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Composing Europe's Fundamental Rights Area: A Case for Discursive Pluralism

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Abstract
This article offers a perspective on how the objective of a strong and coherent European protection standard pursued by the fundamental rights amendments of the Lisbon Treaty can be achieved, as it proposes a discursive pluralistic framework to understand and guide the relationship between the EU Court of Justice and the European Court of Human Rights. It is argued that this framework – which is suggested as an alternative to the EU law approach to the Strasbourg system applied by the CJEU in *Opinion 2/13* and its Charter-based case law – has a firm doctrinal, case law and normative basis. The article ends by addressing three of the most pertinent challenges to European fundamental rights protection through the prism of the proposed framework.

Keywords: European Union, European Convention on Human Rights, Charter of Fundamental Rights, *Opinion 2/13*, pluralism, fundamental rights

I. EUROPEAN FUNDAMENTAL RIGHTS PROTECTION AT A CROSSROADS

The entry into force of the EU Charter of Fundamental Rights (the EUCFR/the Charter) and the Treaty obligation for the EU to accede to the European Convention on Human Rights (the ECHR/the Convention) are human rights milestones; they have been close to four decades in the making,[1] and have been launched with the intention of buttressing the Union's human rights credibility as well as strengthening the overall protection standard in Europe and the coherence of the Union's fundamental rights system and that of the ECHR system (the human rights regime established by the ECHR under international law).[2] That this in fact will be the outcome is,

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[1] The ideas of an EU Charter and the EU acceding to the ECHR have featured on the EU agenda since the late 1970s; in 1977 the joint declaration by the European Parliament, the Council and the Commission on fundamental rights ([1977] OJ C103/1) was adopted and in 1979 an unsuccessful proposal for the EU to accede to the ECHR was tabled by the Commission (COM (79) 2010 final).

[2] Final report of Working Group II 'Incorporation of the Charter/Accession to the ECHR', which was established by European Convention on the Future of Europe, CONV 354/02, 22 October 2002, pp 4–7 and 11–13 in particular; Recital 4 of the Charter; 'Explanations Relating to the Charter of Fundamental Rights' [2007] OJ C303/17, concerning Article 52(3) EUCFR; Recital 1 of the Draft Explanatory Report to the Draft Agreement on the accession of the European Union to the Convention for the

however, far from certain. The Lisbon amendments have restructured the European human rights landscape to the effect that this area of law presents a textbook example of the complex realities in the modern, fragmented and globalised legal world. Indeed, the consequence of the Lisbon Treaty is that fundamental rights protection in Europe today is made up by a 'crowded house' of co-existing and overlapping national, international and supranational norms each of which is supervised by their own supreme court.[3] For national courts this implies having to navigate in the spider's web of EU and ECHR rules every time a case with a human rights dimension is brought before them.

Clarity about the relationship between EU law and the ECHR is therefore crucial to the effectiveness of the protection given to individual rights holders in Europe. The legal foundation provided by the Lisbon amendments is nothing but an empty promise if the legislative intentions are not implemented in practice by the EU Court of Justice (CJEU/Luxembourg Court) and the European Court of Human Rights (ECtHR/Strasbourg Court) by way of clear guidelines to national judiciaries about the applicable European standards and the coherence of these.[4] One could assume that this task, as complicated as it may be, is manageable for the CJEU and the ECtHR considering that, since the 1970s, they have proved themselves capable of handling their overlapping competences in a remarkably harmonious and mutually beneficial manner.[5] The problem with this assumption is, however, that the Lisbon Treaty has altered the delicate balance of power and authority which so far has underpinned the relationship between the two courts. Despite the CJEU President Skouris' claim to the contrary at the 2014 *FIDE* congress,[6] the reality is that the Luxembourg Court today is also a very powerful human rights court in its own right; it now has its own Bill of Rights which is placed 'at the heart'[7] of the Union's constitutional framework and it therefore no longer has to derive its human rights legitimacy from the

(F'note continued)
Protection of Human Rights and Fundamental Freedoms of 5 April 2013, annexed as appendix V to Council of Europe document 47 + 1(2013)2008rev2; and Joint Communication from Presidents Costa and Skouris, 27 January 2011, available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf [last accessed on 14 May 2015].

[3] P Cruz Villalón, *Rights in Europe, The Crowded House*, King's College London Working Paper 01/2012, available at: https://www.kcl.ac.uk/law/research/centres/european/research/CELWPEL012012FINAL.pdf [last accessed 15 May 2015] p 3.

[4] On this, see J Polakiewicz, 'EU Law and the ECHR: Will EU Accession to the European Convention on Human Rights Square the Circle?' (26 September 2013), pp 3–4. doi:10.2139/ssrn.2331497.

[5] Although the functioning of the pre-Lisbon relationship between the CJEU and the ECtHR was not perfect, it was largely harmonious and the inter-systemic tensions that did arise were resolved by way of a high degree of mutual accommodation on both parts, cf Section II below.

[6] It is widely cited that President Skouris at the 2014 FIDE Conference in Copenhagen stated that the CJEU 'is not a human rights court. It is the Supreme Court of the Union', cf S Douglas-Scott, 'Opinion 2/13 on EU Accession to the ECHR: A Christmas Bombshell from the European Court of Justice', (24 December 2014) *Verfassungsblog* available at: http://www.verfassungsblog.de/en/opinion-213-eu-accession-echr-christmas-bombshell-european-court-justice/#.VJ8TXP8CRA [last accessed on 15 May 2015].

[7] *Opinion 2/13 (Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms),* EU:C:2014:2454 2014, para 169.

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ECHR (and national constitutional traditions). When the CJEU's reinforced jurisdiction over the rights-sensitive Area of Freedom, Security and Justice (AFSJ) and the EU supranational enforcement machinery are also taken into account, it is difficult to get around the fact that CJEU constitutes a serious contender to the overburdened Strasbourg Court's position as the prime pan-European human rights authority.

The impression that European fundamental rights protection is currently at a crossroads and that a positive outcome, in terms of a strong and coherent protection standard, is far from given, is confirmed by recent transnational jurisprudence. Three interrelated observations can be made in that regard, the first of which is the trend, detected by scholars and practitioners alike, of the CJEU having severed its close ties to Strasbourg and opting for a more autonomous EU approach to fundamental rights adjudication under the Charter.[8] The second observation concerns the body of recent European case law on the fundamental rights compatibility of intra-EU transfers of asylum seekers under the Dublin Regulation, which showcases the need for, and potentials of, a judicial dialogue between Luxembourg and Strasbourg, but certainly also the pitfalls of such dialogue when cross-fertilisation of vaguely defined judicially established concepts and the authority struggle between the CJEU and the ECtHR risk compromising the human rights of the individual right holders.[9] Last, but certainly not least, the CJEU's *Opinion 2/13* from 18 December 2014 has served to make the present day tensions between the two transnational fundamental rights regimes in Europe crystal clear.[10] In this Opinion, the Luxembourg Court deemed the carefully negotiated agreement on EU accession to the ECHR to be incompatible with the EU Treaties in a surprisingly far-reaching and uncompromising manner.[11] Through the ten objections advanced to the agreement, the CJEU thus broadened the EU's external

[8] S Douglas-Scott, 'The Relationship Between the EU and the ECHR Five Years on From the Treaty of Lisbon' in S de Vries et al (eds), *Five Years Legally Binding Charter of Fundamental Rights* (Hart Publishing, forthcoming), *Oxford Legal Research Paper* (January 2015), pp 16–20 available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2533207&download=yes [last accessed 15 May 2015]; J Callewaert, *The Accession of the European Union to the European Convention on Human Rights* (Council of Europe, 2014) pp 9–11 and 20–21; and G De Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator' (2013) 11 *Maastricht Journal of European and Comparative Law* 168.

[9] J Vedsted-Hansen, 'Reception Conditions as Human Rights: Pan-European Human Rights or Systemic Deficiencies' in V Chetail, P De Bruycker and F Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Martinus Nijhoff, forthcoming); and C Costello and M Mouzourakis, *Reflections on Reading Tarakhel: Is 'How Bad is Bad Enough' Good Enough?*, Working Paper of 12 December 2014, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2548542 [last accessed 3 February 2015].

[10] *Opinion 2/13,* EU:C:2014:2454 concerning the Treaty compatibility of Draft revised agreement (DAA) on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms of 5 April 2013, annexed as Appendix I to Council of Europe document 47 + 1(2013)2008rev2.

[11] J Polakiewicz, 'The Future of Fundamental Rights Protection Without Accession', speech given on 26 June 2015 at Maastrict University, available at: http://www.coe.int/fr/web/dlapil/speeches-of-the-director/-/asset_publisher/ja71RsfCQTP7/content/the-future-of-fundamental-rights-protection-without-accession?inheritRedirect=false [last accessed 3 July 2015].

autonomy claim *vis-à-vis* the Strasbourg regime considerably compared to previous case law,[12] claimed the primacy of the Charter over the ECHR and, notably, did so without displaying any willingness to accommodate the prerogatives and competences of the ECtHR and without ever mentioning the ECHR's place in EU constitutional law.[13]

The CJEU's changed approach to fundamental rights and its non-emphatic attitude in *Opinion 2/13* has not gone unnoticed in Strasbourg where ECtHR President Spielmann in unprecedentedly explicit language has characterised *Opinion 2/13* as a 'great disappointment'.[14] Furthermore, he has on several occasions hinted that the CJEU's claim to EU fundamental rights superiority in Europe is not readily acceptable for the ECtHR, and that a plausible countermove for the Strasbourg Court could be for it to conduct a more intensified indirect review of the Union in cases concerning alleged ECHR violations by Member States implementing EU law measures.[15]

All in all, it is the manner in which the Luxembourg Court has defined, emphasised and prioritised EU law autonomy *vis-à-vis* the Strasbourg regime under the post-Lisbon European fundamental rights landscape which has caused the current situation of inter-systemic tensions and consequent legal uncertainty about the level and coherence of protection standards in Europe. Still, this article does not set out to send more criticism the CJEU's way. It pursues a more constructive objective: what the above outlined developments call for, above all, are perspectives on how the dialogue between the Luxembourg and Strasbourg courts can be reinstalled and, ideally, improved on in order for the promises of the Lisbon amendments to be achieved and the protection of human rights for individuals in Europe strengthened.

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[12] L Halleskov Storgaard, 'EU Law Autonomy v European Fundamental Rights Protection' forthcoming (2015) *Human Rights Law Review* doi:10.1093/hrlr/ngv012 [first published online: 20 July 2015]; BH Pirker and S Reitemeyer, 'Between Discursive and Exclusive Autonomy – *Opinion 2/13*, the Protection of Fundamental Rights and the Autonomy of EU Law' *Cambridge Yearbook of European Legal Studies* doi:10.1017/cel.2015.7 [first published online: August 2015]; T Lock, 'Autonomy Now?! A Brief Response to Daniel Halberstam', (12 March 2015) *Verfassungsblog* available at: http://www.verfassungsblog.de/autonomy-now-a-brief-response-to-daniel-halberstam/#.VS-7xpONhIY [last accessed on 15 April 2015]; and J Komárek, 'It's a Stupid Autonomy…' (14 March 2015) *Verfassungsblog* available at: http://www.verfassungsblog.de/its-a-stupid-autonomy/#.VTESGZONhIY [last accessed on 17 April 2015].

