law conceived as a "minimum threshold of protection". Should this approach be endorsed by the majority, EU law would then tend to *de facto* set the standards in the Council of Europe legal order. This raises conceptual and political difficulties, which will be analyzed in light of the principle of subsidiarity underlying the Convention.

The principle of subsidiarity lies at the basis of one of the major interpretative methods of the EurCourtHR case law, namely the consensus and margin of appreciation doctrine. Resting on the recognition that local and national authorities are "better placed" that the Strasbourg Court to address the specific needs of their constituencies, the marginal interpretation technique leaves the respondent States some leeway to balance legitimate social objectives with fundamental rights.[118]

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[116] Sionaidh Douglas-Scott, *A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights* Acquis, 43 CMLREV. 629, 652 (2006).

[117] The Charter acquired legally binding status with the entry into force of the Lisbon Treaty, to which it is annexed, on December 1, 2009.

[118] In *Handyside*, the EurCourtHR expressly recognized that in the absence of common grounds among the Contracting Parties, national or local authorities are better placed, by reason of their "*direct and constant exposure*

The scope of the margin of appreciation is inversely proportionate to the degree of consensus prevailing in Council of Europe States on a particular matter, in the sense that the more an issue is contentious and sensitive, the more leeway the Court will afford the State to strike a balance tailored to local needs. The consensus and margin of appreciation doctrine applies in conjunction with the living instrument doctrine. The latter provides that the Convention must be interpreted "in light of present day conditions"[119] and take account of evolutions in science and technology, social context and prevalent moral views,[120] as well as political context and legal developments[121] (including the existence of other international instruments[122] or even of foreign sources[123]). Accordingly, progressive and flexible interpretations of the Convention may derive from an emerging trend without it being necessary that a comparative law exercise reveals a shared approach among Contracting Parties.[124]

The attractiveness of EU law from the EurCourtHR viewpoint may be explained by its potential to provide visible and readily accessible points of reference to discern the emergence of a consensus in a majority of Contracting Parties. As Judge Zagrebelsky pointed out in his dissent in *Demir and Baykara v. Turkey*, *"[t]he evolution of legislation in various States is a more difficult basis on which to assess the time or period from which a significant change became perceptible".*[125] Moreover, the Strasbourg Court enjoys limited resources in terms of funding and staff to undertake detailed analyses of the laws of every Contracting Party,[126] all the

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to the vital forces of their country", to identify local needs and select the policies to address them (*Handyside v. United Kingdom*, judgment of 7 December 1976, App. No. 5493/72, Series A-24). See also *Fretté v. France*, judgment of 26 February 2002, App. No. 36515/97, EHRR 2002-I, para. 41.

[119] *Tyrer v. United Kingdom*, judgment of 25 April 1978, App. No. 5856/72, Series A-26.

[120] *Dudgeon v. United Kingdom.* judgment of 22 February 1983, App. No. 7525/76, Serie A-59.

[121] *Marcks v. Belgium*, E. Commission H. R. decision of 16 March 1975, App. No. 6833/74, Series B 29.

[122] *Id.*

[123] *Hirst v. United Kingdom (No. 2)*, judgment of 6 October 2005, App. No. 74025/01, EHRR 2005-IX. At paras. 36-39, the Court refers to Canadian and South-African law and practices regarding the voting rights of prisoners.

[124] John Murray, *Consensus, Concordance of Hegemony of the Majority*, *in* DIALOGUE BETWEEN JUDGES: FIFTY YEARS OF THE EUROPEAN COURT OF HUMAN RIGHTS VIEWED BY ITS FOLLOW INTERNATIONAL COURTS 35 (2008), *available at* http://www.echr.coe.int/NR/rdonlyres/D6DA05DA-8B1D-41C6-BC38-36CA6F864E6A/0/Dialogue_between_judges_2008.pdf. The "emerging consensus" notion in the EurCourtHR case law has been compared with the US Supreme Court's approach of extracting an "evolving consensus" from the mere start of an evolution (e.g., Justice Kennedy in *Roper v. Simmons*, [2005] 543 U.S. 551, 125 S. Ct. 183). See also Laurence Helfer, describing the consensus as a "continuum" based on the text of the Convention, the extent of domestic law reforms and the existence of other international or regional instruments (Laurence Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 CORNELL INT'L L.J. 146 (1993)).

[125] Separate Opinion of Judge Zagrebelsky in *Demir and Baykara v. Turkey*, judgment of 12 November 2008, App. No. 34503/97, para. 2.

[126] Over the last five years, however, the Court has been equipped with a research division entrusted with comparative and international law research tasks arising in Grand Chamber cases (SEE DAVID J. HARRIS, MICHAEL

more in view of the overload of cases.[127] This may reinforce the incentive to rely on EU law as a good proxy for the state of consensus in a majority of Council of Europe States. References to EU law may have variable functions, from strengthening a consensus simultaneously discerned in other instruments (1) to initiating of a new consensus (2). In addition, Member States' obligations under EU law have been taken into account to modulate their obligations under the Convention (3).

1. EU law to reinforce the finding of a consensus

The EurCourtHR has repeatedly referred to the Charter of Fundamental Rights to strengthen its decisions discerning a new consensus, sometimes even before the Charter became legally binding[128] and irrespective whether the defendant State is a member of the EU.[129] In a number of cases, the Charter, as well as EU secondary law and case law, have been invoked alongside other developments to justify departures from previous case law.

In *Demir and Bayraka v. Turkey*, Article 28 of the Charter was relied upon as an indication of a consensus regarding the right of civil servants to form trade unions and conclude collective agreements under Article 11 (1) of the Convention. This allowed the Court to overturn its previous case law.[130] Although this finding was also supported by other international and national developments,[131] Judge Zagrebelsky pointed out in his separate opinion that the proclamation of the Charter actually constituted the only new evolution, since all other

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O'BOYLE, EDWARD P. BATES AND CARLA M. BUCKLEY, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 10 (Oxford University Press, 2010)).

[127] See, in that respect, Judge Jean-Paul Costa, President of the European Court of Human Rights, Speech given at the occasion of the opening of the judicial year (Jan. 25, 2008), *available at http://www.echr.coe.int/NR/rdonlyres/D5B2847D-640D-4A09-A70A-7A1BE66563BB/0/ANNUAL_REPORT_2008.pdf*

[128] *Christine Goodwin v. UK*, judgment of 11 July 2002, App. No. 28957/95, EHRR 2002-VI, paras. 58 and 100; *Sorensen and Rasmussen v. Denmark*, judgment of 11 January 2006, App. No. 52562/99 and 52620/99, EHRR 2006-I, paras. 37 and 74; Dissenting Opinion of Judges Costa, Ress, Türmen, Zupancic and Steiner in *Hatton v. UK*, judgment of 8 July 2003, App. No. 36022/97, EHRR 2003-VIII; *Vilho Eskelinen and other v. Finland*, judgment of 19 April 2007, App. No. 63235/00, paras. 29-30.

[129] See e.g. *Pishchalnikov v. Russia*, judgment of 24 September 2009, App. No. 7025/02, para. 42 and *Salduz v. Turkey*, judgment of 27 November 2009, App. No. 36391/02, para. 44.

[130] *Swedish Engine Drivers' Union v. Sweden*, judgment of 6 February 1976, App. No. 5614/72, Series A 20, paras. 37-39.

[131] At paras. 98 to 106, the Court referred to the European Social Charter, the ILO Convention No. 87, a Recommendation of the Council of Ministers of the Council of Europe and the practice of many Contracting Parties.

instruments to which the Court referred already existed at the time of its prior case law.[132] In *Scoppola v. Italy*, the Court identified an evolving consensus in favor of a principle of retroactive application of milder penalties, against the background of a previous ruling of the Commission of Human Rights denying such a right (considering that the principle of *"nulla pena sin legem"* in Article 7 ECHR only commanded the non-retroactivity of harsher penalties).[133] For that purpose, the Court relied (alongside other indicators of consensus)[134] on Article 49(1) of the Charter – whose wording "no doubt deliberately" departs from Article 7 ECHR[135] – and the CJEU *Berlusconi* ruling endorsing the said principle as part of the constitutional traditions common to the Member States.[136] *Neulinger and Shuruk v. Switzerland* also illustrates the consensus-reinforcing function of the Charter. The Court, interpreting Article 8 ECHR in the context of child abduction, granted a *"particular"* importance to Article 24(2) of the Charter[137] – again alongside other international instruments[138] – to support the existence of a broad consensus that the children's best interest must be of paramount importance in all decisions concerning them.[139]

The potential for the Charter to influence EU case law had already been mobilized before it became legally binding. In *Christine Goodwin v. U.K.*, the Court discerned a "continuing international trend" in favor of social acceptance of transsexuals and legal recognition of their reassigned gender.[140] In distancing itself from its previous case law concerning the legal recognition of gender reassignment for the purpose of the right to marry, the Court relied on Article 9 of the Charter, which, too, departs "no doubt deliberately" from Article 12 ECHR in

[132] Separate Opinion in *Demir*, para. 2. Judge Zagrebelsky, however, does not infer that the Charter has played a particularly determinant role in discerning a consensus. He rather argues that reference to this new instrument provided an alibi for the Court to "correct" its previous case law.
[133] *Scoppola v. Italy (No. 2)*, Grand Chamber judgment of 17 September 2009, App. No. 10249/03.
[134] Namely the newly adopted American Convention on Human Rights, the Statute of the International Criminal Court and the case law of the ICTY (see paras. 36, 40 and 41).
[135] Article 49(1) of the Charter innovates in specifically mentioning that *"[i]f, subsequent to the commission of a criminal offense, the law provides for a lighter penalty, that penalty shall be applicable"*.
[136] *Scoppola*, para. 106.
[137] Article 24(2) of the Charter provides that *"[e]very child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests"*.
[138] Such as the International Convention on the Rights of the Children and Article 13 of the Hague Convention on International Child Abduction.
[139] *Neulinger and Shuruk v. Switzerland*, judgment of 6 July 2010, App. No. 41615/07.
[140] *Christine Goodwin v. United Kingdom*, judgment of 11 July 2002, App. No. 28957/95, EHRR 2002-VI. This approach based on a "continuing international trend" departs from the *Evan* and *Vo* rulings where the absence of consensus led to the recognition of a broader margin of appreciation (Murray, *supra*, 1414).

omitting the reference to "men and women".[141] *Christine Goodwin* was reaffirmed in *I. v. U.K.*, where the Court found a British refusal to recognize the reassigned gender of transsexuals to exceed the State's margin of appreciation under Article 8 and 12 ECHR. Again, the Court relied on Article 9 of the Charter alongside the international scientific, medical and societal evolutions.[142] Finally, the Court was led, in *Schalk and Kopf v. Austria*, to rule on the existence of a right to same-sex marriage in a case which, unlike *Christine Goodwin* and *I.*, did not involve gender reassignment.[143] The Court pointed out the difference in wording between the respective provisions of the Charter and the Convention on the right to marry. However, it added the caveat that while the Commentary to the Charter *"confirms that Article 9 is meant to be broader in scope than the corresponding articles in other human rights instruments"*, that provision leaves the decision whether or not to allow same-sex marriage to the States.[144] Although the Court recognized that the admission of same-sex marriage remains within the discretion of each Contracting Party, it nevertheless acknowledged the influence of Article 9 of Charter. The Court emphasized that it would no longer consider that the right to marry enshrined in Article 12 ECHR must in all circumstances be limited to marriage between two persons of the opposite sex.[145] Concurring Judge Malinverni criticized the Court for drawing inferences from Article 9 of the Charter in spite of the express reservation of the choice whether or not to authorize same-sex marriage to the Member States.[146]

The above cases illustrate the use that has been made of Charter provisions as supplementary means of interpretation to discern an emerging consensus warranting an evolution in the Strasbourg case law. The dividing line between reliance on EU law for *strengthening* an otherwise existing consensus, and actually *initiating* a new consensus (*i.e.*, where EU law

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[141] *Christine Goodwin*, para. 100.
[142] *I. v. United Kingdom*, judgment of 11 July 2002, App. No. 25680/94, para. 80.
[143] *Schalk and Kopf v. Austria*, judgment of 24 June 2010, App. No. 30141/04.
[144] Note of the Praesidium on the Draft Charter of Fundamental Rights of the European Union, Text of the explanations relating to the complete text of the Charter, CHARTE 4473/00 of 11 October 2001, CONVENT 49, para. 61, *available at* http://www.europarl.europa.eu/charter/pdf/04473_en.pdf
[145] *Schalk and Kopf*, paras. 60-61. In *Fretté v.* France, the Court had referred to Article 21 of the Charter, which specifically includes sexual orientation among the grounds for prohibited discrimination, as an evidence of consensus towards the prohibition of discrimination on grounds of sexual orientation.
[146] The Commentary on the Charter clarifies that even though *"the drafters of Article 9 intended it to be broader in scope than the corresponding articles in other international treaties"*, Article 9 only guarantees the right to marry *"in accordance with the national laws governing the exercise of these rights"* (Note of the Praesidium, *supra*, at 11).

constitutes a central and indispensable element in the finding of consensus) is however tenuous, as expressed by Judge Zagrebelsky's dissent in *Demir and Baykara.*

2. EU law as a minimum level of protection?

Beyond the above cases where EU law was relied upon as one indicator among others of an evolving pan-European consensus, certain judges have suggested, in separate opinions, that EU law should be regarded as a minimum benchmark of protection. These judges expressed the concern that the EurCourtHR, if it does not align on EU standards where those are more protective of the individual than the guarantees under the Convention, might be marginalized in its own field of specialty.