[13] On *Opinion 2/13*, see ibid; and S Peers, 'The CJEU and the EU's Accession to the ECHR: A Clear and Present Danger to Human Rights Protection' (19 December 2014) *EU Law Analysis* available at: http://eulawanalysis.blogspot.co.uk/2014/12/the-cjeu-and-eus-accession-to-echr.html [last accessed on 15 May 2015]; and C Barnard, 'Opinion 2/13 on EU Accession to the ECHR: Looking for the Silver Lining' (16 February 2015) *EU Law Analysis* available at: http://eulawanalysis.blogspot.dk/2015/02/opinion-213-on-eu-accession-to-echr.html [last accessed 15 May 2015].

[14] European Court of Human Rights, 2014 Annual Report, foreword by President Spielmann p 6; and speech by President Spielmann at the opening of the judicial year of the European Court of Human Rights, 20 January 2015, pp 4–6 where it is noted, for example, that 'the important thing is to ensure that there is no legal vacuum in human rights protection on the Convention's territory, whether the violation can be imputed to a State or to a supranational institution'.

[15] Ibid.

This article offers such a perspective as it proposes a discursive pluralistic framework to function as the prism for understanding and guiding the relationship between the CJEU and the ECtHR. It will be argued that this framework – which is suggested as an alternative to the EU law approach to the Strasbourg system applied by the CJEU in *Opinion 2/13* and its Charter-based case law – has a solid doctrinal, jurisprudential and normative basis.

The first two sections of the article provide the backdrop for addressing the current challenges in the European fundamental rights sphere: at the outset the evolution of the relationship between the CJEU and the ECtHR is outlined (Section II); whereupon the overlapping competences of the two courts and the specific challenges to European fundamental rights protection arising thereof are explained and identified (Section III). Against this background, a discursive pluralistic framework for describing, comprehending and managing the relationship between the CJEU and the ECtHR is introduced (Section IV). It consists first and foremost of the meta-principles devised by Maduro for judicial dialogue in the intra-EU context. However, when demonstrating the applicability of this framework to the EU-ECHR context, and when proposing an additional meta-principle to reflect the external nature of this context, the article relies also on the writings of other prominent scholars who see discursive or moderate pluralism as the best theoretical tool to address the multileveled global legal landscape. Finally, the practical workability of the proposed framework is demonstrated by utilising it as the lens to address three of the most pertinent challenges to European fundamental rights protection at the CJEU-ECtHR interface (Section V).

It is relevant to note that the article's focus on the CJEU–ECtHR relationship is founded on the assumption that it ultimately is for the ECtHR and the CJEU, in their capacities as the highest authorities on the ECHR and the Charter respectively, to ensure that the promises of the Lisbon Treaty are brought into life. That being said, it must be acknowledged that a theory on fundamental rights adjudication in Europe is complete only if it also takes into account national human rights norms and the important function that domestic courts serve as Union and Convention courts of first instance. The proposed framework is capable of embracing the relationship between national constitutional courts and, respectively, the CJEU and the ECtHR, but this aspect is not specifically addressed and reasoned due to the confinements of the article.

II. THE HORIZONTAL AND VERTICAL DIALOGUES BETWEEN THE CJEU AND THE ECtHR

When carving out an approach to the current relationship between the two courts, one does not operate in a vacuum as the CJEU and the ECtHR have more than four decades of experience with handling the overlapping competences of EU law and the Convention system in a manner which has benefitted the overall protection standard in Europe. They have done so through cooperation and interaction, intra- as well as extra-judicially,[16]

[16] Since the late 1970s, representatives from both courts have met on a regular basis, and since the establishment of the 'new' ECtHR in 1998 these meetings have been held annually, cf L Scheeck,

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which have pursued their shared goals and values but certainly also interests which are specific to each organisation and its institutions. The CJEU has looked to Strasbourg for legitimacy to counter the challenges on authority from national constitutional courts as well as, more broadly, to justify its introduction of fundamental rights into EU constitutional law. For the ECtHR, the experienced part of the relationship, its engagement with EU law and jurisprudence has functioned as a means for it to underscore its function and place in the European fundamental rights edifice, and thus as a way for it to seek to counter the risk of marginalisation which has emerged concurrently with the ever expanding scope of EU law and its own institutional problems.[17]

In parallel articles dating from 2010, CJEU Judge Bay Larsen and (then) ECtHR Judge Lorenzen operationalised the cooperation or 'dialogue' between the CJEU and the ECtHR in a useful manner by identifying a 'horizontal' and a 'vertical' dimension thereof.[18] Vertical dialogue refers to the ECtHR's long tradition of indirect review of EU law and EU institutions when litigating on cases involving Member State actions taken under EU law.[19] Horizontal dialogue, on the other hand, characterises the cross-fertilisation of the two legal regimes that takes place on a daily basis in the courtrooms of the CJEU and the ECtHR: they draw inspiration from the case law of each other to support or develop jurisprudence, and/or they complement each other in carrying out their functions.[20] Using this terminology, this section briefly outlines the CJEU's approach to the Strasbourg regime prior to the entry force of the Lisbon Treaty (Section II.A) and explains how the ECtHR's approach to the Union regime has developed up until today (Section II.B). This part of the article reflects the assumption that an understanding of how the two courts traditionally have (successfully) interacted with each other is of key importance to proposing a viable solution to the current challenges in the European fundamental rights sphere.[21]

(F'note continued)

'Diplomatic Intrusions, Dialogues, and Fragile Equilibria: The European Court as a Constitutional Actor of the European Union' in J Christoffersen and M Rask Madsen (eds), *The European Court of Human Rights between Law and Politics* (Oxford University Press, 2013) ch 9, pp 168–171; and S Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis' (2006) 43 *Common Market Law Review* 629, p 655.

[17] J Juncker, Council of Europe/European Union, 'A Sole Ambition for the European Continent', *Report to the Heads of State and Government of the Member States of the Council of Europe*, 4 April 2006; and S Douglas-Scott, see note 6 above, p 19.

[18] L Bay Larsen, 'Dialogue Between the ECJ and the ECHR'; and P Lorenzen, 'Dialogue Between the ECJ And the ECHR and the WTO Judiciary' in C Baudenbacher C (ed), *International Dispute Resolution Vol 2: Dialogue Between Courts in Times of Globalization and Regionalization* (German Law Publishers, 2010) 33 and 41. This typology resembles, to some extent, the seminal one of A Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 *University of Richmond Law Review* 99.

[19] Ibid.

[20] Ibid.

[21] This section only delivers a compressed overview of the evolution of the CJEU–ECtHR relationship. For a more thorough account, see, in addition to those already cited, B de Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights' in P Alston (ed), *The EU and Human Rights* (Oxford University Press, 1999) 839; FG Jacobs, 'Human Rights in the

A. The pre-Lisbon role and position of the ECHR in Union law

When, in the 1970s, the CJEU[22] began the process of incorporating human rights into the general principles of Union law, it identified the two main sources of inspiration hereof to be the Member States' constitutional traditions and international human rights treaties,[23] and in terms of the latter category it quickly displayed adherence to the ECHR: in 1975 the CJEU cited the ECHR for the first time in its reasoning;[24] in 1979 it embarked on its first substantive analysis of a Convention right;[25] and in 1989 it characterised the ECHR as a source of 'particular significance of the general principles of EU law[26] – a status maintained ever since and later approved by the Member States, first in a non-binding manner,[27] and later in primary EU law by Article F(2) TEU of the Maastricht Treaty (now Article 6(3) TEU). No other international law instrument holds a similar position under Union law.[28]

In the decades leading up to the entry into force of the Lisbon Treaty, there was a rising awareness and codification of human rights at the EU level and a steady rise in the number of rights-based cases being presented to the CJEU,[29] which allowed for the Luxembourg Court to become more confident in its role as a fundamental rights adjudicator. Instead of this confidence leading the CJEU in its own fundamental rights direction, it reaffirmed and visibly expanded the close ties between the EU protection regime and that of the ECHR. Accordingly, during this period the CJEU's references to the ECHR and Strasbourg case law gradually changed from being brief and unexpansive to 'engage more with Strasbourg jurisprudence' and 'be more reliant on it as a ground of justification'.[30] Cases such as

(F'note continued)

European Union: The Role of the Court of Justice' (2001) 26 *European Law Review* 331; A Rosas, 'Fundamental Rights in the Luxembourg and Strasbourg Courts' in C Baudenbacher et al (eds), *The EFTA Court: Ten Years On* (Hart Publishing, 2005); S Douglas-Scott, see note 16 above; and NA Lorenz et al, *The European Human Rights Culture – A Paradox of Human Rights Protection in Europe?* (Martinus Nijhoff, 2013) pp 125–157.

[22] For ease of understanding, the article applies the current EU institutional terminology and Treaty numbering also when past events are examined.

[23] *Nold v Commission*, 4/73, ECLI:EU:C:1974:51, para 13.

[24] *Rutili*, 36/75, ECLI:EU:C:1975:137, para 32.

[25] *Hauer*, 44/79, ECLI:EU:C:1979:290, paras 17-–19 (Article 1 of Protocol 1 to the ECHR).

[26] *Hoechst*, 46/87 and 227/88, ECLI:EU:C:1989:337, para 13. See also *ERT*, C-260/89, ECLI:EU:C:1991:254, para 41; and *Kremzow*, C-299/95 ECLI:EU:C:1997:254, para 14.

[27] Joint Declaration of 5 April 1977 of the European Parliament, The Council and the Commission on fundamental rights, [1977] OJ C103/1.

[28] See, A Rosas, 'The EU and International Human Rights Instruments' in C Kronenberger (ed) *The EU and the International Legal Order* (TMC Asser Press, 2001) ch 3.

[29] S Douglas-Scott, see note 16 above, pp 644–652 with further references.

[30] Ibid; and S Douglas-Scott, 'The ECJ and the ECtHR After Lisbon' in S de Vries et al (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (Hart Publishing, 2013) ch 7, p 158. This jurisprudential pattern is also reflected in the surveys of the of the Luxembourg Court's reliance on the ECHR, cf E Guild and G Lesieur, *The European Court of Justice on the European Convention on Human Rights. Who Said What, When?* (Kluwer Law International, 1998); and L Scheeck,

Rundfunk,[31] *Spector Photo Group*[32] and *Commission v Parliament*[33] bear witness to this development which peaked with the seminal *Kadi I* case from 2008 which also more than any other case showcases the privileged EU law position accorded to the Convention by the CJEU before the entry into force of the Lisbon Treaty.[34] In this judgment, the CJEU effectively and expressly deduced the material content of the Union's constitutional principles which international law 'cannot have the effect of prejudicing' from the ECHR and ECtHR jurisprudence.[35] In other words, the firm autonomy claim made by the CJEU on behalf of the Union *vis-à-vis* international law (*in casu*, the UN system) did not encompass the ECHR regime, which instead was invoked as a *de facto* integral part of EU constitutional law to buttress this claim.[36]

In 2009, CJEU President Skouris stated that he saw *Kadi I* as reaffirming 'the fundamental role and importance of the [ECHR] as such, and the role and importance of its interpreters for the protection of fundamental rights at the level of the European Union'.[37] This statement mirrors the common pre-Lisbon opinion amongst scholars and practitioners alike according to which the Convention constituted the minimum content of the fundamental rights of the general principles of Union law and the CJEU's inclusive approach to the Convention system had facilitated a coherent European fundamental rights standard where 'harmony, rather than conflict, is a much more likely scenario'.[38] This is underlined by the fact that during more than four decades in which the ECHR was a particular important source of the general principles of Union law, the CJEU enjoyed plenty of room for manoeuvre in determining the exact authoritative force of the Strasbourg sources in Union law,[39] yet never once intentionally deviated from the Strasbourg Court's interpretation of the ECHR.[40]

(F'note continued)

'Competition, Conflict and Cooperation between the European Courts and the Diplomacy of Supranational Judicial Networks', *Garnet Working Paper 23/07* (2007), available at: http://www2.warwick.ac.uk/fac/soc/garnet/workingpapers/2307.pdf [last accessed on 14 May 2015].