The partly dissenting opinion of Judge Rozakis joined by five other judges in *Saadi v. UK* best illustrates this approach in emphasizing that *"[t]he crux of the matter here is whether it is permissible today for the European Convention on Human Rights to provide a lower level of protection than that which is recognized and accepted in the other organizations."* In *Saadi*, a unanimous Court had repeated its previous case-law generously interpreting the power of the States under Article 5(1)(f) ECHR to deprive an asylum applicant of liberty with a view to prevent his unlawful entry in the country. The Court held that restricting this sovereign prerogative to the exclusive situation where a person is shown to be trying to evade entry restrictions, would sweep too broadly on the States' power to control immigration.[147] In sharp contrast, the dissent pointed out that Council of Europe's recommendations, decisions of the International Human Rights Committee's interpreting the ICCPR as well as Article 18 of the EU Charter (the right of asylum) and EU secondary law all assert that detention of asylum applicants may not be imposed on administrative efficiency grounds. The dissenting judges considered in particular that Article 18(1) of Directive 2005/85, which precludes Member States from holding a person in detention for the sole reason of its status of asylum applicant, must be regarded as the *"minimum guarantee"*.

A similar stance was adopted by three judges, led by Judge Tulkens, concurring in *Martinie v. France.* In that case, the Court had replied negatively to the question whether disputes

[147] *Saadi v. United Kingdom*, Grand Chamber judgment of 29 January 2008, App. No. 13229/03, para. 65.

between a civil servant and the State concerning the former's conditions of employment fall within the scope of Article 6 ECHR. Unlike Article 6 ECHR, Article 47(2) of the EU Charter does not limit the right to a fair trial to procedures concerning the determination of "civil rights" or "criminal charges". Consequently, the concurring judges forcefully suggested a revision of the Court's case law in light of Article 47 of the Charter. The three judges considered that "*the* raison d'être *and justifications for the exclusion of certain categories of public servants from the guarantees of a fair trial should now be fundamentally reviewed in the light of Article 47 of the Charter of Fundamental Rights of the European Union*".[148] Accordingly, a provision of the Charter going beyond ECHR rights would in itself justify a revision of the Convention's interpretation. If this approach were to be generalized and endorsed by a majority, this would effectively initiate a "race to the top" with the Strasbourg Court endorsing the EU standards every time they appear to narrow down the margin of appreciation of the States. Such an "upwards spiral" dynamic would, as developed below, not be costless however.

3. EU law to modulate the scope of EU Member States' obligations under the Convention

In addition to those cases where EU law was referred to in the general interpretation of the Convention, the EurCourtHR has also relied on EU law to interpret the scope of Member States specific obligations without pronouncing on the general meaning of the Convention. The case law has emphasized that Contracting Parties are bound under the Convention to comply with their own legislations: Once national law (including obligations deriving from EU law) protects fundamental rights to a degree higher than the minimum required under the Convention, those national obligations are taken into account in assessing State's liabilities under the Convention.

The Court has traditionally considered the stage of development of the respondent State's domestic law to influence the measurement of the latter's margin of appreciation.[149] In

[148] Article 47 of the Charter provides that *"[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article"*.

[149] See *Tyrer*, pointing out that in accordance with the "living instrument" doctrine, the interpretation of the Convention must be influenced by the trends in national legislations (*Tyrer v. United Kingdom*, judgment of 25 April 1978, App. No. 5856/72, Series A 26, para. 31). In that case, the fact that the legislation on corporate punishment in the Isle of Man was currently under review weighed as a factor narrowing down the margin of appreciation of the State. In 1993, Helfer argued that the Strasbourg Court should rely more systematically on

Dangeville, the Strasbourg Court made specific reference to a breach of EU law in order to establish a violation of the Convention.[150] French authorities' failure to implement the Sixth Directive on VAT in their national law weighed significantly in the Court's finding that France had not struck the proper balance between the general interest and the individual right to property in depriving the applicant from its right to VAT refund.[151] This indicates that once EU law protects certain rights, the EurCourtHR will be inclined to cooperate in their enforcement and consider the breach of EU law in assessing the proportionality of the restriction. Along the same line, the Court has repeatedly emphasized that an arbitrary refusal by a national court to make a preliminary reference to the CJEU might undermine the fairness of the proceedings and breach Article 6(1) of the Convention.[152]

The legality requirement attached to the derogation clauses contained in the second paragraphs of Articles 8 to 11 ECHR also internalizes the Contracting Parties' national laws, in the sense that derogations will not withstand the Court's scrutiny if they are not *ex ante* authorized by national law. In *Parti Nationaliste Basque*, the Court however missed the opportunity to integrate EU law in assessing a limitation to the right to peaceful association under Article 11 ECHR. In determining whether a French prohibition of funding of political parties by foreign entities was necessary in a democratic society, the Court rejected the applicant's claim that EU law would command a specific approach regarding the funding of a

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domestic rights-enhancing law reforms to narrow down the Contracting Parties' margin of appreciation (Laurence Helfer, *supra*, 161).

[150] *Dangeville v. France*, judgment of 16 April 2002, App. No. 36677/97, ECHR 2002-III. The Court considered the rights deriving from the Sixth Directive on VAT to establish a "valid claim" of property for the purpose of Article 1 of Protocol 1 to the ECHR. The Court reiterated its *Dangeville* finding in *Cabinet Diot* (*Cabinet Diot and S.A. Gras Savoye v. France*, judgment of 22 July 2003, App. Nos. 49217/99 and 49218/99, para. 28) and *Aon Conseil* (*Aon Conseil et Courtage S.A. and Christian de Clarens S.A. v. France*, judgment of 25 January 2007, App. No. 70160/01, EHRR 2007, para. 43).

[151] *Dangeville*, *supra*, paras. 57-58. See Allan Rosas, *Fundamental Rights in the Luxembourg and Strasbourg Courts*, *supra*, 172.

[152] The Court has, however, never found a refusal to refer to Luxembourg to constitute an actual violation of Article 6. *John v. Germany*, inadmissibility decision of 13 February 2007, App. No. 15073/03, where the Court found that the refusal by a Greek court of appeal to request a preliminary ruling on the interpretation of Article 101 TFEU did not raise any issue under Article 6 ECHR since the court was not a court of last instance and was therefore not requested to seek preliminary ruling in accordance with Article 267 TFEU. See also *Coëme and others v. Belgium*, judgment of 22 June 2000, App. No. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, EHRR 2000-VII. See Dean Spielmann, *supra.* In a similar vein, Greece was condemned in *Hornsby* for the non-execution of a national judgment based on a preliminary ruling of the CJEU (*Hornsby v. Greece*, judgment of 19 March 1997, App. No. 18357/91, EHRR 1997-II, paras. 42 and 44. See Dean Spielmann, *La prise en compte et la promotion du droit communautaire par la Cour de Strasbourg*, *available at* http://www.echr.coe.int/NR/rdonlyres/BB82E8C7-8828-4A06-B634-2B60FD08D7C0/0/CJCE_discours_Spielmann.pdf).

political party in one Member State by another party established in another Member State. It laconically considered that "*it is not for the Court to interfere in matters relating to the compatibility of a Member State's domestic law with the European Union project*".[153] The Court explained its failure to internalize the French obligations under EU law in its analysis under Article 11(2) ECHR by the eminently political character of the issue.[154] Judge Rozakis dissented, considering it unacceptable to disregard the specific context of the EU integration process in assessing the restriction insofar as the funding relationship between two EU political parties was concerned.[155] It has also been argued that the Court should have considered the incompatibility of the French measure with the free movement of capitals under EU law, which requires that any restriction be justified by a "genuine and sufficiently serious threat to a fundamental interest of society".[156]

Recently, the *M.S.S.* judgment opened the door to the reliance on the respondent State's national law to flesh out the very content of its conventional obligations. Unlike the above cases involving the limitation, in light of EU law, of Member States' margin of appreciation to derogate from ECHR provisions, the *M.S.S.* ruling concerned the substantial scope of the obligations under Article 3 ECHR (which admits no derogations). The Court first recalled that the Strasbourg case law on Article 3 ECHR does not go so far as to oblige the host State to provide accommodation and means of subsistence to asylum seekers. Nevertheless, it considered that Greece's obligations under the EU Reception Directive justified a departure from this principle. Accordingly, Greece was condemned for failing to ensure appropriate living conditions to the asylum applicant. This was motivated by the fact that "*the obligation to provide accommodation and decent material conditions to impoverished asylum seekers has now entered into positive law and [that] the Greek authorities are bound to comply with their own*

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[153] *Parti Nationaliste Basque v. France*, judgment of 7 June 2007, App. No. 71251/01, para. 48.

[154] Para. 48 of *Parti Nationaliste Basque* states: "*[T]he choice of the French legislature not to exempt political parties established in other European Union Member States from this prohibition is an eminently political matter, which accordingly falls within its residual margin of appreciation.*"

[155] Dissenting Opinion of Judge Rozakis, para. 5 *in fine.*

[156] Case C-54/99, *Scientology Church*, [2000] ECR I-1335, para. 17. See Philipp Tamme, *Aspects of enforcement of European Community law by the European Court of Human Rights*, 6th Summer School European Public Law, "Transnational Judicial Dialogue in Europe: The horizontal and vertical interactions between national high courts and the rising influence of European Courts" (September 2009), *available at* http://www.europeanpubliclaw.eu/contenuti/summer-school/2009/Tamme-Enforcement-of-EC-law-by-ECHR.pdf

legislation, which transposes Community law".[157] In so doing, the Court modulated the content of Greece's obligations under Article 3 ECHR in accordance with its commitments under EU law, deemed to go beyond the level of pan-European consensus reflected in the Strasbourg case law. As a result, the Court differentiates the conventional obligations of EU Member States, on the one hand, and other Council of Europe members, on the other.

Reliance on EU positive law to measure the margin of appreciation of EU Member States and the content of their obligations under the Convention allows the Court to selectively increase the level of scrutiny in parallel with the developments of EU law in the human rights domain. At the same time, it presents the advantage of avoiding imposing the majority hegemony on the non-EU members. The EurCourtHR therefore appropriates some of the fundamental rights standards originating in the EU to serve its human rights enhancing agenda, while respecting the European diversity and subsidiarity underpinning the Convention. By the same token, the Strasbourg Court joins its efforts to the effective enforcement of EU law and therefore contributes to reinforcing the rule of law in the EU. On the other hand, modulating the scope of ECHR provisions in accordance with Member States' obligations under EU law, thereby subjecting EU Member States to additional or stricter standards, would paradoxically establish, through the backdoor, the "two-speed Europe" that the Council of Europe seeks to avoid.[158]

B. Criticisms of the doctrine of consensus and margin of appreciation and their relevance in assessing the influence of EU law on the Strasbourg jurisprudence

As Judge Martens of the Belgian Constitutional Court observed, the concept of consensus is *"sometimes positive, sometimes negative, sometimes descriptive, sometimes prescriptive, sometimes decisive, sometimes contingent"*.[159] Beyond this alleged vagueness and unpredictability, the doctrine of consensus and margin of appreciation is subject to number of criticisms pointing out different types of risks that may arise if the consensus is understood either too broadly, or too narrowly.

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[157] *M.S.S., supra*, para. 250.

[158] See Declaration of the Committee of Ministers, 106th session (10-11 May 2000), transmitted officially to the Convention on the Future of Europe on 24 May 2000, cited by Pierre Drzemczewski, *The Council of Europe's position with respect to the EU Charter of Fundamental Rights*, 22 HRLJ 14, 25 (2001).

[159] Judge Paul Martens, *Perplexity of the national judge faced with the vagaries of European consensus, in* DIALOGUE BETWEEN JUDGES, *supra*, 54.

The traditional fear associated with a narrow construction of the consensus relates to the risk of minimalism, reducing the content of ECHR rights to minimum common denominators accepted by all Contracting Parties.[160] Notably, the Vice-President of the Hungarian Constitutional Court warned against the danger of deferring excessively to the States on the basis of their national historical and social traditions. In his opinion, Strasbourg decisions recognizing a margin of appreciation for Hungary in its post-communist transition had in fact justified a downgrade of the level of human rights protection in the Constitutional Court's case law.[161] Associated with the risk of minimalism, a danger of cultural relativism contradicting the universal essence of human rights is often alleged. To remedy the risks of minimalism and relativism, an alignment of the EurCourtHR case law on the standards of a core (now a majority) of presumably "more advanced" and leading countries – namely the EU Member States – has been considered preferable to a strict consensual approach leading to paralysis or even regression of fundamental rights protection in Europe.[162]

Conversely, a consensus understood too broadly, so as to extend to "emerging tendencies" which are not generally shared by all Contracting Parties, raises the spectrum of majority tyranny and marginalization of the minority which might not recognize itself in the alleged consensus. This would risk undermining the Court's democratic and pluralistic legitimacy.[163] Yet, this evolutive approach seems to have been endorsed by the Court, which considers a continuous evolution in international law or in the domestic laws of the majority of Contracting Parties to be sufficiently indicative of common grounds in democratic societies.[164] Against this backdrop, it has been questioned whether a "majority consensus" does not merely amount to a contradiction in terms.[165] Should EU law be used as a minimal threshold of protection, as suggested by the separate opinions in *Martinie* and *Saadi*, the EU would truly replace the Strasbourg legal order as

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[160] Judge Péter Paczolai, *Consensus and Discretion: Evolution or Erosion of Human Rights Protection?, in* DIALOGUE BETWEEN JUDGES, *supra,*74-77).
[161] *Id.*, 74-75.
[162] For example, François Rigaux, *La liberté d'expression et ses limites*, 23 REV. TRIM. D.H. 401, 411 (1995).
[163] John L. Murray, *Consensus: Concordance, or Hegemony of the majority?, in* DIALOGUE BETWEEN JUDGES, *supra,* 26.
[164] *Marcks v. Belgium, supra,* para.41, *Demir and Baykara, supra,* para. 86 and *Christine Goodwin, supra,* para. 85.
[165] John Murray questioned whether the notion of "majority consensus" is not merely a contradiction in terms (Murray, *supra,* 45).

a standards-setter not only in the EU legal order, but also in the broader Europe-47. The Council of Europe and its Human Rights Court would then be *de facto* downgraded to the status of "standards-receivers".[166] Such an approach would fail to take account of the Strasbourg Court's democratic legitimacy foundations, which rest on the consent to be bound of its Contracting Parties, and of the value of cultural diversity underlying the Convention. Moreover, EU human rights-related provisions sometimes obey to specific EU logics which have no vocation to extend beyond the EU legal order. As developed below, EU law (including the Charter of Fundamental Rigths) does not even necessarily reflect a consensus within the EU Member States, let alone in the Europe-47.

The opinion one may hold about the merits and drawbacks of relying on EU law in assessing the States' liabilities under the ECHR may in fact widely depend on one's evaluation of the consensus and margin of appreciation doctrines. According to whether the emphasis is placed on the risk either of minimalism or of majority tyranny, one may either approve wide reliance on EU law to discern and build a consensus, or on the contrary distrust such a "race to the top" perceived to marginalize minority States and to undermine the legitimacy of the Court's decisions. Against this background, a common argument refuting the relativism criticism stresses that although human rights are universal at the level of abstraction, they remain national and local in their concrete application.[167] Thus, the universal aspiration of human rights is not impaired where some local modulations are accommodated through the margin of appreciation doctrine.[168] Accordingly, the margin of appreciation is considered to be rooted in a form of "ethical decentralization" and subsidiarity rather than in cultural relativism.[169] The principle of subsidiarity, as reflected in the margin of appreciation doctrine, permits the combination of loyalty to universal principles with their particular adaptations to each particular historical ad

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[166] This expression is inspired by the works of Olivier De Schutter (*The emerging division of tasks between the Council of Europe and the European Union promoting Human Rights in Europe*, 14 COLUM. J. EUR. L. 509, 513 (2007-2008)).

[167] Lord Hoffmann, "The Universality of Human Rights", *Judicial Studies Board Annual Lecture* (March 19, 2009), at 27, *available at* http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/ Hoffmann_2009_JSB_Annual_ Lecture_Universality_of_Human_ Rights.pdf.

[168] James A. Sweeney, *Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era*, 54 INT'L & COMP. L. Q. 459, 467 (2005). The author draws on Michael Walzer's works arguing that the margin of appreciation doctrine results from the interaction between "thick" concepts of human rights (*i.e.*, rights in the abstract) and "thin" versions (*i.e.*, rights in the details, embedded in specific contexts) (MICHAEL WALZER, THICK AND THIN: MORAL ARGUMENT AT HOME AND ABROAD (1994)).

[169] Sweeney, *supra*, 459-474.

social context in democratic societies. Such an "ethical decentralization", however, only appears legitimate once the protection against gross bad faith abuses of powers has been secured.[170] If the view that human rights decentralization and subsidiarity cannot be adequately described as minimalism or cultural relativism is endorsed, the second type of objections, arising where the consensus is understood too broadly, then remains to be addressed. The next section analyzes to what extent this risk of majority hegemony could materialize should EU law be relied upon by the EurCourtHR where this would not appear coherent with the Convention foundational principles. The issue relates in particular to the question whether and, if so, to what extent the EU Charter may be considered to reflect a "consensus" in the sense of the EurCourtHR case law.

C. Limited 'interoperability' between the EU and the ECHR legal orders

Assessing the implications of the various forms of reliance on EU law in the EurCourtHR case law requires an understanding of the degree of "interoperability" between the two European supranational legal orders. In other words, to what extent do EU and ECHR principles and judicial methodologies share sufficient common grounds to allow for the importation of EU law within the Strasbourg case law? In that respect, some reservations may be expressed in view of the divergent approaches of the two Courts in the application of the margin of appreciation doctrine, as well as the uncertain status of the Charter of Fundamental Rights as embodiment of an EU-wide consensus.

1. The EU and the EurCourtHR interpretative methods in a comparative perspective

Although the Luxembourg and the Strasbourg Courts are both entrusted with the interpretation and application of fundamental rights, their respective methods to define the rights deserving protection widely diverge. This mirrors the differences in the legal and political underpinnings of the two courts. Beyond the balancing exercise between individual rights or between individual rights and government interferences, the EU pursues a goal of economic as well as, increasingly, political integration. Moreover, the CJEU has since the early seventies been continuously pressured by national supreme courts threatening to disregard the supremacy

[170] See Paul Mahoney, *Marvellous richness of diversity or invidious cultural relativism*, 19:1 HRLJ 1, 2-4 (1998), cited by Sweeney, *supra*, 472.

of EU law should the EU fail to endorse human rights standards deemed equivalent to the domestic ones. The classic human rights equation is therefore complexified in the EU, which suggests that any attempt to draw inspiration from EU law to shape the Strasbourg case law should be undertaken with great cautiousness.

In the same manner as the EurCourtHR, the Luxembourg Court faces the dilemma between a need to impose a common nucleus of shared values on the one hand, and to preserve value pluralism and diversity of national traditions on the other.[171] As from its earliest case law, the EU Court of Justice has endorsed a consensus-type approach, protecting human rights as general principles of EU law *"as they result from the common constitutional traditions of the Member States and from international agreements to which all the Member States are parties"*.[172] Nonetheless, general principles of EU law are not discerned from an arithmetic comparison of the national laws or a lowest common denominator. Rather, the Court derives them from a "top down" method selecting the standards of human rights protection best appropriate to the structure and aims of the EU.[173] The CJEU has not hesitated, when it found a principle to be generally accepted among the majority of Member States at a high level of abstraction, to define the precise scope and content of the principle autonomously, while national laws were highly divergent at this more specific level.[174] For example, the Court in *P v. S* decided, having noted the widespread acceptance of nondiscrimination on grounds of sex as a general principle of EU law, to encompass discrimination on grounds of gender reassignment within the scope of the prohibition of sex discrimination.[175] It did not, for that purpose, undertake any analysis of Member States' constitutional traditions or international instruments. Yet, the prior EurCourtHR *Rees* judgment had pointed out that the Member States' approaches regarding the recognition of

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[171] The dilemma concerns the relationship between the CJEU and the member states (vertically) on the one hand, and between the CJEU and the EU legislative branches (horizontally) on the other (Joseph H. H. Weiler, *Fundamental Rights and Fundamental Boundaries: On the Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space, in* THE CONSTITUTION OF EUROPE: "DO THE NEW CLOTHES HAVE AN EMPEROR?" AND OTHER ESSAYS ON EUROPEAN INTEGRATION 109-111 (1999)).

[172] *Stauder* and *Internationale Handelsgesellschaft, supra.*

[173] *Internationale Handelsgesellschaft, supra*, para. 14.

[174] Matthias Herdegen, *General Principles of EU Law – the Methodological Challenge*, *in* GENERAL PRINCIPLES OF EC LAW IN A PROCESS OF DEVELOPMENT 348 (Ulf Bernitz, Joakim Nergelius and Cecilia Cardner eds., Kluwer Law International, 2008), referring to the Joined Cases 56/74 to 60/74, *Kampffmeyer*, [1976] ECR 41, para.6 and Case 155/79 *AM&S* [1982] ECR 1575, paras. 18-27.

[175] Case C-13/94, *P v. S and Cornwall County Council*, [1996] ECR I-02143. For a commentary of *P v. S*, see Catherine Barnard, *P v S: Kite Flying or a New Constitutional Exercise*, *in* EQUAL TREATMENT 59-79 (Alan Dashwood and Siofra O'Leary eds., 1997).

gender reassignment widely varied.[176] Along the same line, the Court recognized in *Mangold* a general principle of nondiscrimination on grounds of age in spite of the absence of any adequate source of inspiration in national laws or in international instruments.[177]

By contrast, the EurCourtHR follows a "bottom up" approach coupling the level of protection to a discerned grassroots consensus or "common ground" among Contracting Parties. However, no strict guidelines govern the assessment of consensus, which is subject to varying – stricter or laxer – interpretations. Although the Court purports to be closely tied to comparative analysis of the national laws and practices,[178] the case law does not always unveil a high level of inquiry into each national system. A few judgments have carried out such a comparative law assessment,[179] while most omitted it.[180] This is most probably due the overload of cases as well as a lack of sufficient (financial and human) resources.[181] The consensus doctrine is therefore an elastic one which, in John Murray's words, reflects a tension between the search for "moral truth" and progressivism on the one hand, and the need to prevent the hegemony of the majority

[176] Unlike *P v. S*, *Rees* did not concern a direct discrimination on grounds of gender reassignment. The claim related to the impediments caused by the lack of recognition of the applicant's reassigned gender for the purpose of its rights of private and family life (*Rees v. United Kingdom*, judgment of 17 October 1986, App. No. 9532/81, Series B 89, paras. 42-44).

[177] Only the Finnish and the German constitutions endorsed such a principle, and it is not expressly recognized by any international human rights protection instrument. See German Federal Labour Court, judgment of 26 April 2006, *Neue Zeitschrift fur Arbeitrsecht 2006*, 1166. The Court has been criticized for exceeding its jurisdiction in imposing obligations on Germany in the absence of any directly applicable EU provision, since Article 19(1) TFEU (*ex*-Article 13 EC) is not directly applicable and that the implementation period for Directive 2000/78 was not yet elapsed. Lenaerts and Guttiérez-Fons, however, have suggested that the Court's finding of a general principle of nondiscrimination on grounds of age might have been justified in light of Article 21(1) of the Charter (which expressly mentions age among the prohibited grounds of discrimination), which was about to be recognized a legally binding status (Koen Lenaerts and José A. Guttiérez-Fons, The *Constitutional Allocation of Powers and Fundamental Principles of EU Law*, 47:6 CMLREV. 1629, 1654 (2010)). This statement fits uncomfortably with Article 51(1) of the Charter, which expressly limits its scope of application, in so far as Member States are concerned, to situations where they "*implement EU law*". *Mangold*'s finding of a general principle of nondiscrimination on grounds of age under EU law was reaffirmed in Case C-555/07, *Kücükcdevici*, judgment of 19 January 2010, para. 21.

[178] Discussion paper prepared by Judges Anatoly Kovler, Vladimiro Zagrebelsky, Lech Garlicki, Dean Spielmann, Renate Jaeger and Roderick Liddell, *The role of consensus in the system of the European Convention on Human Rights*, in DIALOGUE BETWEEN JUDGES, *supra*, 19.

[179] For example, the Grand Chamber in *Stec* referred to the pensionable age in other European countries in assessing whether the British pension scheme constituted a discrimination on grounds of sex (*Stec and others v. United Kingdom*, judgment of 12 April 2006, App. No. 65731/01 and 65900/01, EHRR 2006-VI, paras. 36 and 37. The Plenary Court also compared in *Dudgeon* the laws of England and Wales, Scotland and Northern Ireland (*Dudgeon v. the United Kingdom*, judgment of 22 October 1981, App. No. 7525/76, Series A-45, para.46).

[180] For instance, *Hirst v. the United Kingdom (no. 2)*, *supra* and *Marcks v. Belgium*, *supra*. This lack of comparative methodology was criticized by the Judge Martens' dissent in *Cossey v. United Kingdom*, Plenary Court judgment of 27 September 1990, App. No. 10843/84, Series A 184.