[31] *Österreichischer Rundfunk and Others*, C-465/00, ECLI:EU:C:2003:294, paras 68–94.

[32] *Spector Photo Group*, C-45/08, ECLI:EU:C:2009:806, paras 39–43 in particular.

[33] *Parliament v Council*, C-540/03, ECLI:EU:C:2006:429, paras 52 and 57–74 in particular.

[34] *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, C-402/05, ECLI:EU:C:2008:461.

[35] Ibid, paras 285, 334–335, 356, 360 and 368 in particular.

[36] On this issue, see L Halleskov Storgaard, see note 12 above, pp 32–35 with further references.

[37] V Skouris in 'Dialogue Between Judges: Fifty Years of the European Court of Human Rights Viewed by its Fellow International Courts' (Strasbourg, 2009), available at: http://echr.coe.int/Documents/Dialogue_2009_ENG.pdf [last accessed on 15 May 2015], p 43.

[38] Cf note 21 above; J Callewaert, 'Unionisation and Conventionisation of Fundamental Rights in Europe: The Interplay Between Union and Convention Law and its Impact on the Domestic Legal Systems of the Member States', in J Wouters et al (eds), *The Europeanisation of International Law* (Asser Press, 2008) ch 7, pp 110–115; and Opinion of Advocate General Jacobs in *Bosphorus*, C-84/95, ECLI:EU:C:1996:312, para 53.

[39] S Douglas-Scott, see note 16 above, p 651 argues that the CJEU deliberately chose not to clarify the precise EU law position of the ECHR and the ECtHR.

[40] Cf S Douglas-Scott, see note 8 above, p 14 where it is explained how the often quoted examples of conflicts – *Hoechst v Commission*, C-46/87, ECLI:EU:C:1989:337 and *Orkem v Commission*, C-374/87,

B. The ECtHR's approach to the Union

The *Bosphorus* case is by far the most well-known example of the Strasbourg Court's attitude towards the Union.[41] Even though this case concerns the vertical level of the ECtHR's dialogue with the CJEU, it can reasonably be said that it encapsulates this court's general approach to the EU. In this, the ECtHR found the protection of fundamental rights under EU law to be equivalent to that of the ECHR and therefore established a general presumption of compliance with the Convention standards applicable whenever EU Member States implement a legal obligation flowing strictly from Union law.[42] This presumption can be refuted only, the ECtHR held, if the protection of ECHR rights in an individual case is considered to be 'manifestly deficient'.[43] Although the judgment has been widely criticised for adopting a too lenient approach on the Union at the expense of the human rights protection,[44] its conclusions still stand today, ten years later, where the *Bosphorus* message of deference is echoed in cases involving indirect review of procedures before EU institutions.[45]

Still, a number of ECtHR judgments in the post-Lisbon era involving Member States' implementation of AFSJ measures have generated attention. The obligations flowing from the EU principle of mutual trust underpinning this area are not easily reconcilable with the Member States' human rights commitments,[46] and since these cases did not involve implementation of EU law in the strict *Bosphorus* sense, the ECtHR was able to conduct a full fundamental rights review. The result is that the Strasbourg Court's high-profile judgments in *MSS* (2011) and *Tarakhel* (2014)

(F'note continued)

ECLI:EU:C:1989:387 – in fact are the products of either no, or no clear, Strasbourg jurisprudence. Cf also P Craig and G de Búrca, *EU Law: Text, Cases and Materials* (Oxford University Press, 2011), pp 404–405 regarding the so-called *Emesa Sugar* saga.

[41] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Siketi v Ireland* (Application no. 45036/98) (2006) 42 EHRR 1.

[42] Ibid paras 159–165.

[43] Ibid para 166 cf para 156.

[44] Cf eg LFM Besselink, *The European Union and the European Convention on Human Rights After the Lisbon Treaty: From 'Bosphorus' Sovereign Immunity to Full Scrutiny?*, Working Paper of 12 January 2008, available at: http://papers.ssrn.com/sol3/papers.cf.m?abstract_id=1132788 [last accessed on 15 May 2015]; C Costello, 'The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe' (2006) 6 *Human Rights Law Review* 87; and A Hinarejos Parga, 'Bosphorus v Ireland and the Protection of Fundamental Rights in Europe' (2006) 31 *European Law Review* 250.

[45] Illustrative hereof are *Connolly v 15 EU Member States* (Application no. 73274/01), decision 9 December 2008; and *Kokkelvisserij v the Netherlands* (Application no. 13645/05), decision of 20 January 2009. The ECtHR has, however, in a number of cases concerning the application of the presumption of equivalence conducted a surprisingly intense scrutiny of decisions by national and the EU judiciary under the Article 267 TFEU, cf. *Michaud v France* (Application no. 12321/11), 6 December 2012; and *Povse v Austria* (Application no. 3890/11), decision of 18 June 2013.

[46] On the tension between the principle of mutual trust and fundamental rights, see Meijers Committee (Standing Committee of Experts on International Immigration, Refugee and Criminal Law), *The Principle of Mutual Trust in European Asylum, Migration and Criminal Law* (2012); and J Polakiewicz, see note 11 above.

challenge the CJEU's definition of when EU Member States should disregard the presumption of fundamental rights compliance inherent in the principle of mutual trust when transferring asylum seekers under the Dublin regulation.[47]

In the horizontal dimension, the Strasbourg Court's references to, and involvement with, EU law and jurisprudence have been on a steady increase ever since the Charter was proclaimed in 2000.[48] It is careful to pay attention to the EU legal order whenever a case arises at the ECHR–Union law interface, and it has on several occasions explicitly referred to the 'useful guidance' of EU law.[49] The ECtHR, more specifically, engages with Luxembourg in the following forms and manners. First, it invokes EU law and CJEU case law as the reason for altering, clarifying and/or elevating the standard of protection under the ECHR.[50] In that respect EU law serves as a 'European consensus' which motivates and justifies the ECtHR's new or modified position.[51] Second, in cases of explicit jurisdictional overlap, ie where the CJEU has ruled on the circumstances of the case before it reaches Strasbourg, the ECtHR indirectly underscores the authority of the Luxembourg Court by *inter alia* emphasising the 'strong persuasive value' and 'extensive reasoning' of the CJEU's rulings.[52] Third, the ECtHR also promotes the Contracting Parties' observance of EU law as a general legitimate interest under the Convention.[53] Finally, it enforces and sanctions the Contracting States' non-observance of EU law under the ECHR. The Strasbourg Court has in fact done so for a long period in cases displaying a relative clear violation of a well-defined EU law provision.[54] However, in the 2011 case of *Ullens de Schooten and Rezabek* the ECtHR went a step further and incorporated the broadly defined criteria developed by the CJEU in *CILFIT* as the standard to meet under the Convention when assessing the conformity of a refusal by a national court to refer a question to the CJEU for a preliminary ruling (Article 267 TFEU) with Article 6(1) ECHR.[55]

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[47] *MSS v Belgium and Greece* (Application no. 30696/09) (2011) 53 EHRR 2; and *Tarakhel v Switzerland* (Application no. 29217/12) (2015) 60 EHRR 28. On these cases, see the literature referred to note 9 above; S Peers, 'Tarakhel v Switzerland: Another Nail in the Coffin of the Dublin System?' (5 November 2014) *EU Law Analysis*, available at: http://eulawanalysis.blogspot.co.uk/2014/11/tarakhel-v-switzerland-another-nail-in.html [last accessed on 15 May 2015]: and below sections III.B and V.B.

[48] S Douglas-Scott, see note 16 above, pp 640–644; and A Rosas, see note 21 above, pp 168–171.

[49] See eg *Eskelinen v Finland* (Application no. 63235/00) (2007) 45 EHRR 43, para 60.

[50] See eg *Maslov v Austria* (Application no. 1638/03) (2008) 47 EHRR 20; *Christine Goodwin v UK* (Application no, 28957/95), (2002) 35 EHRR 18; and *Zolotukhin v Russia* (Application no. 14939/03) (2012) 54 EHRR 16.

[51] See eg *Neulinger v Switzerland* (Application no. 41615/07) (2012) 54 EHRR 31, para 135.

[52] See eg *Stec and Others v UK* (Application no. 65731/01) (2006) 43 EHRR 47, para 58; and *Ramaer and Van Willigen* (Application no 34880/12) (2013) 57 EHRR 3.

[53] *Avotin v Latvia* (Application no. 17500/07), judgment of 25 February 2014.

[54] Cases such as *Hornsby v Greece* (Application no. 18357/91) (1997) 24 EHRR 250; and *Mendizabal v France* (Application no. 51431/99) (2010) 50 EHRR 50.

[55] *Ullens de Schooten and Rezabek v Belgium* (Application no. 3989/07), judgment of 20 September 2011, paras 55–67. with reference to *CILFIT v Ministero della Sanità*, C-283/81, ECLI:EU:C:1982:335.

The interesting effect of this approach is that the ECtHR by means of Article 6 ECHR partly remedies the *de facto* non-existence of a right to direct appeal to the CJEU over a national court's refusal to initiate the preliminary ruling procedure.

III. UNDERSTANDING THE CHALLENGES FACING EUROPEAN FUNDAMENTAL RIGHTS PROTECTION

Before explaining the proposed framework for the CJEU–ECtHR interaction, it is relevant to clarify precisely why this framework is needed, ie to identify how the authority claims of the two courts can collide as well as other potential factors which can challenge the overall objective of a strong and coherent European fundamental rights standard. In order to do so, one must start by addressing the strengthened yet complex and multifaceted role and position of the ECHR in EU law post-Lisbon.[56]

A. The normative framework for the CJEU's approach to Strasbourg

From a normative perspective, the Lisbon Treaty has created a closer linkage between EU fundamental rights and the Convention system and thereby not only reinforced the position of the ECHR in EU law but also firmly underlined that Union law treats the ECHR differently than other international legal sources. In addition to maintaining its status as a recognised source of the fundamental rights of the general principles of EU law (Article 6(3) TEU), the ECHR will become a EU law source in its own right once (if) the Union accedes to the ECHR (Article 6(2) TEU).[57] Crucially, this step will also make the Union as such subject to the external scrutiny of the ECtHR. Finally, the ECHR also holds an important function as regards the Charter (Article 6(1) TEU): 17 out of the Charter's 53 provisions correspond to rights of the Convention,[58] and it follows from the 'homogeneity clause'[59] in Article 52(3) EUCFR that the meaning and scope of these provisions, as a minimum, shall be the same as laid down in the Convention. The explanations relating to this provision specify that the ECtHR's case law must be observed as well, and that the meaning and scope of the authorised limitations to the provisions encompassed by Article 52(3) EUCFR must be aligned with the Strasbourg standard.[60] Article 52(3) EUCFR is put in place to 'ensure the necessary consistency' between the Charter and the ECHR,[61] and it therefore provides the legal basis for ensuring what ECtHR and CJEU Presidents Costa and Skouris called for in 2011, namely 'the greatest

[56] On this issue, see W Weiss 'Human Rights in the EU: Rethinking the Role of the European Convention on Human Rights After Lisbon' (2011) 7 *EU Constitutional Law Review* 64.