[181] See *supra*, notes 126 and 127.

on the other.[182] The EurCourtHR has been suspected of being *"primarily interested in evolution towards the moral truth of the ECHR rights, not in the evolution towards some commonly accepted standard, regardless of its content"*.[183] According to this view, the EurCourtHR has read ECHR provisions in such a way as to enhance the objective of human rights integration, in the same manner as the CJEU has interpreted fundamental principles of EU law in light of the objective of EU integration. Critics object that the Council of Europe is, unlike the EU which is mandated to harmonize Member States' rules within the scope of the Treaties, not endowed with the legitimacy to pursue further human rights integration.[184]

At EU level, an additional layer of complexity derives from the differentiate intensity of judicial review according to whether an EU or a national measure is controlled, and whether a Member State implements or derogates from EU law. The Court of Justice has not developed any systematic approach regarding the level of scrutiny and corresponding national margins of appreciation. Rather, the case law evolved in a rather haphazard manner rendering all attempted typologies uncertain. Broadly speaking, the CJEU has been found to generally exert a higher review power for acts of EU institution and of Member States implementing EU law. Conversely, it affords a wider margin of appreciation for Member States when they derogate from EU law.[185]

As regards the conformity of EU institutions' acts with human rights, the CJEU faced a dilemma between two potentially conflicting imperatives. On the one hand, a strict approach towards human rights protection seemed to be warranted to address the concerns of national constitutional courts threatening the supremacy of EU law.[186] On the other hand, a maximalist

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[182] Murray, *supra,* 40.

[183] George Letsas, *The Truth in Autonomous Concepts: How to Interpret the ECHR*, 15:2 EJIL 302 (2005).

[184] Hoffmann, *supra,* para. 39 and Murray, *supra,* 43. Hoffmann severely criticized the megalomania of the Strasbourg court, accusing it to have been *"unable to resist the temptation to aggrandize its jurisdiction and impose uniform rules on Member States"* (para. 27).

[185] Paolo G. Carozza, *Subsidiarity as a structural principle of international human rights law*, 97 AM. J. INT'L L. 38, 55 (2003).

[186] National constitutional courts (most notably the German *Bundesverfassungsgericht*) have subordinated the primacy of EU law to the guarantee by the EU of a level of human rights protection deemed equivalent to the national one. The German Constitutional Court, for example, reserves itself the jurisdiction to declare EU law inapplicable in the German legal order where this EU measure violates fundamental rights, German constitutional identity or constitutes an *ultra vires* act. The Constitutional Court's jurisdiction to exert human rights review of EC law was first asserted in *Solange I* (Decision of 29 May 1974, BVerfGE 37, 271). For a comprehensive overview of

approach aligning EU human rights protection to the more demanding national standards would have subjected the Court to the hegemony of individual Member States.[187] In striking the balance between these countervailing interests, the Court seems to have recognized only a restricted margin of appreciation for EU institutions.[188] In the recent *Test-Achats* case, for example, the Grand Chamber invalidated a provision of Directive 2004/13 on the principle of gender equality in the access to and supply of goods and services which allowed Member States to derogate from the principle of equality of premiums on the basis of objective criteria.[189] In asserting an absolute conception of gender equality under Articles 21 and 23 of the Charter, the Court denied EU institutions any scope for legislative choices to permit deviations from the equality of premiums on the grounds that the respective situations of men and women are not objectively comparable based on statistical data.[190]

When assessing national measures implementing EU law (the *Wachauf*-type of situation),[191] the CJEU has also tended to narrow down Member States' margins of appreciation. Under this scenario, Member States are considered to be "agents" of the EU and thereby bound by standards similar to the ones imposed on EU institutions.[192] By contrast, the main concern when assessing other national measures falling within the scope of EU law rather relates to the risk of alienating Member States in imposing centrally defined EU values. The preservation of the legitimacy of its rulings has required the Court to concede a margin of appreciation to Member States when

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the jurisprudence of the *Bundesverfassungsgericht* on EU law matters, see Mehrdad Payandeh, *Constitutional Review of EU Law after* Honeywell*: Contextualizing the Relationship between the German Constitutional Court and the EU Court of Justice*, 48 CMLREV. 9, 9-38 (2011).

187 See Joseph H. H. Weiler, *Fundamental Rights and Fundamental Boundaries: On the Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space*, *supra*, 109-111 (1999).

188 The Court emphasized in *Internationale Handelsgesellschaft* and in *Hauer* that Community measures would be assessed centrally and in light of Community law exclusively, without allowing for any interference of criteria flowing from national law damaging the unity of EC law (*Internationale Handelsgesellschaft, supra*, para. 3 and Case 44/79 *Hauer*, [1979] ECR 3727, para. 14). The opposite argument has also been submitted. For example, Armin von Bogdandy considered that the Court had afforded broader discretion to EU institutions than to Member States in exercising its human rights review power, and referred to various critics of double standards expressed in the litterature (Armin von Bogdandy, *The European Union as a Human Rights Organization? Human Rights and the Core of the European Union*, 37 CMLREV. 1307, 1323 and 1326).

189 Directive 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ 2004 L 373, 37, Article 5(2).

190 Case C-236/09 *Association de consommateurs Test-Achats*, judgment of 1 March 2011. The Grand Chamber had, however, shown more deference towards the EU institutions in rejecting the European Parliaments' challenge against the Family reunification Directive 2003/86 under Article 8 ECHR (Case C-540/03 *Parliament v. Council*, [2006] ECR I-5769).

191 Case 5/88 *Wachauf*, [1989] ECR 2609.

192 Tridimas, *supra*, 321.

they derogate from EU law, especially in politically or morally sensitive areas where an EU-wide consensus could not be discerned. As Herdegen pointed out, *"the aims and structures of the [EU] can justify judicial activism whilst respect for plausible legislative choices of the Member States commands judicial restraint"*.[193]

Where assessing the human rights consistency of domestic measures derogating from EU law (the *ERT*-type of situation),[194] the Court has still prescribed a set of standards to the Member States. Yet, they were left a certain margin of appreciation in a similar manner as under the Strasbourg case law.[195] Where, on the other hand, Member States deviate from a fundamental freedoms in the name of fundamental rights (the *Omega*-type of situation),[196] the CJEU has adopted a more deferential attitude.[197] Member States would allegedly not have tolerated to restrict their constitutionally defined fundamental rights for the sake of EU economic freedoms.[198] The Court admits that in a pluralistic legal order, certain values that are not part of the "core nucleus" of ECHR rights may still justify proportionate derogations from EU fundamental freedoms.[199] Even in these cases however, Koen Lenaerts and José Guttiérez-Fons have pointed out that the degree of scrutiny may diverge according to whether or not the very foundations of EU law are at stake. The margin of appreciation may be narrowed down in the presence of a protectionist goal, especially where secondary law has preempted the balance

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[193] Herdegen, *supra*, 354.

[194] Case C-260/89 *ERT*, [1991] ECR I-2925. The review under EU law covers both measures adopted under the express Treaty derogations as were at stake e.g. in *ERT* or *Rutili* (Case 36/75, [1975] ECR 1219) and restrictions justified under the judicially-developed mandatory requirements (Case C-368/95 *Familiapress* [1997] ECR I-3689).

[195] Tridimas, *supra*, 327. Jacobs had argued that in this scenario, the conformity of the national measure with human rights should not be examined by the CJEU. Rather, the EU Court should limit itself to review the compatibility of the measure with EU law, leaving an eventual human rights assessment to the control of national judges or, ultimately, the EurCourtHR (Francis Jacobs, *Human Rights in the European Union: The Role of the Court of Justice*, 26 ELREV. 336 (2001)).

[196] Case C-36/02 *Omega*, [2004] ECR I-9609. See also Case C-112/00 *Schmidberger*, [2003] ECR I-5659. In *Dynamic Medien*, the Court similarly upheld a measure restricting free movement of DVDs on grounds of child protection, recognizing – referring to *Omega* – the Member States' margin of discretion to determine the level of protection they deem appropriate (Case C-244/06 *Dymanic Medien*, [2008] ECR I-505, para. 44).

[197] See John Morijn, *Balancing Fundamental Rights and Common Market Freedoms in Union Law:* Schmidberger *and* Omega *in the Light of the European Constitution*, 12:1 ELJ 15, 23 (2006). The Court's finding in *Mangold*, however, contradicts the idea that judicial deference should be exercised with respect to national legislative choices.

[198] In that respect, Judge Rosas considered that the *Schmidberger* ruling should be read as confirming the complementarity between fundamental rights and economic freedoms rather than a hierarchical relationship between the two (Rosas, *Fundamental Rights in the Luxembourg and Strasbourg Courts*, *supra*, 168). The Charter of Fundamental Rights, by including both of them in the catalogue of rights, clarifies that the fundamental freedom of movement and residence of EU citizens is placed on the same footing as fundamental rights.

[199] The *Omega* ruling has fully recognized this ideal of constitutional pluralism, admitting that a certain view of human dignity legitimately justified a derogation, imposed by the German courts, to the freedom to provide services.

between fundamental rights and free movement and thus achieved a higher level of specificity in the scope of the right at stake.[200] Therefore, the scope of Member States' autonomy to enforce their own value choices is being gradually restricted by EU law developments. This logically results in prescribing a centrally-defined balance of interests in a growing number of situations.

Broadly speaking, national measures can thus be divided in three sub-categories with decreasing intensity of judicial scrutiny, namely: (i) measures implementing EU law; (ii) measures deviating from EU fundamental freedoms while at the same time potentially breaching human rights; and (iii) measures invoking fundamental rights to obstruct fundamental freedoms.[201] This complexity is somehow reflected in Article 51(1) of the Charter of Fundamental Rights, in so far at it is understood literally as limiting the Charter' scope to EU institutions and Member States *"when they implement EU law"*. This would suggest that the Charter does not reflect a general consensus among the Member States, leaving them room to define their own values as long as they do not implement EU law.

2. The limited consensus value of the Charter in the sense of the Strasbourg case law

The preamble of the EU Charter of Fundamental Rights presents it as a codification of existing standards of human rights protection, including in particular the EU Treaties and case law, the ECHR as interpreted in Strasbourg, as well as the constitutional traditions common to the Member States.[202] The provisions of the Charter, however, should not too readily be perceived to reveal an existing or emerging pan-European or even EU-wide consensus in the

[200] Lenaerts and Gutiérrez-Fons, *supra*, 1667. The authors contrast the *Omega* case, where the principle of human dignity and the freedom of expression were respectively invoke to derogate from the freedom to provide services and the free movement of goods, with the *Viking* and *Laval* cases where the freedom of association conflicted with EU fundamental freedoms. In the later case, the Posted Workers Directive was considered to have preempted the balance between these conflicting considerations. As a result, Member States were barred from invoking human rights to derogate from the fundamental freedoms beyond the scope of that directive.

[201] This proposed classification is consistent with Weiler's argument that a wider margin of appreciation should be conceded to Member States in *ERT*-types of review, while the EU could more easily impose its standards in *Wachauf*-type of agency situations (Weiler, *Fundamental Rights and Fundamental Boundaries*, *supra*, 126).

[202] The preamble states that the Charter *"reaffirms (…) the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights"* (Preamble of the Charter of Fundamental Rights of the EU, para. 5). See also Secretariat of the Convention, document CHARTE 4473/00 of 11 October 2000.

sense of the EurCourtHR case law. The Charter does not apply to the 20 remaining non-EU Council of Europe members and it only binds EU Member States in limited circumstances.

The Charter – unlike a federal bill of rights – is not intended to dictate on Member States the human rights standards they should endorse in their internal legal orders.[203] Article 51(1) of the Charter limits its scope of application to acts of the EU institutions as well as acts of Member States in so far as they *"implement EU law"*. The contrast between this wording and the CJEU settled case law confirming its jurisdiction to review any acts of Member States *falling within the scope of EU law* in light of human rights (as general principles of EU law) has triggered a debate as to the ambit of Article 51(1). On the one hand, a textual interpretation would warrant a narrow reading of these terms and limit the scope of the Charter to the "agency situation" where a Member State merely implements EU law (the *Wachauf*-type of situation). On the other hand, a broader reading might be endorsed in the continuation of the case law. The Charter would then bind Member States for any action falling within the scope of EU law, including derogations to EU free movement law (the *ERT*-type of review).[204] In that respect, it should be noted that the EU Court of Justice has massively stretched the scope of EU law in free movement cases.[205] This largely widens the gap between the respective ambits of the two possible interpretations of Article 51(1). Recently, the *Ruiz Zambrano* ruling extended the scope of the Treaty provision on the EU citizens' right to free movement and residence to the situation of "static" EU citizens absent any cross-border element.[206] The Court thereby quite spectacularly abolished the "purely

[203] This contrasts with the U.S. Constitution, which has progressively incorporated, through the 14th Amendment, all the guarantees of the federal Bill of Rights to render them applicable to the states.