[57] Article 216(2) TFEU; and *Opinion 2/13*, EU:C:2014:2454, para 180.

[58] These are identified in the explanations to the Charter, see note 2 above. Different paragraphs of the same Charter provisions are in this respect counted as one insofar as they correspond to the same ECHR provision.

[59] Opinion of AG Kolkott in *Solvay*, C-110/10, ECLI:EU:C:2011:257, para 95, and *Bonda*, C-489/10, ECLI:EU:C:2011:845, para 44.

[60] Explanations relating to Article 52(3) EUCFR.

[61] Ibid.

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coherence between the Convention and the Charter insofar as the Charter contains rights which correspond to those guaranteed by the Convention'.[62]

Article 52(3) EUCFR is closely linked to Article 53 EUCFR according to which the Charter must not be construed in a way which restricts or adversely affects fundamental rights protected under Union law, the Member States' constitutions and international law, including the ECHR.[63] The CJEU has underlined that these provisions do not – as long as the EU has not acceded to the ECHR – entail the Convention being formally incorporated into European Union law.[64]

The commitment to European fundamental rights coherence signaled by Article 52(3) EUCFR and Article 53 EUCFR is somewhat compromised by the fact that the wording and structure of the corresponding Charter provisions are very different from their ECHR counterparts, the fact that the Charter's approach to limitation of rights differs considerably from that of the ECHR and that the precise meaning of Article 52(3) EUCFR remains disputed (this is due, for example, to the vague manner in which the corresponding rights are identified and the ongoing debate about the authoritative status of Strasbourg case law).[65] In addition to causing undue uncertainty about the precise legal implications of the horizontal provisions, the crucial effect of these factors is that it is left for the CJEU to clarify exactly how the coherence of European standards is to be carried out in practice.

B. Identifying the challenges to European fundamental rights protection at the CJEU–ECtHR interface

The consequence of the normative framework just outlined is that the competences of the CJEU and the ECtHR are profoundly entangled. In jurisdictional terms, both courts are empowered to litigate claims relating to the human rights compatibility of Member States acting within the scope of Union law. This implies that the ECtHR today, as explained above, performs a (lenient) indirect review of the Union where an alleged non-compliance with the ECHR is grounded in a Contracting State's obligations under EU law or in procedures of EU institutions. In the event that the Union accedes to the ECHR, EU law and institutions can be reviewed directly by the ECtHR for compliance with the Convention. Given that the CJEU will be ensured a first say over disputes relating to EU law,[66] the Strasbourg Court will, once accession

[62] Joint Communication from Presidents Costa and Skouris, see note 2 above.

[63] On the argument made by CJEU in *Opinion 2/13* as regards Article 53 EUCFR, see L Halleskov Storgaard, note 12 above, pp 8–9 and 21–23 with further references.

[64] *Åklageren v Åkerberg Fransson*, C-617/10, ECLI:EU:C:2013:105, para 44; *Schindler v Commission*, C-501/11, ECLI:EU:C:2013:522, para 32; and *Dirextra Alta Formazione*, C-523/12, ECLI:EU:C:2013:831, para 20.

[65] L Halleskov Storgaard, see note 12 above, pp 29–30; NA Lorenz et al, see note 21 above, pp 162–217; K Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 *European Constitutional Law Review* 375; and T Lock, 'The CJEU and the ECtHR: The Future Relationship Between the Two European Courts' (2009) 8 *The Law and Practice of International Courts and Tribunal* 375, pp 383–385. See also Section V.A below on the CJEU's inconsistent approach to Article 52(3) EUCFR.

[66] This is the rationale underpinning the prior-involvement mechanism in the Draft Accession Agreement. On the issue of the ECtHR's competence over the CFSP, see Section V.C below.

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is carried out, be able to overrule the fundamental rights review conducted by the Luxembourg Court in individual cases. In substantive terms, the material overlap between EU fundamental rights (the Charter in particular) and the ECHR entails that the CJEU and the ECtHR supervise the observance of corresponding human rights provisions.

These entanglements come, as explained by Tuori, with the potential for inter-systemic conflicts of authority.[67] Since EU law and the Convention system are not integrated in the same manner as EU law and national law are, the conflicts arising at the CJEU–ECtHR interface are of a different nature and/or present different challenges to those arising at the CJEU–national constitutional court interface. However, the above outlined privileged status and role of the ECHR in Union law entails that the conflicts in the EU–ECHR cross-field also, to some extent at least, differ from those encountered at the interface between Union law and the international legal order in general.

I submit that the authority clashes between the CJEU and the ECtHR can be divided into three interrelated categories. The first is interpretative competition caused by the CJEU's and the ECtHR's overlapping substantive and jurisdictional powers. The second variant is contests about the weight or priority to be given to fundamental rights when such rights collide with other legitimate objectives. Contests of this kind are the product of, first and foremost, a combination of the jurisdictional entanglements of the two courts and their different 'normative umbrellas'[68], ie the fact that the ECtHR a human rights court monitoring exclusively a human rights convention of an international legal nature, whereas the CJEU supervises a full-blown supranational legal order that pursues a wide range of objectives. Since the CJEU, as was famously explained in *Internationale Handelsgesellschaft* and recently reiterated in *Opinion 2/13*, adjudicates on EU fundamental rights within 'the framework of the structure and objectives of the EU',[69] the Charter and the fundamental rights of the general principles are construed, applied and sometimes balanced against broader Union objectives of an economic and market orientated nature, for example.[70] That is not to say that the ECtHR is unfamiliar with the need to balance human rights with other legitimate concerns,[71] but merely that it only is natural if the ECtHR's approach to such cases is informed by the fact that it is the guardian of human rights convention. Authority conflicts comparable to those of the first and second categories can also be detected in the cross-field between EU law and international law in general – illustrative hereof is the EU and UN regimes' different balancing of fundamental rights and anti-terror

[67] K Tuori, 'Transnational Law' in M Maduro et al (eds), *Transnational Law: Rethinking European Law and Legal Thinking* (Cambridge University Press, 2014) ch 1, pp 32–33.

[68] This expression is borrowed from NA Lorenz et al, see note 21 above, p 200.

[69] *Internationale Handelsgesellschaft*, 11/79, ECLI:EU:C:1970:114, para 4; and *Opinion 2/13,* EU:C:2014:2454, para 170.

[70] Cf Section IV.D.3 below as regards the principle of 'substantive awareness'.

[71] Such balancing is inherent in the ECHR's limitation regime and is also conducted by the ECtHR when determining the extent of the Contracting Parties' positive obligations under the Convention.

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objectives in the *Kadi I* case,[72] but they are more complicated in nature at the EU law–ECHR interface because of the profound overlap between these two regimes and national law. This is exemplified by the argument made by the CJEU in *Opinion 2/13* about the Member States' obligations under the EU principle of mutual trust prevailing over their obligations under the Convention which is (very likely) motivated by the ECtHR's abovementioned judgment in *Tarakhel*.[73]

The third and final type of conflict is the one presenting itself in the event of an EU accession to the ECHR, namely the question of ultimate European fundamental rights authority triggered by the fact that the CJEU's interpretation of EU fundamental rights will directly compete and, potentially, collide with that of the ECtHR. Accordingly, even though the Strasbourg Court, strictly speaking, is competent to rule only on the Convention,[74] the above outlined linkage between the ECHR and the Charter coupled with the fact that the CJEU now utilises the Charter as its main or sole fundamental rights standard, entail that it often in practice will be the CJEU's interpretation of its own 'Bill of Rights' which is tried and potentially overruled in Strasbourg.[75] The complexities pertaining to all three kinds of conflicts are accentuated by the fact that both the CJEU[76] and the ECtHR[77] have promoted a constitutionalisation of their respective regimes which, from their individual viewpoints at least, serves to reinforce their respective claim to authority.[78]

In order to fully comprehend the EU–ECHR interface one must adopt a perspective which transcends the conflict of authority scenarios in the sense that it too acknowledges that other factors can challenge the objective of a strong and coherent European fundamental rights standard. Divergence or, equally pertinent, apparent divergence between EU fundamental rights and the ECHR standards is not *per se* the product of a judicial struggle on the final say. It may also be ascribable, wholly or partly, to a multitude of other interrelated factors, including: insufficient attentiveness to the broader implications of rulings involving overlapping human rights; lack of clarity about the concepts being cross-fertilised (think of the 'systemic deficiency' criterion in Dublin cases); political/institutional interests in not relying openly on each other's authorities;[79] the different 'legal cultures' of the

[72] *Kadi I*, ECLI:EU:C:2008:461.

[73] *Opinion 2/13,* EU:C:2014:2454, paras 158, 167–168 and 191–195 in particular; and L Halleskov Storgaard, see note 12 above, pp 9 and 23–26 with further references. This argument is addressed in Section
V.B below.

[74] Articles 19 and 32 ECHR.

[75] L Halleskov Storgaard, see note 12 above, pp 34–35; NA Lorenz et al, see note 21 above.

[76] *Van Gend en Loos,* 26/62, ECLI:EU:C:1963:1; *Costa v. E.N.E.L,* 6/64, ECLI:EU:C:1964:66; and *Opinion 2/13,* EU:C:2014:2454.

[77] *Loizidou v Turkey* (Application no. 15318/89) (1997) 23 EHRR 513; *Bosphorus v Ireland,* see note 41 above, para 156; and *Behrami & Behrami v France* (Application no. 71412/01) and *Saramati v France, Germany and Norway* (Application no. 78166/01), decision of 2 May 2007, para 145.

[78] See Section IV.D.2 below.

[79] S Douglas-Scott, see note 16 above, pp 652–660.

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two courts;[80] and/or the just mentioned different 'normative umbrellas' of EU law and the ECHR system.

IV. DISCURSIVE PLURALISM IN THE EUROPEAN FUNDAMENTAL RIGHTS AREA

So how can the challenges to European fundamental rights protection outlined above best be accommodated and human rights coherence and effectiveness ensured? In *Opinion 2/13* the CJEU made use of a classic constitutional approach to firmly emphasise that the Union's autonomy claim *vis-à-vis* international law, as declared in *Kadi I*,[81] includes also the ECHR.[82] Thus, the Opinion mentions neither the ECHR's place in EU constitutional law nor the 'role and importance of its interpreters for the protection of fundamental rights at the level of the European Union'.[83] The internal, sovereignty-based, perspective of *Opinion 2/13* implies that the envisaged accession is perceived of and portrayed as a threat to the Union's constitutional autonomy, and that the CJEU's interest in countering this threat by positioning Union law as the superior fundamental rights regime in Europe prevails over the interest in ensuring European fundamental rights coherence and EU law compliance with international human rights law.[84] Strictly speaking, in *Opinion 2/13* the CJEU solely pronounced its view on the primary law compatibility of an accession on the terms envisaged by the Draft Accession Agreement. Nevertheless, the confrontational tone of the Opinion and the far reaching nature of several of the CJEU's objections, including the one relating to the implications of the EU principle of mutual trust on the level of human rights protection in the AFSJ area,[85] make it plausible to argue that the rationale underlying *Opinion 2/13* is indicative of the Luxembourg Court's current attitude to the Strasbourg regime and therefore elucidates on why the CJEU today is referring less to and engaging less explicitly with the ECHR and ECtHR case law.[86]

The Union is undisputedly a unique constellation and its supranational features justify it being granted some privileged treatment on the international legal scene, including when it accedes to the ECHR. The problem with the CJEU's 'black box'[87] approach to the Strasbourg system in *Opinion 2/13* is that it

[80] NA Lorenz et al, see note 21 above.

[81] *Kadi I*, ECLI:EU:C:2008:461; and Section II.A above.

[82] L Halleskov Storgaard, see note 12 above, pp 32–35.

[83] V Skouris, see note 37 above, p 43; and Section II.A above.

[84] Ibid.

[85] See Section V.A below.

[86] L Halleskov Storgaard, see note 12 above, pp 34–35 and Section V.B below. Cf S Iglesias Sánchez, 'The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights', (2012) 49 *Common Market Law Review* 1565 who notes (p 1601) that the CJEU today determines the value of Strasbourg case law 'through the prism of the autonomy of the EU system'.

[87] This expression is borrowed from K Tuori, see note 67 above, who (pp 13 and 35) refers to 'the black box' model as encapsulating a state-sovereigntist view of modern law.

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profoundly disregards the legal realities. The preceding sections have demonstrated that while EU law and the ECHR system, from a formal perspective, are two different and self-standing protection systems, they are intertwined to such an extent that it makes no sense to approach them as if they are self-sufficient or self-contained legal systems. Because of the particular, privileged role and position of the ECHR in EU law compared with other international law instruments, it is also wrong to straightforwardly align the ECHR with the international legal order in general in this respect – at least if the objective is to ensure European fundamental rights coherence.

What is needed, therefore, is an alternative perspective on how the two systems can coexist in a way which recognises their independent status and respective claims to authority without that leading to an erosion of the overall protection standard. In search of such, it is only natural to turn to the growing body of literature which promotes moderate or discursive pluralism as the best theoretical tool to describe and manage the multileveled global legal landscape. In the following, the essence of discursive pluralism is outlined (Section IV.A) and subsequently exemplified by an account of the particular perspectives of a number of authors assigned to this category (Section IV.B). This serves as a stepping stone for addressing Maduro's theory on contrapunctual law, including in particular the principles he has devised for judicial dialogue in the intra-EU context of pluralism (Section IV.C). It is, essentially, these discursive principles which I propose as a descriptive and normative frame for the relationship between the CJEU and the ECtHR. This argument is demonstrated and concretised in the remaining part of this section; by explaining its doctrinal, case law and normative basis (Section IV.D.1); clarifying the absence of a 'constitutional' terminology (Section IV.D.2); and proposing an additional principle to complement the (external) contrapunctual principles in the relations of EU law with the ECHR system.

A. What is discursive pluralism?

When engaging with the ever growing body of literature which strives to make sense of the modern world order, one quickly encounters the general problem facing the scholarly debate, namely that is impeded by the participating authors' fundamentally different terminological points of departure. The dominant concepts – 'pluralism', 'constitutionalism' and the fusion 'constitutional pluralism' – share the unfortunate fate of having neither an inherent meaning nor being subject to uniform agreement on their specific content, interrelation and/or context of application.[88] This is also the case as regards the category of literature which I collectively refer to as 'discursive pluralism' and which includes authors such as Maduro ('contrapunctual law'),[89]

[88] See, for example, JHH Weiler, 'Prologue: Global and Pluralist Constitutionalism – Some Doubts' in G de Búrca and JHH Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge University Press, 2012) p 9; and M Avbelj and J Komárek, 'Introduction' in M Avbelj and J Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing, 2012) ch 1, p 4.

[89] MP Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in N Walker (ed), *Sovereignty in Transition* (Hart Publishing, 2003) ch 2; 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' (2007) 1 *European Journal of Legal Studies* 1;

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Walker ('epistemic constitutionalism);[90] Halberstam ('plural constitutionalism'),[91] Kumm ('cosmopolitan constitutionalism'),[92] de Búrca ('soft constitutionalism');[93] and Tuori ('transnational law').[94] Indeed, when one looks beyond the fact that the titles of the theories of these scholars allude to very different conceptions of the contemporary legal world, it is possible to deduce a common substantive core from their writings, and it is this common core which this article coins 'discursive pluralism'.

What the scholars belonging to the category of discursive pluralism share is a pluralistic, heterarchical view on the organisation and interaction of the overlapping national, supranational and international legal systems on the global scene: each of these is perceived to be principally autonomous and subject to its own rule of recognition and neither holds a valid claim to legal superiority over another. Their shared standpoint is thus based on a principal disagreement with the classic constitutional understanding that law is organised in a single Kelsian-like 'Stufenbau' with a specific legal *Grundnorm* placed at the apex of the legal pyramid[95] – whether it is the traditional state bound version, the EU version which endorses the rationale and language of the CJEU's jurisprudence on the Union's international constitutionalisation,[96] or the transnational/global model hereof which allocates the supreme and unifying position to an international law regime, most often that of the UN.[97]

(F'note continued)

and 'Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism' in JL Dunoff and JP Trachtman (eds), *Ruling the World: Constitutionalism, International Law and Global Governance* (Cambridge University Press, 2009) ch 12.

[90] N Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review*; and 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders' (2008) 6 *International Journal of Constitutional Law* 3.

[91] D Halberstam, 'Systems Pluralism and Institutional Pluralism in Constitutional Law: National, Supranational and Global Governance', in M Avbelj and J Komárek (eds), see note 88 above, ch 5; and 'Local, Global and Plural Constitutionalism: Europe Meets the World' in G de Búrca and JHH Weiler (eds), see note 88 above, ch 4.

[92] M Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship Between Constitutionalism In and Beyond the State', in JL Dunoff and JP Trachtman (eds), see note 89 above, ch 10.

[93] G de Búrca, 'The ECJ and the International Legal Order: A Re-evaluation' in G de Búrca and JHH Weiler (eds), see note 88 above, ch 3.

[94] K Tuori, see note 67 above.

[95] H Kelsen, *General Theory of Law and State* (Harvard University Press, 1945), pp 393–395.

[96] On classic constitutionalism and the EU, see, eg, E Stein, 'Toward Supremacy of Treaty-Constitution by Judicial Fiat: On the Margin of the Costa Case' (1965) *Michigan Law Review* 63; M Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) 11 *European Law Journal* 262; and MP Maduro, see note 89 above (2003), pp 503–505.

[97] Cf eg J Habermas, *Divided West* (Polity, 2006); B Fassbender, *The United Nations Charter as the Constitution of the International Community* (Martinus Nijhoff, 2009); and C Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century, General Course on Public International Law' (1999) 281 *Recueil des Cours* 9. E de Wet, 'The Emergence of

Furthermore, when advancing their view on law beyond the state all of the above listed scholars, except for Tuori,[98] couple their pluralistic outlook with an alternative perspective on how constitutionalism can contribute to resolve cross-boundary contests – a perspective that does not embody the traditional constitutionalist virtues of hierarchy and ultimate authority. Instead of being invoked to superimpose the authority claim of one legal system on another, constitutionalism is in these writings first and foremost redesigned as a framework for managing plurality (of norms, judiciaries and or/claims of authority) or, put otherwise, a means to soften or moderate pluralism. The viability of such common meta-framework to which actors of self-standing, equally-footed legal systems must voluntarily subscribe in order to achieve a harmonious co-existence, is what distinguishes discursive pluralism from the 'radical' or 'strong' theories on legal pluralism put forward by authors like Krisch,[99] Teubner[100] and Fischer-Lescano.[101]

B. Different models of discursive pluralism

The similarities between the writings of the scholars in the discursive pluralistic category end, to some extent at least, when the character, content and context of the proposed common 'unifying' framework is identified: it is presented in various shapes, with a varying degree of constraining effect on pluralism and in mainly descriptive or normative models. Still, two interconnected messages recur: the importance of inter-systemic dialogue, mutual learning and cross-fertilisation but also the pertinence of acknowledging that the distinct, to use the words of Walker, 'epistemic', nature of each legal order constitutes an inherent limit to the universalisability or unifying effect of the proposed frameworks.[102] Illustrative hereof are the theories of de Búrca, Tuori and Maduro which are accounted for in the following: while the first two are addressed in this section, the work of Maduro is addressed in the following one.

The normative soft constitutionalist paradigm proposed by de Búrca as a more suitable approach to the relationship between EU law and international law than that spelled out by the CJEU in the *Kadi I* case consists of three main components:[103]

(F'note continued)
International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order' (2006) 19 *Leiden Journal of International Law* 611 argues that the ECHR constitutes the core value system of the emerging international constitutional order.

[98] The pertinence of adding 'constitutionalism' to 'pluralism' is discussed in Section IV.D.2 below.

[99] N Krisch, 'The Case for Pluralism in Postnational Law' in G de Búrca and JHH Weiler, see note 88 above ch 5.

[100] G Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press, 2012); and 'Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?' in C Joerges et al. (eds), *Transnational Governance and Constitutionalism* (Hart Publishing, 2004).

[101] A Fischer-Lescano and G Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', (2004) 25(4) *Michigan Journal of International Law* 999. For an overview and discussion of 'radical' pluralist theories, see K Tuori (2014), see note 67 above, pp 34–37; and G de Búrca, see note 93 above, pp 126–131.

[102] N Walker, see note 90 above, p 338; and M Avbelk and J Komárek, see note 88 above, pp 5–6.

[103] G de Búrca, see note 93 above, pp 138–148 and 278–284 in particular. De Búrca (p 137) compares her theoretical perspective with that of Bogdandy, Burke-White, Kumm and Halberstam.