[204] That interpretation was recommended by Michael Dougan (*The Treaty of Lisbon 2007: Winning Minds, not Hearts*, 45 CMLREV. 617, 664-665 (2008)) and Piet Eeckhout (*The Proposed EU Charter: Some Reflections on its Effects in the Legal Systems of the EU and of its Member States, in* AN EU CHARTER OF FUNDAMENTAL RIGHTS: TEXT AND COMMENTARIES 97, 106-110 (Kim Feus ed., 1 Federal Trust Series, 2000)).

[205] See, in particular, Cases C-60/00 *Carpenter*, [2002] ECR I-6279; C-413/99 *Baumbast*, [2002] ECR I-7091; C-148/02 *Garcia Avello* [2003] ECR I-11613; C-200/02 *Zhu and Chen*, [2004] ECR I-9925.

[206] However, the Grand Chamber considered that unlike Article 20 TFEU, Directive 2004/38 on the rights of EU citizens does not apply to purely internal situations, since Article 3(1) clearly limits its scope to EU citizens who move to or reside in a Member State *other than that of which they are a national* (*Ruiz Zambrano*, *supra*, para. 39).

internal rule",[207] and consequently broadened the potential reach of the CJEU's jurisdiction to control national measures in light of fundamental rights as general principles of EU law.[208]

Should the "agency" interpretation of Article 51(1) be retained, Member States would rather oddly be subject to a dual regime of human rights obligations. They would be bound by the Charter when implementing EU law, whilst the CJEU would continue to review other Member States' measures falling within the scope of EU law under fundamental rights as general principles of EU law, drawing "inspiration" from the ECHR and the Strasbourg case law. Depending on the situation, individuals would therefore see their rights enshrined in the national constitutions, the Charter and/or the ECHR. This distinction may seem illusory and unduly complex in practice,[209] all the more since the scope of application of the Charter is not straightforward.[210] On the other hand, the broader interpretation of Article 51(1) would, especially in view of the *Ruiz Zambrano* ruling, extend the scope of the Charter to situations where the involvement of the right of residence of a national of a Member State represents the sole link with EU law. This extension in scope could most probably not have been foreseen at the time the Charter was enacted. The debate has not been settled yet and the case law points to different directions.[211] In any event, both interpretations exclude the situations that are

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[207] Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171, para. 23; Case C-148/02 *Garcia Avello, supra*, para. 26; and Case C-403/03 *Schempp* [2005] ECR I-6421, para. 20. More recently, Case C-212/06 *Gouvernement de la Communauté française et Gouvernement Wallon v. Gouvernement Flamand* (« Flemish Welfare Aid »), [2008] ECR I-1683.

[208] The potential implications of the *Zambrano* judgment are still uncertain. However, it can be expected that the meaning of the "scope of EU law" for the purpose of the human rights review jurisdiction shall be affected by the extension of the scope of Article 20 TFEU.

[209] Francis Jacobs expressed concerns in that respect, considering that the distinction between situations when Member States implement EU law and when they are acting on their own would not always be easily discernible. Moreover, subjecting Member States, when the implement EU law, to three simultaneous sets of guarantees could be "one layer too many" (Francis Jacobs, *The European Convention on Human Rights, the EU Charter of Fundamental Rights and the European Court of Justice: The Impact of European Union Accession to the European Convention on Human Rights, in* THE FUTURE OF THE EUROPEAN JUDICIAL SYSTEM IN A COMPARATIVE PERSPECTIVE 294 (Ingolf Pernice, Juliane Kokott and Cheryl Saunders eds., 2006)). See also Jörg Polakiewicz, *Relationship between the ECHR and the EU Charter of Fundamental Rights*, in THE EUROPEAN UNION IN THE INTERNATIONAL LEGAL ORDER: DISCORD OR HARMONY? 74 (Vincent Kronenberger ed., 2001).

[210] Francis Jacobs, *The European Convention on Human Rights, the EU Charter of Fundamental Rights and the European Court of Justice, supra*, 293-294.

[211] Recent case law has not adopted a consistent stance in that respect. Some case law suggests that the Court may have endorsed the second interpretation, since it relied on the Charter to determine Member States' obligations even when they were not implementing EU law, *e.g.* in *Sayn-Wittgensen* concerning an Austrian rule refusing recognition of nobility titles and considered to restrict the free movement rights of EU citizens (Case C-208/09, judgment of 22 December 2010, paras. 52 and 89). Advocate General Bot has also recently expressed its preference for the broad interpretation of the scope of Article 51(1), so as to avoid the creation of a dual regime of human rights protection

completely unconnected with EU law, as well as the primary EU law, from the scope of the Charter.

The restricted scope of the Charter is, of course, of limited relevance with respect to the rights that correspond to similar provisions of the Convention. The Charter includes, however – and beyond the specific rights of EU citizens laid down in Articles 39 to 46 – a few provisions that are specifically designed to the EU context and are not inspired either by other international catalogues or by Member States common constitutional traditions. For example, Article 47(1) on the right to an effective remedy goes further than Article 13 ECHR as the former specifically provides for a right to *judicial* remedy while the latter more generally recognizes a remedy before *a national authority*. The Commentary to the Charter insists that Article 47(1) exclusively applies to EU institutions as well as Member States where they implement EU law.[212] Similarly, Article 47(2) of the Charter recognizes a general right to fair trial, whereas Article 6 ECHR confines it to disputes regarding civil rights and obligations. The Commentary also emphasizes that the right to protection of personal data under Article 8 of the Charter is to be interpreted in accordance with Directive 95/46, which goes further than Council of Europe instruments[213] as well as national constitutional traditions and is specifically tailored to the internal market needs. Article 9 on the right to marry, which abandons the ECHR specific reference to the two genders, does not dictate Member States to authorize same-sex marriage.

(Opinion in Case C-108/10 *Scattolon*, delivered on 5 April 2011, paras. 118-120). By contrast, the General Court, in assessing a Belgian measure restricting the freedom to provide services in the *FIFA* case (T-385/07, judgment of 17 February 2011, para. 55), referred to Article 10 ECHR (freedom of expression) without mentioning the corresponding provision of the Charter. The Court's ruling in *McB.*, holding that in the context of that case "*the Charter should be taken into consideration solely for the purposes of interpreting Regulation No 2201/2003, and [that] there should be no assessment of national* law *as such"*, also seems to favor the narrow interpretation (Case C-400/10 PPU *McB.*, judgment of 5 October 2010, para. 51-52).

[212] Note of the Praesidium on the Draft Charter of Fundamental Rights of the European Union, Text of the explanations relating to the complete text of the Charter, CHARTE 4473/00 of 11 October 2001, CONVENT 49, available at http://www.europarl.europa.eu/charter/pdf/04473_en.pdf. On the interpretation of Article 47 of the Charter, see Opinion of Advocate General Cruz Villalón in *Samba Diouf*, recalling that the first paragraph of Article 47 corresponds to Article 13 ECHR while its second paragraph is based on Article 6 ECHR, and that both provide reinforced protection as compared with the ECHR provisions (Opinion presented on 1st March 2010 in Case C-69/10 *Samba Diouf*, para. 38).

[213] Article 8 ECHR, the EurCourtHR case law as well as the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to the Automatic Processing of Personal Data. In *Bavarian Lager*, the Court expressly recognized the more extensive character of the EU personal data protection as compared with the protection under Article 8 ECHR, holding that *"Article 4(1)(b) of Regulation No 1049/2001 establishes a specific and reinforced system of protection of a person whose personal data could, in certain cases, be communicated to the public"* (Case C-28/08 *Bavarian Lager*, judgment of 29 June 2010, para. 60).

Rather than expressing an EU-wide consensus in favor of the recognition of same-sex marriage, this provision merely prevents EU law from undermining the rights granted by some Member States to homosexual couples.[214]

Furthermore, the Charter provisions do not all present the same normative value, some of them having a mere "soft law" status.[215] Dissenting judges in *Hatton v. U.K.* referred to Article 37 of the Charter, among other toothless instruments such as the Declaration of the UN Conference on the Human Environment and the Kyoto Protocol, as evidence of a consensus to include a high level of environmental protection within the scope of the right to private and family life under Article 8 ECHR.[216] It is doubtful, however, whether provisions which are not justiciable in the EU should even be considered in identifying a consensus to impose additional obligations on the States under the Convention.

Ultimately, if it is established that the Charter cannot be considered to embody a consensus among the 27 EU Member States,[217] it *a fortiori* does not represent any common ground among the 47 Council of Europe Contracting Parties. The EurCourtHR might, therefore, risk being misled in relying on the Charter to discern a consensus in a 27-State majority of its constituency. The misrepresentation would be even more compelling should the Strasbourg Court initiate new developments conclusively based on the Charter.

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[214] Article 2(2)(b) of Directive 2004/38 however compels the host Member State to recognize the rights of nationals of other Member States to be joined by their same-sex spouse.

[215] On the distinction between rights and principles, see Goldsmith, *supra*, 1212-1214. Preliminary references concerning the interpretation of some programmatic provisions of the Charter are currently pending in the Belgian Joined Cases C-267/10 *Rossius* and C-268/10 *Collard* (references lodged on 28 May 2010, OJ C 221, 22-23, August 14, 2010). The referring judges ask the Court to interpret Article 35 of the Charter (the right of access to healthcare and the principle of integration of a high level of health protection in all EU policies and activities).

[216] Dissenting opinion of Judges Costa, Ress, Türmen, Zapancic and Steiner in *Hatton v. United Kingdom*, at 1.

[217] Additional evidence that the Charter should not be regarded as a consensus among Member States derives from the fact that the United Kingdom and Poland had originally contracted out of the Charter, fearing a sweeping effect on their national laws. In particular, Poland was concerned about the effects of the Charter on the rights of homosexual couples, while the UK feared an alteration of its labour law. Only after an additional Protocol clarified that the Charter only reaffirms existing fundamental rights and does not affect the courts' ability to invalidate their national laws, did these two States accept to sign the Lisbon Treaty (Protocol No. 30 on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom).

D. The relationships between the two European Courts through the lens of subsidiarity

In view of the restricted consensus-value of the EU Charter as well as the methodological differences between the Strasbourg and Luxembourg case law, principles and modalities remain to be elaborated to discern in which circumstances reliance on EU law by the EurCourtHR would be warranted. Subsidiarity considerations might provide useful guidance in that respect.

1. Subsidiarity in identifying a "European consensus"

Under EU law, the principle of subsidiarity provides a benchmark for governing the allocation of competences between the EU and its Member States. It restricts the exercise of EU competences to situations where Member State action is not sufficient to achieve the objectives of the Treaty. This ensures that decisions are taken as closely as possible to the citizens.[218] Regarding fundamental rights, the Charter reaffirms this principle in its preamble and in Article 51(1).[219] In the Strasbourg context, the principle of subsidiarity has a similar function and is expressed through the admissibility condition of exhaustion of domestic remedies,[220] the obligation for Contracting Parties to provide domestic judicial remedies against ECHR violations,[221] and the judicially-developed consensus and margin of appreciation doctrines. Under these self-restraint doctrines, national courts will be considered "better placed", by reason of their "*direct and constant exposure to the vital forces of their country*",[222] to balance individual rights with the public interest in particular cases and to decide whether a certain right is included within the scope of the Convention in the absence of a pan-European consensus.[223]

With the increasing development of human rights standards at EU level, subsidiarity concerns arise with regards to the relationships not only between the EU and its Member States,

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[218] Treaty on European Union, preamble and Article 5(3).
[219] Preamble, para. 5.
[220] Article 34(1) of the Convention.
[221] Article 13 of the Convention.
[222] *Handyside* and *Fretté, supra.*
[223] Letsas advocates for a distinction between a substantive and a structural concept of the margin of appreciation. The substantive concept is used to arbitrate between individual and collective freedoms (and thus governs the relationships between individual rights and public interest), whilst the structural concept aims at deferring to Member States in the absence of pan-European consensus (thereby governing the interactions between the EurCourtHR and national authorities). Letsas would therefore support the development of a "reason-blocking" model (as opposed to an "interest-based" model) affording larger deference to the States (George Letsas, *Two Concepts of the Margin of Appreciation*, 26:4 OXFORD JOURNAL OF LEGAL STUDIES, 705-732 (2006)).

but also between the two European legal orders. In that respect, it has been argued that the definition of subsidiarity could be adapted to extend to the attribution of competences between the EU and other international organizations.[224] Accordingly, the more specialized institution should be considered "better placed" to enact legislative standards in a particular field. As far as the relationships between the CJEU and the EurCourtHR are concerned, however, this principle appears of limited relevance. The EU Charter and human rights-related secondary legislation pursue, beyond the reaffirmation of the "core nucleus" of ECHR rights, specific objectives related to the EU integration project. Human rights are, therefore, fully integrated within the EU legal order, in such a manner that the consideration that the Council of Europe and the EurCourtHR are more specialized than the EU and the Luxembourg Court lacks substantive justification.