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(i) the assumption of an international community of some kind; (ii) a Kantian-inspired emphasis on universalisability, ie a duty 'always to take account of the position of the other in reaching decision which have implications for that other, and to articulate ones own position as far as possible in terms which are cognisable to the other';[104] and (iii) the recognition of common principles of communication for addressing authority conflicts which could be based on customary international law and the UN Charter.[105] Applied to the circumstances of *Kadi I*, the difference between a soft constitutionalist approach and the sovereigntist-based one utilised by the CJEU would, de Búrca clarifies, not be seen in the final conclusion of the case, but in the way in which that conclusion was reached: had the Luxembourg Court adhered to the soft constitutionalist mindset, its reasoning would be phrased in a manner prioritising inter-systemic dialogue by, for example, including references to human rights standards in international law and/or making use of a so-long-as-style of reasoning along the lines of the *Solange* judgments from the German Constitutional Courts or the *Bosphorus* ruling from the ECtHR.[106]

Tuori, for his part, in his recently launched theory on transnational law, expressly adheres to a discursive form of pluralism.[107] He finds that we obtain a better understanding of the current legal landscape by focusing not only on cross-borders conflicts, but also on what makes overlap, interpenetration and consensus-orientated dialogue ('interlegality')[108] possible in the interspace between national law and 'transnational law'[109] or between instances of the latter.[110] In that respect he emphasises the important role played by the perspectivism of all legal actors: relying on his perception of the multi-layered nature of law, Tuori observes that in addition to the (surface level) explicit normative material, a legal order includes a (sub-surface) legal-cultural layer without which surface level norms could not be applied, interpreted or systemised.[111] This implies, more concretely, that when seeking to understand and normatively guide the relations between transnational systems, one must be aware that legal actors are inevitably influenced by the *Vorverständnis* or perspectivism that their own respective legal culture has equipped them with, also when they navigate in areas of overlap.[112] Tuori holds that it is only through transnational legal practice that a transnational legal culture can develop: when transnational interlegality exists, it is because it is made possible by the shared

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104 Ibid, pp 281–282.

105 Ibid, pp 135–148 and 281–283.

106 Ibid. pp 122 and 138–145 in particular.

107 K Tuori, see note 67 above, p 11.

108 Ibid, pp 41–49 with further references to the work of B de Sousa Santos.

109 Ibid, pp 17–23 where 'transnational law' is defined as legal orders or legal systems which have an international law rooting but have eluded the control of nation states. Both EU law and the ECHR system are identified as being transnational legal systems.

110 Ibid, p 44 in particular.

111 Ibid, p 46 and K Tuori, *Critical Legal Positivism* (Ashgate Publishing, 2002), pp 147–197.

112 Ibid, p 47.

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features informing legal actors' *Vorverständnis*, including the basics of a 'common legal language'.[113] In normative terms, Tuori's theory therefore advocates:

> discursive treatment of conflicts of authority, a search for compatible solutions to such conflicts, mutual learning processes and inclusion of the perspective of relevant 'foreign' legal orders in horizontal coherence-seeking reconstructions of law. It embraces a horizontal rather than a vertical notion of coherence-creating relations and rejects hierarchical meta-principles.[114]

Tuori does not elaborate much on how precisely this form of discursive pluralism is to be implemented in practice. He does, however, insist on the need for legal actors to adopt broader perspectives when adjudicating in areas of legal and jurisdictional overlap and in doing so he gives the example that national courts should be prepared to adopt the perspective of European law at large (comprising EU law, domestic law and COE norms).[115] He furthermore observes that his perspective on transnational law comes close to the theories advanced by Walker, Kumm and Maduro.[116]

C. Maduro on the European fundamental rights area and contrapunctual law

The writings of Maduro are particularly interesting in this context because they present a very concrete model of discursive pluralism which is centered on the role and responsibility of courts in the context of constitutional and legal pluralism (the latter being defined as 'the expansion of relevant legal sources, the multiplication of competing legal sites and jurisdictional orders, and the existence of competing claims of final authority').[117] For present purposes Maduro's work offers useful perspectives on how to conceptualise the EU law-ECHR interface as well as on how to describe and manage the relationship between the CJEU and the ECtHR within this interface.

When serving as an EU Advocate General, Maduro penned the opinion in the 2008 *Elgafaji* case where he launched the idea that the fundamental rights systems at national, regional and supranational level in Europe should be perceived as being independent regimes but at the same time also individual, equally important and equal-footed components of a larger European fundamental rights area.[118] This broader area will, however, only be constructed, Maduro explained, if the different systems embrace this understanding and act in accordance herewith when navigating in the area of overlapping competences.[119] The *Elgafaji* opinion was written at a

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[113] Ibid, pp 47–49.

[114] Ibid, p 54.

[115] Ibid, pp 44–45.

[116] Ibid, pp 40 and 54.

[117] MP Maduro 'Three Claims for Constitutional Pluralism' in M Avbelj and J Komárek, see note 88 above, ch 4, pp 70–71.

[118] Opinion of Advocate General Maduro in *Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie,* C-465/07, ECLI:EU:C:2008:479, para 22.

[119] Ibid. Cf similar, Opinion of Advocate General Maduro in *Kadi I*, C-402/05, ECLI:EU:C:2008:11, para 44.

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point of time where the general principles of law were the only source of EU fundamental rights protection, yet the usefulness of conceiving of national law, EU law and the ECHR as pieces in the puzzle of a broader European fundamental rights area has, arguably, only increased since. Indeed, one can plausibly argue that following the Lisbon amendments, the pertinent question is not whether such area exists, but, rather, whether the protection standard within the European fundamental rights area established is coherent and effective.

The perspective introduced in *Elgafaji* is evidently informed by Maduro's scholarly writings on European constitutionalism in which he promotes a pluralistic, heterarchical conception of the relationship between EU law and national law.[120] In this work he uses the distinction between legal order, legal practices and legal systems laid out in Tuori's legal theory[121] to propose that EU law and domestic law of the EU Member States should be conceived as being, on the one hand, autonomous legal orders and, on the other hand, forming part of a common broader European legal system.[122] Maduro uses this conceptual understanding as the stepping stone for advancing his normative theory, termed 'contrapunctual law',[123] the main feature of which is a set of communicative meta-principles embodying the conditions and the language which national courts and the CJEU must subscribe to and utilise in order for this broader legal system to 'be viable and fulfil the aims we ascribe to it'.[124] In other words, the principles construct a normative framework for reducing or managing conflicts between national courts and the EU judiciary and for promoting dialogues between them.[125]

The logic underpinning the contrapunctual principles is that the plurality of legal orders and authority claims in the European legal sphere warrant a particular focus on the role of courts and the character of their adjudication.[126] As such, courts are not merely 'conduits of normative commands but institutions that aggregate preferences' and their legal reasoning has implications that go beyond the confines of their own legal order.[127] The meta-principles, Maduro explains, to a large extent simply enhance and refine the mechanisms of mutual recognition, discourse and compatibility already existing in the relation between (some) national constitutional courts and the CJEU.[128]

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120 MP Maduro, see notes 89 and 117 above.

121 K Tuori, *Critical Legal Positivism* (Ashgate Publishing, 2002).

122 MP Maduro, see note 117 above, p 70; and note 89 above (2003), p 534.

123 MP Maduro, see note 89 above (2003), p 523 where he explains that the title of his theory is inspired by the musical method of harmonising different melodies that are not subject to hierarchical relations *per se.*

124 Ibid, p 534. Although the contrapunctual principles were introduced already in Maduro's earlier writings, cf MP Maduro, note 89 above (2003), pp 524–531, they are in this later works redesigned as modelled specifically to apply to EU and national court, cf MP Maduro, note 89 above (2007), pp 17–21; and (2009), pp 374–379.

125 MP Maduro, see note 89 above (2007) p 17.

126 Ibid p 2.

127 MP Maduro, 'In Search of a Meaning and Not in Search of the Meaning: Judicial Review and the Constitution in Times of Pluralism' (2013) *Wisconsin Law Review* 54, pp 542–544 and 559–563.

128 MP Maduro, see note 89 above (2003) pp 524–525.

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The first principle is 'systemic compatibility' and identifies the basic condition for a constructive pluralistic dialogue: legal orders and judicial institutions only can defer to each other and accommodate their respective jurisdictional claims if they are compatible in systemic terms.[129] Such compatibility exists, according to Maduro, whenever overlapping legal orders belong to the same political community and/or adhere to the same essential values.[130] A very similar idea is advanced by Halberstam who explains that a (principled) constitutional pluralistic practice, in the form of a mutual accommodating judicial dialogue between overlapping legal systems, can take place only if such systems possess an embedded openness to the authority of each other or to some form of collective governance.[131]

The remaining two principles flow from the overall assumption that a harmonious and fruitful judicial discourse within the European legal area is premised on all participants displaying mutual respect and attentiveness, including the idea that the identity of one legal order must 'not be affirmed in a manner that either challenges the identity of the other legal orders or the pluralistic conception of the European legal order itself'.[132] It will be argued below that these two principles encapsulate the above-identified essential messages emanating from the writings on discursive pluralism.

The second principle is 'institutional awareness' obliging the EU and national judiciaries to be continuously aware of the pluralistic context in which they operate, including of the fact 'that they don't have a monopoly over rules and that they often compete with other institutions in their interpretation'.[133] It implies that these courts must reinforce their mutual understanding of their respective virtues and malfunctions, which, ideally, may lead them to conclude that the constitutional values of one legal order can be better guarded by a court of another such order and/or that 'the respect owed to the identity of another legal order should lead them to defer to that jurisdiction'.[134] The requirement of institutional awareness therefore obliges courts to develop instruments for institutional comparison as well as mechanisms to adjust or even defer to the authority claims of each other.[135] The third and final principle, a 'shared hermeneutic framework', is intended to guide courts in their formulations of their decisions.[136] It does not require adherence to a particular theory of the law but, rather, that any judicial body (national or European) should internalise in their rulings the consequences to the common broader legal area and formulate their rulings in accordance with that.[137]

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129 MP Maduro, see note 89 above (2007) p 17; and (2009) p 378.

130 Ibid; and MP Maduro, see note 89 above (2003), pp 531–534.

131 D Halberstam, see note 91 above, pp 152, 160–175 and 200–202.

132 MP Maduro, see note 89 above (2003) p 526.

133 MP Maduro, see note 89 above (2007), p 18; (2009), pp 378–379; and (2003) pp 530–533.

134 Ibid.

135 Ibid.

136 MP Maduro, see note 89 above (2007), p 18; and (2009), pp 374–375.

137 Ibid; and MP Maduro, see note 89 above (2003), pp 526–530.

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D. The proposal: the external contrapunctual principles

1. Explaining the external applicability of the contrapunctual principles

Maduro himself assigns contrapunctual law to the (broad) and immensely popular category of constitutional pluralistic literature[138] – the core content of which is the pluralistic, interactive and non-hierarchical analysis of the relations between EU law and national law introduced by MacCormick in the early 1990s in response to the binary sovereign-based perceptions of the question of ultimate authority spelled out in the course of the Union's constitutionalisation.[139] What Maduro implicitly did in the *Elgafaji* opinion, however, was to use the perspective of contrapunctual law to guide the CJEU's approach to the relationship between EU law and the Strasbourg regime, ie to the external relations of EU law.[140] This approach is as such neither controversial nor innovative as it has long been advocated that constitutional pluralism in some versions has a scope which extends even to the relations of two international regimes.[141] The potential for such wider applicability of the contrapunctual principles is also recognised in several places in Maduro's academic writings,[142] but this aspect of his theory is underdeveloped.

This article picks up on the *Elgafaji* proposal: the rationale underpinning contrapunctual law fits well with the legal realities in the crowded house of European fundamental rights where a successful relationship between the CJEU and the ECtHR is a precondition for ensuring a coherent and effective European protection standard. I find that there are valid grounds for proposing the contrapunctual principles as the descriptive and normative frame for the interaction between the two courts. This argument will be elaborated upon in the following where it is also demonstrated that it rests on a firm: (i) doctrinal; (ii) case law; and (iii) normative basis.