This particular view of subsidiarity underlies the skeptical views raised in Council of Europe spheres against the increasing proactivity of the EU in the human rights field. These are driven by the concern that EU human rights standards would duplicate the tasks of the Strasbourg legal order and lead to a "multispeed" Europe of human rights. The development of EU standards going beyond that prevailing in Strasbourg has been suspected to *"sap the vitality of the Council of Europe as a standard setter […], rob [it of] its normative leadership [and] weaken [its] machinery with respect to the newly democratic countries [of Europe]".*[225] According to this view, creating "dividing lines" within Europe would also allegedly contradict the universality of human rights.[226] This approach implies that the competence to enact and develop human rights standards should be reserved to the Council of Europe and its Human Rights Court, in view of their status of specialized human rights institutions. The argument has been refuted by Olivier De Schutter, considering that as long as they do not contradict Member States' individual

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[224] Parliamentary Assembly of the Council of Europe, Recommendation 1744(2006), *Follow-Up to the Third Summit: The Council of Europe and the Fundamental Rights Agency of the European Union*, at 11.9, *available at* http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta06/EREC1744.htm.

[225] G. Quinn, House of Lords Select Committee on the EU, Session 1999-2000, 8th Report, *EU Charter of Fundamental Rights*, HL Paper 67, 164, at 13-15.

[226] See Drzemczewski, *supra*, 30. In a similar way, the Parliamentary Assembly of the Council of Europe has warned against possible duplication of tasks between the EU Fundamental Rights Agency and the Council of Europe monitoring bodies: *"the existence of such parallel mechanisms would be a serious blow to the principle that there should be no dividing line in Europe"* (Report on the Plans to set up a Fundamental Rights Agency for the European Union, Doc. 10449, Jan. 31, 2005, para. 12, available at http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc05/EDOC10449.htm).

obligations under the Convention, enacting EU standards going beyond the core of the ECHR nucleus is *"no more a problem than it would be for any individual State to go beyond those requirements in national constitutional or legislative framework"*.[227] Ultimately, the debate relates to the perception of the respective status of the two European Courts and of their interrelations. The Council of Europe legal order tends to view the EU as another regional institution disaggregated into its 27 entities. This was recently illustrated by the *M.S.S.* judgment holding each Member State individually liable when cooperation under EU law gives rise to human rights infringements. Nevertheless, the *Moustaquim* case law seemed to some extent to view the EU as a single State in development. It entitled the Union to distinguish between EU and non-EU immigrants in the same manner as a State favors nationals over foreigners for the purpose of entry and residence. Such a conception of the EU appears at odds with the one prevailing in the recent *M.S.S.* ruling. This might provide an additional reason for questioning the relevance of the "citizenship exception" in the Strasbourg case law. By contrast, a relative consensus exists in EU spheres to regard the EU as a quasi-federal State in development. Once the EU would accede to the Convention, the CJEU would then occupy the same position as any national supreme court being subject to an external human rights control, with some EU-specific adaptations.[228] This quasi-federal conceptualization of the EU also sweeps away the objections raised against the adoption by the EU of its own catalogue of fundamental rights allegedly competing with the Convention.[229] The EU Charter would indeed not be regarded differently from the list of rights in the constitutions of any other Contracting Party.

The analogy of the EU with a federal State for the purpose of human rights protection should not be stretched too far however, as various elements push in contradictory directions. On the one hand, EU law treats the EU as a single State for the purpose of the application of the *ne bis*

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[227] Olivier De Schutter, *The EU Fundamental Rights Agency : Genesis and Potential*, 23 Working Paper Series REFGOV at 24 (2009).

[228] The European Parliament considered that in case of accession, the Strasbourg Court would exert an external control on EU acts, with the CJEU having *"a status analogous to that currently enjoyed by the supreme courts of the Member States in relation to the Court of Human Rights"* (European Parliament, Committee on Constitutional Affairs, Draft Report on the institutional aspects of the accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms, 2009/2241 (INI) at 4 (Feb. 2, 2010). Along the same line, see Rosas, *Fundamental Rights in the Luxembourg and Strasbourg Courts*, *supra*, 175 and Marta Cartabia, *Europe and Rights: Taking Dialogue Seriously*, 5 EUCONST. 5, 6 (2009).

[229] Lord Russel-Johnston, *The ECHR and the EU Charter: Competing Supranational Mechanisms for Human Rights Protection?*, *in* AN EU CHARTER OF FUNDAMENTAL RIGHTS: TEXT AND COMMENTARIES 53-56 (Kim Feus ed., 2000).

in idem principle. On the other, EU standards do not have vocation to be substituted to national standards and to suppress value diversity beyond the scope of EU law, as Article 51(1) of the Charter reaffirms.[230] Nevertheless, the extension of the scope of EU law as well as secondary law developments (particularly in immigration, police and judicial cooperation) increasingly broadens the reach of EU fundamental rights standards. The leeway for implementing national value preferences is thus correlatively restricted. In its *Ruiz Zambrano* opinion, Advocate General Sharpston supported a wider scope of application of EU fundamental rights, based on the mere existence of an exclusive or shared EU competence irrespective whether this competence has been exercised.[231] Such a development (which has not been endorsed by the Court)[232] would dramatically expand the scope of application of the EU human rights standards and introduce a strong federal element in the EU constitutional order. It is revealing in that respect that Sharpston AG drew a comparison with the U.S. Supreme Court case law on incorporation of the First Amendment (federal) guarantees within the due process clause of the Fourteenth Amendment applying to the states.[233] The Advocate General recognized, however, that such a modification would require a clear political impulse.[234] Ultimately, the EU lacks a "constitutional moment" enabling it to identify itself as a federation and to be recognized as such by its citizens.[235]

As a further concern, EU law standards could, in addition to dictating human rights standards to the Member States in parallel with the Council of Europe institutions, ultimately prevail

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[230] A decade ago, von Bogdandy advocated, in view of the constitutional arrangements between the EU and its Member States, a very cautious approach regarding the development of an EU human rights policy (Armin von Bogdandy, *supra,* 1309-1318 (2000)). The author challenged Weiler and Alston's call for a "forward-looking human rights policy" positively addressing human rights problems EU-wide (Philip Alston and Joseph Weiler, *An 'ever closer' Union in need of a human rights policy, in* THE EU AND HUMAN RIGHTS 3 (Alston ed., 1999)).

[231] Case C-34/09 *Ruiz Zambrano*, Opinion of Advocate General Sharpston delivered on 30 September 2010, para. 163.

[232] The Grand Chamber condemned the measure of expulsion of the ascendants of EU citizens children on the basis of the citizens' right to free movement of residence, without referring to their fundamental right to family life under Article 8 ECHR and 7 of the Charter (Case C-34/09 *Ruiz Zambrano*, judgment of 8 March 2011, paras. 42-45).

[233] *Gitlow v. New York,* 268 U.S. 652 (1925), referred to in para. 172 of the Advocate General Opinion. Allard Knook had thoroughly developed the comparison between the US doctrine of incorporation and the situation prevailing in the EU (Allard Knook, *The Court, the Charter and the Vertical Division of Powers in the European Union,* 42 CMLREV. 367, 374-383 (2005)).

[234] Opinion of Advocate General Sharpston, para. 172.

[235] Laurent Scheeck, *The Socialization of the Judges of Supranational Courts in Europe and its Effects on Regional Integration*, at 7, *available at* http://www.garnet.sciencespobordeaux.fr/Garnet%20papers%20PDF/SCHEEK%20Laurent.pdf

Europe-wide through their integration within the EurCourtHR case law itself. Not only would it allegedly marginalize the Council of Europe legal order in its own field of specialty, which does arguably not constitute a well-founded fear for the reasons mentioned above. More importantly, it would exacerbate the risk that the "majority" at the basis of an emerging consensus be almost always the same, thereby alienating the minority (*i.e.*, non-EU) States and undermining the very foundations of the consensus doctrine. The possibility of having EU standards expanding at pan-European level is far from being a theoretical one. Although the Strasbourg Court has to date never departed from its previous case law on the sole and conclusive basis of EU law, the Charter has played a primordial role in some recent judicial innovations. Certain separate opinions suggest internal pressures inside the Court to align to EU law standards, in so far as these are considered rights-enhancing. In the scenario where the CJEU would initiate a ruling on an issue which has not yet been decided in Strasbourg and recognize EU standards going beyond the current state of consensus in Europe-47, it might be difficult for the EurCourtHR to resist and decide autonomously. However, harnessing its case law on the position of the Council of Europe members deemed the "most advanced", a solution that is advocated in the literature,[236] would correspond to a very particular conception of the consensus doctrine, detached from its original rationale to promote subsidiarity and value pluralism.

2. Subsidiarity and accession of the EU to the Convention

When taken at face value and in isolation from other judicial policy objectives, subsidiarity considerations have motivated proposals that full autonomy should be recognized to the EU legal order to centrally implement and control the respect of fundamental rights.[237] Such proposals were based on the consideration that the CJEU is closer to the citizens and better understands the internal logics of EU law as well as Member States particularities. This narrow focus on the benefit of simplicity, however, misunderstood the value of subjecting the EU to an external control by an independent judicial institution. The view that the EU should join the ECHR, after a difficult political journey,[238] has finally prevailed and been officially endorsed in the Lisbon

[236] Rigaux, *supra*, 411.
[237] Notably, former Advocate General Toth made in 1997 the subversive suggestion to integrate all the provisions of the Convention within the EU legal order, followed by the withdrawal of all the Member States from the ECHR, the CJEU ensuring a closer, centralized and uniform human rights control (A.G. Toth, *The European Union and Human Rights: The Way Forward*, 34 CMLREV. 491-529 (1997)).
[238] Opinion 2/94

Treaty.[239] Membership of the EU to the Convention is currently being discussed between the EU and the Council of Europe, including between representatives of the two European supranational Courts. In that context, the CJEU has expressed a specific subsidiarity concern in requesting that any challenge of EU measures on human rights grounds should first be subject to effective internal review by the CJEU, before being externally controlled by the Strasbourg Court.[240] Luxembourg seems to worry about the risk of indirect invalidation of a CJEU judgment by the EurCourtHR.[241] This would risk undermining the legitimacy of its judgments and reopening the Pandora box of national constitutional courts' refusal to recognize the primacy of EU law.[242] To remedy the Court's silence on the form of this "effective internal review", further clarifications were added in the course of a dialogue between the presidents of the two European Courts in January 2010. The presidents drew a distinction between direct actions brought by individuals against EU acts on the one hand, and indirect actions challenging national measures before national courts and incidentally related to the validity and interpretation of EU law on the other hand. In the former case, the EU Court should always have an opportunity to rule before Strasbourg by virtue of the condition of exhaustion of domestic remedies under Article 35(1) ECHR. In the latter scenario, since the preliminary ruling procedure of Article 267 TFEU depends on national courts' discretion, the presidents considered that a "special procedure" should be put in place to ensure an opportunity for the CJEU to pronounce on the matter.[243] What form this "special procedure" should take, remains unspecified.[244] Some Luxembourg judges have publicly proposed that the Commission should request a CJEU opinion on the

[239] Article 6(3) TEU.

[240] Discussion document of the Court of Justice of the European Union on certain aspects of accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, *available at* http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en_2010-05-21_12-10-16_272.pdf, paras. 7 to 9.

[241] The Strasbourg Court does not have jurisdiction to set aside an internal judgment of a Contracting Party (see Puissochet and Costa, *supra*, 170-171). However, the declaration that the implementation of a judgment would amount to a violation of the Convention indirectly challenges the validity of the judgment itself.

[242] Laurent Scheeck, *The Socialization of the Judges of Supranational Courts in Europe and its Effects on Regional Integration*, *supra*, 10 and *The relationship between the European Courts and Integration through Human Rights*, 65 ZAÖRV 837, 849 (2005), *available at* http://www.zaoerv.de.

[243] This would be accompanied, if necessary, by an accelerated procedure to avoid excessive delays.

[244] It remains unclear whether the "specific procedure" would require an opening of the *locus standi* for individuals to challenge EU measures under Article 263(4) TFEU, or whether it would rather involve advisory opinions of the CJEU or bilateral contacts between the two supranational courts.

compatibility of an EU or a national measure with EU law before the Strasbourg Court could review it in light of the Convention.[245]

In that respect, the approach of the German Constitutional Court in the 2010 *Honeywell* judgment provides a helpful parallel. *Honeywell* held that even though the Constitutional Court remains entitled to declare EU acts inapplicable in Germany where these acts are found *ultra vires*, this review power must take account of the need to maintain the coherence and unity of EU law.[246] As a consequence, the German Court will refrain from reviewing an EU act before the CJEU has received an opportunity to rule on the validity or interpretation of it under the preliminary ruling procedure.[247] In 2009, the *Lisbon* judgment (upholding the constitutionality of the German act approving the Lisbon Treaty) had already established that the *ultra vires* review by the Constitutional Court would only take place in case no remedy was available at EU level.[248] The approach in *Lisbon* and *Honeywell* indicates a "self-restraint" attitude vis-à-vis EU law, which seems to coincide with the subsidiarity concern expressed by the EU Court of Justice.[249]

Finally, it has been argued that subjecting the EU to the external Strasbourg control would signal an evolution towards the inclusion of a hierarchic element between the Strasbourg and Luxembourg Courts in so far as human rights are concerned. In particular, Mitchell Lasser suggested that the EU and the ECHR legal orders are evolving towards an integrated judicial system comparable to a domestic (French) system. Accordingly, the CJEU would endorse the role of an administrative court under the hierarchic human rights supervision of a constitutional

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[245] CJEU Judge Timmermans, European Parliament, Committee on Constitutional Affairs, 18 March 2010 (*Briefing note of the hearing on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, available at http://www.europarl.europa.eu/document/activities/cont/201003/20100324ATT71267/20100324ATT71267EN.pdf).

[246] Honeywell, Decision of 6 July 2010, 2 BvR 2661/06. The *Honeywell* case raised the issue whether the *Mangold* CJEU judgment had exceeded the scope of EU competences, thereby encroaching on Member States' reserved sphere.

[247] Honeywell, *supra*, para. 60 and Payandeh, *supra*, 21.

[248] Lisbon, Decision of 30 June 2009, BVerfGE 123, 267, paras. 240-241. An English translation is available online at http://www.bverfg.de/en/decisions/es20090630_2bve000208en.html

[249] Note that when reviewing the compatibility of EU law with fundamental rights (a power which was asserted for the first time in Solange I, Decision of 29 May 1974, BVerfGE 37, 271), the German Constitutional Court follows a similarly deferent approach. In *Banana Market*, it declared all claims inadmissible unless it has been demonstrated that the EU legal system as a whole no longer guarantees an adequate level of protection (Banana Market, Decision of 7 June 2000, BVerfGE 102, 147) (in the same manner as the EurCourtHR *Bosphorus* presumption).

court (the EurCourtHR). In Lasser's view, this development would culminate by the EU accession to the ECHR, resulting in the integration of the two European Courts within a single judicial system.[250] In our view however, if any relevant comparison is to be made, the interactions between the Luxembourg and the Strasbourg Courts could more adequately – though still very imperfectly – be paralleled with the relationship between any national constitutional court and the EurCourtHR. The relationship between the two Courts – as well as more generally the relationship between the EurCourtHR and national constitutional courts – should better be conceived as horizontal interaction than vertical subordination. Accordingly, the EurCourtHR should not be regarded as a hierarchically superior court, but rather as an *alter ego* institution exerting an external control.

V. Some reflections on how to take advantage of EU law developments while respecting subsidiarity

A. On Strasbourg side: Evaluating the degree of consensus of EU law

The argument that the EurCourtHR should receive EU law with cautiousness and avoid considering it for what it is not, *i.e.* a consensus among all Member States, does not exclude that adequate reference to EU law could be made under particular circumstances. EU law "hybrid" character, forming part of both international law and the domestic laws of the Member States through the supremacy and direct effect principles, differentiates it from universal international law instruments. While the latter can more readily be taken as signs of "emerging consensus" towards a given interpretation of the Convention, EU law generally pursues its specific objectives which are not designed to apply beyond the EU legal order. Reliance on EU law may nevertheless sometimes be appropriate to substantiate the finding of an emerging trend towards a common ground among European Nations. However, it should arguably not be considered a determinative element for that purpose, and even less a "minimum level of protection". This general statement may be refined according to the objectives of each specific provision of EU law and the circumstances in which it is developed.

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[250] Mitchell Lasser has compared the interactions between the two European Courts to the relationships between a national administrative Court and a national supreme court in civil law countries. The author analogizes the CJEU to the French *Conseil d'Etat* and the EurCourtHR to the French *Conseil Constitutionnel.* He argues that the ever growing integration between the CJEU and the EurCourtHR entails an evolution towards a "*meta constitutionalization of Europe*", *"progressively taking on the structure and the dynamics of a single judicial order"* (MITCHELL LASSER, JUDICIAL TRANSFORMATIONS, 210-211 (Oxford University Press, 2009)).

In view of the lack of uniform purpose for EU human rights-related instruments and of univocal approach of the CJEU in exerting its human rights review, no one-size-fits-all solution seems possible. The significance of EU law for the purpose of the ECHR interpretation varies according to whether it pursues an EU-specific goal of internal market integration or enhanced interstate cooperation, or is more "purely" designed to reinforce human rights protection. For example, the right to protection of personal data is specifically intended to allow for the smooth functioning of the internal market[251] or the facilitation of exchange of information in criminal matters.[252] Similarly, the asylum directives are intended to limit the secondary movements of asylum seekers, thereby facilitating the operation of the Dublin II system and the emergence of a common European asylum policy.[253] Conversely, the anti-discrimination directives adopted on the basis of Article 19(1) TFEU are not connected with any of these purely integrationist purposes.[254] The same may increasingly be said of the protection of family reunification rights of third country nationals under Directive 2003/86, which reinforces the protection of fundamental rights of aliens independently from the free movement objective.[255] Some instruments have more indirect integrationist purposes, however. Notably, the Long Term Residents Directive 2003/109 pursues both the objective of social cohesion through the integration of third country nationals in their host communities, and of free movement of persons in the internal market.[256] Arguably, the varying objectives of EU measures could be reflected in the Strasbourg case law. Where EU law pursues EU-specific objectives, it generally defines fundamental rights with a higher level of specificity than the Convention, narrowing down the national margin of appreciation as a result of a "top down" approach designed to address EU needs in the most efficient possible way. These rights do therefore not derive from a consensual

[251] Recital 3 of Directive 95/46/EC on the protection of personal data in the internal market.
[252] Recital 5 of the Framework Decision 2008/977 on the protection of personal data in police cooperation.
[253] Recitals 8 and 4 of Directive 2003/9 on the conditions of reception of asylum seekers; recitals 1 and 6 of Directive 2005/85 on the minimum procedural standards for the treatment of asylum applications and recitals 4 and 7 of Directive 2004/83 on the minimum standards for the qualification of refugees or persons in need of protection. For a critical overview of the European asylum policy, see Jari Pirjola, *European Asylum Policy – Inclusions and Exclusions under the Surface of Universal Human Rights Language,* 11 EJML 347-366 (2009).
[254] Although Recital 7 of Directive 2000/78 aimed at combating employment discrimination briefly refers to the need to coordinate the employment policies of the Member States, Recitals 1-5 make clear that the primary objective of the instrument is to enhance the protection against discrimination within the Member States. Recital 9 of Directive 2000/43 against racial discrimination states the objective of attaining a high level of employment and of social protection in the Member States.
[255] Recitals 1, 3 and 4 of Council Directive 2003/86/EC, as interpreted by the Court in *Chakroun (supra)*.
[256] Recital 4 of Directive 2003/109 emphasizes the social cohesion and integration goal of the measure, while recitals 17 and 18 explicitly refer to its internal market objective.

evolution, which makes then uneasily transposable to the Strasbourg context. On the other hand, EU developments detached from direct integrationist purposes can more readily be taken as indicia of a consensus among the Member States. In sum, the more closely the EU standard pursues specific integrationist goals, the less easily it can be taken as evidence of a consensus and the greater cautiousness should be exercised by the EurCourtHR before relying on it. This approach is, however, still very uncertain, since an integration goal, be it indirect and remote, may always be established. The "purity" of the human rights objective remains ultimately a question of degree.

The above instances where the EurCourtHR referred to the Charter and other EU law provisions may be assessed in light of these considerations. Accordingly, the reference in *Scoppola* to the *Berlusconi* ruling where the CJEU specifying that the principle of retrospective application of more lenient criminal penalties laid down in Article 49(1) of the Charter formed part of the constitutional traditions common to the Member States, was appropriate as it signaled an EU-wide consensus.[257] The reliance in *Demir and Baykara* on the Charter right of "any person" to form a union equally constituted an adequate indication of a consensus to integrate public workers within the scope of Article 11(1) ECHR, in view of the absence of a direct integrationist purpose to this development. For the same reason, the reinforcement of the rights of third country nationals under EU law could also inspire the Strasbourg Court to narrow down the margin of appreciation and tighten its control in family reunification cases.[258] By contrast, the reference in the *Saadi* dissent to the minimum procedural standards for the treatment of asylum applicants under Directive 2005/85 appears unwarranted, since the Directive follows a "top down" approach imposing a high level of protection for the purpose of avoiding secondary movements of third country nationals. The dissent in *Martinie* considering that the treatment of civil servants should be reviewed on the basis of Article 47 of the Charter is also less well-founded. Indeed, the Commentary to the Charter expressly acknowledges that the scope of this provision is limited to EU institutions activities or Member States' agency situations. An additional reason dictating cautiousness in referring to the Charter relates to the possibility that in

[257] Accordingly, the Commentary to the Charter considers that the rights of Article 49 correspond to the constitutional traditions in a number of Member States, and are also enshrined in Article 15 of the International Covenant on Civil and Political Rights (Praesidium note, *supra*, 43).

[258] Daniel Thym, *Respect for private and family life under Article 8 ECHR in immigration cases: a human right to regularize illegal stay?*, 57 INT'L & COMP. L.Q. 87-112 (200) and Anja Wiesbrock, *The right to family reunification of third country nationals under EU law*, Case note under case C-578/08 *Chakroun*, 6 EUCONST 474 (2010).

doing so, the EurCourtHR might indirectly generate the diffusion of the Charter rights beyond their scope of application as laid down in Article 51(1). The EurCourtHR case law would then have the unforeseen effect of making the Charter provisions generally binding on Member States even when they do not implement EU law (or do not act within the scope of EU law, if the broader interpretation of Article 51(1) is favored). Extending the scope of application of the Charter's rights by the back door would arguably not favor the legitimacy perception of both the EurCourtHR judgments and the Charter. This would be particular worrisome in countries such as Poland and the United Kingdom which only accepted the binding character of the Charter after having received the insurance that this would not affect the scope of their human rights obligations.[259]

B. On Luxembourg side: Pursue autonomous developments through Treaty provisions and secondary law rather than the Charter?

In view of the absence of a formal link between the EU Charter and the EurCourtHR case law,[260] the Charter is destined to evolve as a "living instrument" and develop its own content. Given that the ties binding Member States to the EU are closer than the ones linking them to the Council of Europe, the Charter was expected to have a wider scope and a more specific substantive content than the ECHR.[261] Article 53 of the Charter rules out any interpretation which would impair the level of human rights protection resulting from the ECHR, EU law and national constitutions.[262] On Strasbourg side, Article 53 ECHR similarly clarifies that the Convention does not restrict the possibility for Contracting Parties to promote higher standards of fundamental rights protection.[263] Both the Charter and the Convention thus confirm the latter's function of ensuring minimum standards of protection. Furthermore, Article 52(3) of the Charter provides that the rights contained therein shall have the same scope and meaning as corresponding ECHR rights, without prejudice of EU law to confer more extensive protection.

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[259] See *supra*, note 216. For an analysis of the Protocol on Poland and the United Kingdom and its possible interpretations, see Dougan, *supra*, 665-671.

[260] Moreover, the Charter makes to express reference to the Strasbourg case law (beyond the cursory allusion in the preamble, at para. 5).

[261] Andrew Duff, *Towards a European Federal Society, in* AN EU CHARTER OF FUNDAMENTAL RIGHTS: TEXT AND COMMENTARIES 13, 34 (Kim Feus ed., 1 Federal Trust Series, 2000).

[262] For a detailed analysis of the history of adoption of Article 53, see Jonas Bering Liisberg, *Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?,* 38 CMLREV. 1171-1199 (2001). Liisberg submits, in particular, that the reference to national constitutions might threaten the supremacy of EU law.

[263] A similar provision is enshrined in Article 5(2) of the International Covenant on Civil and Political Rights.

Several judgments have referred to this provision.[264] Yet, it remains unclear whether the possibility for *Union law* to grant reinforced protection would also encompass a more extensive interpretation of the Charter provisions themselves. Since Article 52(3) only refers to the Convention, without mentioning the Strasbourg case law,[265] the door remains open to an interpretation of the Charter that would go beyond the EurCourtHR's interpretation of the corresponding ECHR provisions. This would, as Judge Skouris pointed out, not contradict the constitutional law doctrine of "*in dubio pro libertate*" according to which human rights guarantees can always be interpreted in such a way as to confer a more extensive protection to individuals.[266] Differentiated interpretations of similar provisions would, however, raise two types of concerns. First, this would generate confusion in view of the limitation of the scope of application of the Charter and the ensuing subjection of Member States to a dual regional system of human rights protection (the Charter or the Convention, according to the circumstances). Second, such an interpretation of the Charter in Luxembourg would likely influence the Strasbourg judges to align their case law accordingly. As developed above, this should not necessarily be recommended in view of the discrepancies between the objectives, scopes and interpretative methods of EU law and the ECHR respectively.