As regards the doctrinal basis, I submit that the contrapunctual principles, in addition to being a constitutional pluralistic theory on intra-EU constitutionalism, also embody the idea of discursive pluralism. Indeed, what first springs to mind when comparing contrapunctual law with the theories just accounted for is that the

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[138] MP Maduro, see note 89 above (2003), p 523. K Jaklic, *Constitutional Pluralism in the EU* (Oxford University Press, 2014), p 6, characterises constitutional pluralism as the 'dominant branch' of constitutional thought in EU law today, cf similarly, J Weiler, note 88 above, p 12 who, nevertheless, remains hesitant towards the suitability of the 'constitutional' label. On this, see Section IV.D.2 below.

[139] N MacCormick, 'Beyond the Sovereign State' (1993) 56 *Modern Law Review*; and 'The Maastricht-Urteil: Sovereignty Now' (1995) 1 *European Law Journal* 259.

[140] *In concreto*, one of the queried questions in the *Elgafaji* case concerned the relationship between the conditions for granting of subsidiary protection to third country nationals under the EU Qualification Directive and Article 3 ECHR.

[141] See, eg N Walker, note 90 above; D Halberstam, note 91 above; and M Avbelj and J Komárek, note 88 above, pp 3–4 with further references.

[142] MP Maduro, see note 89 above (2007), pp 17–21; and (2009), pp 374–339. Cf also P van Elsuwege, 'New Challenges for Pluralist Adjudication after Lisbon: The Protection of Fundamental Rights in a Ius Commune Europaeum' (2012) 30(2) *Netherlands Quarterly of Human Rights* 195, pp 196–197 who suggests, with reference to Maduro's work, that a constitutional pluralistic perspective can be applied to the Union's external relations with the ECHR regime.

framework constructed by Maduro is of a mainly procedural nature: it offers guidelines on the judicial dialogue between overlapping regimes which are not, as is the case in the theories of de Búrca, Halberstam[143] and Kumm,[144] deduced from a common substantive foundation and/or substantive principles. Put simply, contrapunctual law insists on a procedural rather than substantive universalisability.[145] However, this difference is of little importance as the core product of the theories ultimately is the same: an emphasis on the unifying function of mutual accommodation and mutual perspective-taking in the modern, fragmented legal world. The contrapunctual principles are particularly attractive in the present context because they operationalise discursive pluralism: they offer a concrete judicially-orientated lens through which to convey the core messages of this theory in practice.

When seeking solutions to inter-systemic conflicts and challenges, Tuori notes that it is relevant to identify what makes transnational interlegality possible.[146] In line with this observation the case law basis of my argument is made up of the above-outlined jurisprudence on the vertical and horizontal dialogues between the CJEU and the ECtHR. This body of case law, as suggested by Maduro,[147] exemplifies the contrapunctual principles in action: the Luxembourg Court's incorporation of fundamental rights into EU law by way of reliance on the ECHR facilitated a systemic compatibility between EU law and the ECHR system which allowed for the harmonious relationship between the Luxembourg and Strasbourg courts to take off. On the ECHR's side this is perhaps best illustrated by the way in which the ECtHR approached Union law in *Bosphorus*: here, the ECtHR demonstrated institutional awareness as it recognised that the Contracting Parties' obligations under the ECHR overlap with their obligations under other international or supranational legal orders, and that it is only one court amongst others on the international legal arena.[148] More particularly, the Strasbourg Court acknowledged the need for it to exercise self-restraint and defer to the European Union in order to accommodate the objectives pursued by the Union's legal order, and in legitimising this approach it relied on its knowledge of the institutional functioning of the control mechanisms under EU law.[149] Still, it was the CJEU's fundamental rights jurisprudence and the subsequent formal seal of approval hereof by primary EU law that served as the prime launch pad for the ECtHR to unfold the presumption of equivalence. Thus, both in the

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143 D Halberstam, see note 91 above.

144 M Kumm, see note 92 above.

145 MP Maduro, see note 89 above (2003), observes that the contrapunctual principles aim to promote agreement on particular legal outcomes without an agreement on the fundamental values that may justify those outcomes. Cf also, M Avbelj and J Komárek, note 88 above, p 6.

146 Cf Section IV.B above.

147 MP Maduro, see note 89 above (2007) pp 17–18; and (2009) pp 378–379. See along the same vein, Huomo-Kettunen, 'Heterarchical Constitutional Structures in the European Legal Space', (2013) 6(1) *European Journal of Legal Studies* 47.

148 *Bosphorus v Ireland*, see note 41 above, paras 149–158.

149 Ibid, paras 159–65.

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background information as well as in its substantive reasoning in *Bosphorus,* the ECtHR meticulously went through the milestones of EU fundamental rights protection emphasising the prominent role attributed to Strasbourg law and jurisprudence by the CJEU, EU Advocates General, the Treaties as well the Charter (non-binding at the time).[150] The ECtHR's extensive reliance on and indirect enforcement of EU law in the horizontal dimension of its dialogue with the CJEU can, similarly, be described through the prism of the contrapunctual principles.[151] Prior to 1 December 2009, the Luxembourg Court also adhered to this mindset; its references to and reliance on the ECHR and the ECtHR's case law were on a steady increase in both quantitative and qualitative terms, and its overall inclusive attitude to the ECHR system was cemented in *Kadi I* which placed Strasbourg law and jurisprudence at the heart of EU constitutional law.[152] Its discursive pluralistic approach was in fact implicitly recognised by the CJEU in a statement made in 2010 during the negotiations on EU accession to the ECHR.[153]

Finally, from a normative perspective, the Lisbon Treaty enhances the systemic compatibility between EU law and the ECHR regime as the Charter and the obligation to accede to the ECHR reinforces the Union's embedded openness to Strasbourg.[154] The horizontal provisions of the Charter build a legal foundation which allows for the Luxembourg Court to proceed with and improve on its pre-Lisbon dialogue with the ECtHR and also gives this court the opportunity to contribute to the development of fundamental rights in Europe: by exceeding the Strasbourg standard, by clarifying unclear ECtHR jurisprudence or by ruling on cases that raise novel interpretative questions on overlapping fundamental rights.

In sum, the privileged EU law role accorded to the ECHR, pre- and post-Lisbon, merits the application of the (intra-EU) principles of contrapunctual law to the external relationship of the CJEU with the ECtHR, and this normative argument has a solid descriptive basis. The jurisprudence on the horizontal and vertical dialogues thus displays that the two courts have a long history of approaching each other in a contrapunctual manner and, crucially, that this approach makes interlegality possible.

2. *A note on the added value of 'constitutionalism'*

A pertinent question is why the abovementioned scholars, including Maduro, are so dedicated to emphasising the 'constitutional' element of their theories. Are all the

[150] Ibid, para 159 with further references.

[151] See Section II.B above.

[152] See Section II.A above.

[153] Cf discussion document of the Court of Justices of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 5 May 2010, available at: http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en.pdf [last accessed on 15 May 2015], para 3, where it is noted eg that the CJEU supervises 'that human rights as guaranteed by the Convention are observed, even in the absence of an express obligation to that effect' and that it refers 'more and more precisely in recent years, to the case-law of the European Court of Human Rights'.

[154] See Section III.A above.

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approaches just accounted for not simply forms of pluralism?[155] Is insisting on the use of the constitutional label at the supranational and international level not just a constitutional dilution since the traditional constitutional trademarks are not present in this context?[156] Even though it is not within the ambit of this article to contribute to the complex and ongoing scholarly debate about the constitutionalisation of international law,[157] a few clarifying remarks shall be made here.

It is first of all relevant to stress that constitutionalism in its redesigned discursive pluralistic version does not, as mentioned above, purport to re-launch state based constitutionalism on the global legal scene. Rather, it refers to a form of limited collective self-governance which moderates the implications of pluralism.[158] This implies that approaching international or supranational regimes from this kind of constitutional perspective is not the same as saying that such regimes are constitutional in a nation state sense, but merely, very simply put, that they possess legal, institutional and judicial characteristics with gravitas that justify and make it relevant to view their relations and conflicting claims to authority through the lens of a unifying framework.

It is difficult to dispute that both the EU and the ECHR system have such gravitas. In fact, since both are recognised as possessing constitutional features, the first to greater extent than the latter,[159] and since the main promoters hereof have been, respectively, the CJEU and the ECtHR,[160] it would seem uncontroversial to add the constitutional label to the particular framework proposed in this article, which is aimed precisely at governing the interaction between these two courts. This is particularly so, because the CJEU and the ECtHR, as just explained, for many years have engaged with each other in a manner which can be described through the lens of the above mentioned various discursive pluralistic frameworks that employ a constitutional terminology.

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[155] JHH Weiler, 'Dialogical Epilogue' in JHH Weiler and G de Búrca, see note 88 above, pp 281 and 284–287.

[156] N Krisch, 'The Case for Pluralism in Postnational Law', *LSE Legal Studies Working Papers* 12/2009.

[157] See eg L Dunoff and JP Trachtman, note 89 above; and J Klabbers et al (eds), *The Constitutionalization of International Law* (Oxford University Press, 2009).

[158] N Walker, 'Constitutionalism and Pluralism in Global Context' in M Avbelj and J Komárek, note 88 above, pp 17–18 observes that: 'the constitutional pluralist seeks to retain from constitutionalism the idea of a single authorising register for the political domain as a whole while at the same time retaining from pluralism a sense of the rich and irreducible diversity of that political domain'. Cf similarly, MP Maduro in 'Four Visions of Constitutional Pluralism – Symposium Transcript', M Avbelj and J Komárek (eds), (2008) 2(1) *European Journal of Legal Studies* 325, p 363.

[159] On the constitutional nature of the Union, see eg P Craig, 'Constitutions, Constitutionalism and the European Union' (2001) 7(2) *European Law Review* 125 with further references; and A Arnull et al (eds), *A Constitutional Order of States*? (Hart Publishing, 2011). On the constitutional nature of the ECHR system, see eg S Greer and L Wildhaber, 'Revisiting the Debate About "constitutionalizing" the European Court of Human Rights' (2012) 12(4) *Human Rights Law Review* 655; and H Keller and A Stone Sweet, 'Assessing the Impact of the ECHR on National Legal Systems' in Keller H and Stone Sweet A (eds), *A Europe of Rights – The Impact of the ECHR on National Legal Systems* (Oxford University Press, 2008) ch 10.

[160] Cf notes 76 and 77 above.