Arguably, the implications of EU law on the relationships between the two European Courts could vary according to whether the EU pursues a higher level of specificity in the interpretation of human rights guarantees either via the Charter, or via other Treaty provisions and secondary law. Founding EU autonomous human rights developments on EU law provisions other than the Charter would present the advantage of avoiding widening the gap between the two catalogues of fundamental rights. This would also maintain a more visible link to the EU specific objectives where relevant. Recent CJEU case law has reflected this attitude of affirming the autonomy of EU law from the ECHR by relying on secondary law without it being any need to extend the interpretation of the Charter provisions. In particular, the *Elgafaji* ruling[267] defined the scope of the right to subsidiary protection under Directive 2004/83 more broadly than the EuCourtHR

[264] Case C-400/10 PPU *McB*, judgment of 5 October 2010, para. 53; Case C-450/06 *Varec*, [2008] ECR I-581, para. 48; and Case C-279/09, *DEB Deutsche Energiehandels und Beratungsgesellschaft mbH*, judgment of 22 December 2010, para. 32).

[265] The Commentary to the Charter however specifies that the meaning and scope of the rights in the sense of Article 52(3) is also determined by the EurCourtHR case law (Note of the Praesidium, *supra*, at 48).

[266] Skouris, *supra*, 270.

[267] Case C-465/07 *Elgafaji* [2009] ECR I-921.

case law on Article 3 of the Convention.[268] The CJEU based its conclusion on Article 15(c) of the directive, explicitly emphasizing the autonomous scope of this provision.[269] The Court therefore refrained from adopting any interpretation of Article 4 of the Charter (the provision corresponding to Article 3 ECHR) which would have departed from the Strasbourg interpretation of Article 3 ECHR. Along the same line, and in sharp contrast with its previous case law grounding the protection of family life on fundamental rights,[270] the Court in *Metock* made only cursory reference to the right to family life under Articles 8 of the Convention.[271] Instead, it based its reasoning exclusively the Citizenship Directive. Yet, the finding in *Metock* clearly departs from the EurCourtHR case law on the right to family life in affording a higher level of protection to EU citizens and their third country national spouses.[272] This enhanced protection has now been extended to family reunification of third country nationals covered by Directive 2003/86, since the *Chakroun* ruling interpreted the said instrument in light of the Citizenship Directive (expressly referring to *Metock*).[273] The reinforced level of protection of family life offered by the EU to its citizens and to ever-expanding categories of third country nationals is therefore primarily based on secondary law. The reference to the ECHR in *Chakroun*, where the Court emphasized the consistency of its interpretation with Article 8 ECHR and Article 7 of the Charter *"which do not draw any distinction based on the circumstances in and time at which a family is constituted"* departs from this idea however.[274] Although it is true that the vague wording of these provisions does not expressly draw such a distinction, the interpretation of Article 8 ECHR by the Strasbourg Court affords a wide margin of appreciation to the States. It

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[268] The EurCourtHR requires a higher degree of individualization of serious threats in order to benefit from the protection (under Article 3 ECHR) against expulsion to a country encountering a situation of generalized violence. See Judgments of the ECtHR of 30 October 1991, *Vilvarajah and others v. United Kingdom*, App. No. 13163-5/87 and 13447-8/87, A215 and of 11 January 2007, *Salah Sheekh v. Netherlands*, App. No. 1948/04.

[269] *Elgafaji*, paras. 28 and 29. Article 15(b) of the Qualification Directive directly reflects the EurCourtHR case law on Article 3 of the Convention, which logically motivated the Court to confer an autonomous meaning to Article 15(c) (see *Gráinne de Búrca, The Road Not Taken: The EU as a Global Human Rights Actor*, 105 AM. J. INT'L L. (forthcoming 2011). A working version of the paper is available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1705690 (at 35).

[270] In particular, *Carpenter*, *Akrich* and *Chen*, *supra*. See Catherine Costello, *Free Movement and 'Normal Family Life' within the Union*, 46 CMLREV. 591, 612-613 (2009).

[271] *Metock*, para. 79.

[272] The *Metock* case law recognizes the right of EU citizens in the host Member State to be joined by their third country national spouse, even if the latter had entered illegally within the EU territory and resided illegally in the host Member States before marrying the EU citizen (*Metock*, para. 70).

[273] Advocate General Sharpston would have based the decision on the right to nondiscrimination, considering that there were no objective justifications for subjecting family formation to more restrictive conditions than family formation (Opinion delivered on 10 December 2009, para. 40).

[274] *Chakroun*, para. 63.

only exceptionally secures a right to enter the State of residence of one's family member. The EurCourtHR protects against the expulsion of a member where the family is settled in a Contracting Party. Otherwise, it tolerates restrictive national immigration policies governing family reunion as long as a family life remains possible elsewhere (for example in the country of origin of one of the family members).[275] Against this background, the interpretation of the right to family life suggested by the CJEU seems to have achieved a much higher level of specificity than the EurCourtHR case law and accordingly narrowed down Member States' margin of appreciation. Insinuating that EU Member States might violate the ECHR (and the Charter) in refusing family reunification of third country nationals within their borders therefore constitutes a rather audacious interpretation of the ECHR, which is not reflected in the Strasbourg case law.

Whether the reaction of EurCourtHR judges would vary according to whether the EU fundamental rights standards derive either from the provisions of Charter, or from secondary law or Treaty provisions, remains to be ascertained however. Beyond the symbolic aspiration for the EurCourtHR to avoid the Convention being superseded by another more protective catalogue of rights, EU secondary law arguably makes the link with EU-specific objectives more visible. This might relativize any perceived need to align the Strasbourg case law on the EU level of human rights protection. That said, the sources of EU law referred to in Luxembourg do not seem to have entailed conclusive effects in Strasbourg, which remains primarily concerned by the respective outcomes in the two legal orders. The concurring judges in *Saadi* do not appear to have been refrained by the fact that the specific rights of asylum seekers (beyond the general right of asylum under Article 18 of the Charter) were enshrined in secondary law. Without regard to their secondary law source, the considered that the EU procedural guarantees for asylum seekers should be regarded as a minimum level of protection. In *Sevinger and Eman*, the Strasbourg Court considered itself compelled to justify its nonalignment with the previous *Eman and Sevinger* CJEU ruling although the latter was based on Treaty provisions, independently from the Charter or the Convention.[276] In *Eman and Sevinger*, the Luxembourg Court had condemned the Netherlands for having deprived Dutch citizens residing in Aruba from the right to participate in European Parliamentary elections, while other Dutch citizens living abroad

[275] *Abdulaziz, Cabales and Balkandali v. United Kingdom*, *supra*, para. 61. See Costello, *supra*, 591 and 613.
[276] *Sevinger v. Netherlands*, inadmissibility decision of 6 September 2007, App. No. 17173/07 and 17180/07 and Case 300/04 *Eman and Sevinger*, [2006] ECR I-8055.

remained enfranchised. The CJEU's reasoning was based on the EU citizens' right not to be discriminated in the exercise of their citizenship rights under the Treaty, rather than the fundamental right to vote under the ECHR or the Charter.[277] The Strasbourg Court, subsequently seized of the claim that the Netherlands had violated the Convention in depriving its citizens residing in Aruba from the right to vote to the Lower House, still found it necessary to justify its deviation from the Luxembourg case law in distinguishing between the two factual situations. In declaring the request inadmissible, it held – rather unconvincingly[278] – that unlike the European Parliament, the Lower House's activities did not sufficiently affect Aruban residents to grant them the right to vote under Article 3 of Protocol 1 to the Convention. Plausibly, however, the Court might have been more strongly influenced by the Luxembourg ruling should the CJEU have based its reasoning on the right to vote under Protocol 1 to the ECHR (eventually combined with the right to nondiscrimination under Article 14 ECHR).

VI. Conclusion

The ongoing shift in the significance of fundamental rights in the EU, from negative integration benchmarks into positive integration factors, has affected the relationships between the EU and the ECHR legal orders. This paper has examined both the effects of the Strasbourg case law on the EU integration project, and the influence of EU law developments on the EurCourtHR case law. On both levels, the Strasbourg jurisprudence seems to be driven by the concern that growing autonomization of EU law in the fundamental rights area might create dividing line in Europe. This risk could allegedly materialize should the EU disconnect itself from the Convention regime in absolving Member States from their individual liabilities where they cooperate under their mutual trust and recognition obligations. Additionally, a "multi-speed" Europe of human rights might arise where the EU promotes specific standards restricting the Member States' margin of appreciation beyond their ECHR requirements as interpreted in Strasbourg. These concerns were translated on two different fronts.

[277] *Eman and Sevinger*, paras. 48 and 53.

[278] Leonard F. M. Besselink, *Case Note under Cases C-145/04* Spain v. United Kingdom, *C-300/04* Eman and Sevinger *and ECtHR* Sevinger and Eman *judgment*, 45 CMLREV. 787, 810-811 (2005). Aruban residents were indeed much more closely affected by the Lower House's acts than by the European Parliament's legislations.

First, while the Strasbourg Court had previously recognized the specificity of the EU legal order and accordingly established special arrangements deviating from the normal operation of the Convention, it has recently appeared unwilling to further compromise with the EU. The *M.S.S.* judgment has *de facto* eliminated any possibility for Member States to operate presumptions that their counterparts comply with the Convention when they cooperate with one another. This approach questions the very foundations of mutual trust in the EU, which is based on the presumption that all Member States comply with their EU and ECHR obligations. The other form of EU exceptionalism, namely the *Moustaquim* exception allowing Member States to treat third country nationals and EU migrants unequally, has also arguably lost some of its relevance. EU law itself has evolved towards a growing equalization of the status of EU citizens and foreign nationals, while the EurCourtHR case law has treated nationality discriminations with a particular severity. These evolutions reinforce the appeal for correcting the remaining inequalities between EU citizens and third country nationals and question the continuing validity of the "citizenship exception".

Second, EU law has influenced the Strasbourg substantive case law. The EurCourtHR has repeatedly referred to EU developments (in particular the Charter of Fundamental Rights) as supplementary means of interpretation to discern an evolving consensus justifying departures from its previous case law. A few separate opinions suggest internal pressure within the Court in the sense of an even more influential role for EU law. This paper submitted, however, that the EurCourtHR should rather remain faithful to the spirit of consensus underlying the Convention and avoid overestimating the consensus value of EU law. A sweeping alignment on human rights developments in the EU would tend towards the imposition of majority choices on the minority of (non-EU) Council of Europe members. This would negatively affect the legitimacy perception of the EurCourtHR. Although the concern to avoid differential levels of human rights protection across Europe has been expressed in Strasbourg circles, the EurCourtHR case law paradoxically contributes to generating these unwanted dividing lines where it joins its efforts to the enforcement of EU law. Yet, the modulation of Member States' obligations and margins of appreciation in accordance with their positive obligations under EU law allows the Court to take advantage of EU developments to pursue its human rights enhancement agenda, while avoiding the imposition of majority value choices. Arguably, this risk of majority hegemony, which

would undermine the Convention's consensual foundations, represents a greater concern than the creation of dividing lines in Europe. If one endorses the view that value diversity is driven by subsidiary considerations and lies at the roots of the legitimacy of the ECHR legal order, the development by the EU of its own specific standards of human rights protection indeed appears less threatening. To prevent the more compelling risk of majority hegemony, the Strasbourg Court could also subordinate the references to EU law to a closer assessment of the consensus value of each specific EU law provisions in light of the degree to which they pursue specific EU integrationist objectives. On Luxembourg side, it was suggested that the Court should as far as possible avoid interpretations of the Charter that would go beyond the corresponding ECHR provisions as interpreted in Strasbourg. Instead, refining human rights protection through the interpretation of other Treaty and secondary law provisions would prevent the confusion that would result from discrepancies between the two European catalogues. This would also maintain a more visible link with the specific objectives of the EU.

Ultimately, the divergences between the two European supranational Courts with respect to mutual trust, as well as the concerns expressed at Council of Europe level regarding the EU human rights-related developments, arguably correspond to different constitutional conceptualizations of the EU. On the one hand, the Strasbourg legal order treats the EU as another supranational organization potentially overlapping with the Council of Europe in the promotion of human rights. The EU is then regarded as the sum of 27 disaggregated entities, each remaining fully responsible under the Convention. On the other hand, the EU increasingly conceives itself as a quasi-federal State in development. Its Member States cooperate and trust one another, and correspondingly implement their human rights obligations, in a manner as close as possible as the multiple entities of a single State. The likely accession of the EU to the Convention would help clarifying the relationships between the two legal orders. It would make it more visible that the Charter does not constitute a concurrent bill of rights and that the CJEU does not overlap with but rather subjects itself to the EurCourtHR external control, in the same manner as the constitutional court of any Council of Europe member. In Strasbourg, this would eventually provide additional reasons to relativize the alleged concern about the creation of dividing lines in Europe. Consequently, attempts to align the EurCourtHR case law on EU law

developments might be readjusted in such as way as to preserve the consensual foundations of the Convention.

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