Still, it is a deliberate choice that this article refers to 'discursive pluralism' instead of, for example, 'transnational constitutional pluralism'. This choice does not reflect an opposition to the unifying function which the constitutionalist label brings to the pluralist table, but the assumption that the coupling of 'constitutional' with 'pluralism' is not strictly necessary to get the discursive message across. It can therefore contribute to the abovementioned general conceptual confusion relating to the use and understanding of 'constitution' and 'constitutionalism' in scholarship as well as, more specifically, create undue uncertainty about the content and merits of the theory advocated. In other words, the universalising virtues and logic encapsulated in reinterpreted models of constitutionalism relied on in this article can, in my view, just as well be promoted under the heading of discursive or moderate pluralism. This is illustrated in an exemplary manner by Tuori's abovementioned theory on transnational law which, essentially, contains the same key elements as the theories of Walker, Kumm and Maduro without ever making use of the 'constitutional' label.[161]

These observations do not purport to neglect the relevance of paying attention to the constitutional nature and claim advanced by international and supranational regimes when seeking to understand their respective claims of authority and provide solutions to how they can be reconciled and accommodated, quite the contrary. Such attentiveness is highly important because a constitutional claim elucidates on the *Vorverständnis* of legal actors belonging to that system and therefore also serves to explain how it interacts with overlapping regimes – one only has to look to *Opinion 2/13* for an example of a situation where a supranational claim of supreme authority is inextricably linked with that particular regime's constitutional perception of itself.[162] This is why the pertinence of having regard to the distinct constitutional nature EU law is reflected in the 'substantive awareness' principle introduced in the following section.

3. *The external contrapunctual principles*

Accordingly, the discursive pluralistic framework which should be applied to describe and conceptualise the interaction between the CJEU and the ECtHR as well as to normatively guide them on how to ensure a harmonious and coherent pan-European fundamental rights area consists first and foremost of Maduro's three meta-principles of contrapunctual law, that is: (i) 'systemic compatibility'; (ii) 'institutional awareness'; and (iii) a 'shared hermeneutic framework'. Modelled to the EU law-ECHR sphere, the essential content of these three principles is the same as in the EU law–national law sphere. However, since the principles constitute concrete reflections of the discursive pluralistic mindset, they can and should be read and applied in light of the additional perspectives offered by the work of other scholars belonging to this theoretical category. For instance, when

[161] K Tuori, see note 67 above, pp 39–41, in fact develops his normative standpoint on the ideas of Walker.

[162] D Halberstam, '"It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward', *Michigan Law Public Law and Legal Theory Research Paper Series*, Paper No 432, February 2015.

seeking to understand the content of the 'shared hermeneutic framework' principle, one can look for guidance in the way in which de Búrca reasons her emphasis on the need for a universal judicial reasoning.

Furthermore, I propose that Maduro's framework should be complemented by an additional meta-principle when it is applied to the CJEU–ECtHR relationship. This principle, which is coined 'substantive awareness', is warranted by the fact that the principally external context under which the two courts interact involves considerations which are not relevant, or equally pertinent, as in the intra-EU sphere to which the contrapunctual principles were developed. Thus, the fact that the ECHR system and EU law are not integrated in the same way as national law and Union are implies that EU law holds no claim to primacy and direct effect over the ECHR which can be justified by reference to the coherence of a shared legal order supported by a political community, but also that the ECtHR's role as regards Union law and *vis-à-vis* the CJEU does not (and will never) correspond to that of national courts when they act as EU courts of first instance. More importantly, the external character of the EU–ECHR interface means, as mentioned above,[163] that the two courts operate under two very different normative umbrellas or, adopting Tuori's terminology, legal cultures; whereas the ECtHR's competences are functionally delineated to human rights, such rights are within EU law interpreted and applied by the CJEU within the ever expanding scope of Union law.[164] The fact that the CJEU's and the ECtHR's judicial reasoning inevitably are informed by their own legal cultural *Vorverständnis*, challenges the ability of these two courts to engage in a coherent and harmonious judicial discourse, particularly after the CJEU's normative umbrella has been complemented with its own Bill of Rights which is situated at the heart of its constitutionalised supranational structure.[165]

The principle of 'substantive awareness' strives to accommodate these observations by prescribing that the CJEU and the ECtHR each should adjust their review in the area of substantive and jurisdictional overlap as to accommodate, to the widest extent possible, the very different normative backgrounds of the other system. It implies that both courts should make efforts to understand the implications of the other part's very different perception of itself as a guardian of a constitutionalised legal order. If such substantive awareness is not exercised, a risk of conflict of values, interpretative divergence and/or legal uncertainty emerges. In more concrete terms adherence to this principle entails, for example, that it must be acknowledged by all parties that the best way to realise the common objective of European fundamental rights coherence is not for the courts to strive for a uniform interpretative outcome when ruling on overlapping fundamental rights – simply because this goal often cannot be achieved in practice.[166] The more viable way for the courts to realise this

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[163] See Section III.B above.

[164] *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114, para 4; and *Opinion 2/13,* EU:C:2014:2454, para 170.

[165] *Opinion 2/13*, EU:C:2014:2454, para 169.

[166] Cf NA Lorenz et al, note 21 above, p 200; and P Lorenzen, note 17 above, p 47. See also L Halleskov Storgaard in T Gammeltoft-Hansen et al (eds), *Protecting the Rights of Others* (DJØF Publishing, 2013) 443, pp 447–449 where this argument is demonstrated through an analysis of the

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objective is for them to subscribe to the contrapunctual principles, including to aspire to a common minimum level of protection by way of an universal judicial reasoning within the context of the shared hermeneutic framework of the European fundamental rights area.[167]

In all, the four meta-principles, which are collectively referred to as the 'external contrapunctual principles', carve out an approach through which the CJEU and the ECtHR can accommodate the above identified challenges at the EU law–ECHR interface, including a framework under which the courts can advance their equally valid claim of authority without it resulting in legal uncertainty and erosion of the overall protection standard. From the viewpoint of Tuori, the four principles identify the common legal language which is necessary for a transnational legal culture to develop and thus for the Lisbon Treaty's potentials for 'cooperation, interaction, mutual enrichment, for adversarial discourses' in Europe's fundamental rights area to be explored.[168]

V. THE EXTERNAL CONTRAPUNCTUAL APPROACH IN PRACTICE

The argument for a discursive pluralist approach to the relationship between EU law and the Strasbourg system is in this section finalised and concretised by demonstrating the applicability of the proposed framework in practice. Space precludes a comprehensive discussion of all the problematic aspects of the CJEU–ECtHR relationship which have presented themselves following the entry into force of the Lisbon Treaty, including all of the CJEU's objections to the primary law compatibility of the Draft Accession Agreement. The descriptive and normative value of the external contrapunctual principles are therefore proven in the following by addressing the above identified challenges to European fundamental rights protection in turn[169] – and it is thus, inevitably, the CJEU's approach to Strasbourg which is in focus here.

A. Interpretative competition and uncertainty about coherence of standards

The first such challenge identified is the potential for interpretative competition between the CJEU and the ECtHR when they adjudicate on corresponding fundamental rights. Presently, there is no example of the Luxembourg Court expressly disregarding the ECtHR's interpretation of ECHR provisions mirrored in the Charter. Instead, there is ample evidence of the CJEU, despite the message of coherence sent by Article 52(3) EUCFR, having departed from its pre-Lisbon approach to the Strasbourg system in that it is referring less to and engaging less openly with the Convention and ECtHR jurisprudence since the Charter became the

(F'note continued)
CJEU's judgement in *Carpenter v Secretary of State for the Home Department*, C-60/00, ECLI:EU:C:2002:434.

[167] Cf J Polakiewicz, note 11 above, p 2 who argues that 'the aim and purpose of fundamental rights is not to foster harmonisation or uniformity'.

[168] J Polakiewicz, see note 4 above, p 28.

[169] See Section II.B above.

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primary EU fundamental rights norm.[170] Arguably, the impact hereof on the effectiveness of the overall European protection standard is just as harmful as that of interpretative competition. Indeed, because of the CJEU's lack of attentiveness to the shared hermeneutical framework of the European fundamental rights area there is a profound confusion pertaining to whether, and if so to what extent, the CJEU today adheres to the Strasbourg minimum standard as well as the extent to which it actually considers itself obliged to do so.

On the one hand, the CJEU has in several cases acknowledged and explicitly provided for that Charter rights embraced by Article 52(3) EUCFR must be construed in line with the ECHR and the ECtHR's case law.[171] An example of this approach is the seminal *Digital Rights* case from 2014 in which the CJEU for the first time held an entire piece of secondary EU legislation to be void on grounds of non-compliance with the Charter (Article 7 EUCFR on respect for private and family life).[172] When doing so, the CJEU quoted Article 8 ECHR and, essentially, imported the standard to be met under the limitation assessment of Article 52(1) EUCFR from the ECtHR's case law on data protection.[173] On the other hand, the equally seminal *Fransson* and *Google Spain* cases demonstrate how the CJEU routinely abstains from expressly relying on Strasbourg when litigating on corresponding rights.[174]

One can only speculate about why the CJEU chooses not to consistently refer explicitly to the Convention. One factor could be the Court's principally legitimate interest in promoting and emphasising the role and authority of the Union's new Bill of Rights; after all, this document and the constitutional-style process by which it came to life reflects an attempt to strengthen the common identity of the 'peoples of Europe'.[175] It is furthermore, and as noted above,[176] reasonable to assume that the CJEU's new approach to Strasbourg also is motivated by the same excessive concerns

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[170] Cf the literature referred to in note 8 above; and B De Witte, 'The Use of the ECHR and Convention Case Law by the European Court of Justice' in P Popelier et al (eds), *Human Rights Protection in the European Legal Order: The Interaction Between the European and National Courts* (Intersentia, 2011), ch 1 p 25. On the Charter's status as the prime EU fundamental rights norm, see CJEU President Skouris in the 2011 Joint Communication from Presidents Costa and Skouris, note 2 above; N Lorenz et al, see note 21 above p 200; and *Otis and Others*, C-199/11, ECLI:EU:C:2012:684, paras 46–47.

[171] *J McB v LE*, C-400/10, ECLI:EU:C:2010:582; para 53; *Volker und Markus Schecke GbR and Hartmut Eifert v Land* Hessen, C-92/09, ECLI:EU:C:2010:662; *Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland*, C-279/09, ECLI:EU:C:2010:811.

[172] *Digital Rights Ireland*, C-293/12, ECLI:EU:C:2014:238 concerning Directive (EC) No 2006/24 [2006] OJ L105/43.

[173] Ibid, paras 47 and 54–55 in particular.

[174] *Åklagaren v Hans Åkerberg Fransson*, C-617/10, ECLI:EU:C:2013:105; and *Google v Spain*, C-131/12, ECLI:EU:C:2014:317 (article 7 EUCFR). Cf S Iglesias Sánchez, see note 86 above, pp 1601–1604.

[175] Article 1(2) TEU. Cf R Baratta, 'Accession of the EU to the ECHR: The Rationale for the ECJ's Prior Involvement Mechanism' (2013) 50 *Common Market Law Review* 1305, who notes (p 15) that the Charter 'not only exercises a protective function of individual rights, but […] also expresses the set of common values around which to build this social identity'.

[176] See Section IV.A above.

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for its own judicial autonomy and authority that are expressed in *Opinion 2/13*. That being said, I have argued elsewhere that the CJEU's case law on the Charter might not be as 'detached, autonomous and insufficiently informed'[177] as it appears at first glance because its reasoning in substantive terms in fact is often aligned with the ECHR standard.[178] This finding is important as it suggests that the key problem with the Luxembourg Court's approach to the Charter is not necessarily that its judgments disregard the Strasbourg system, but rather that the CJEU's willingness to acknowledge that is draws on the ECHR and ECtHR case law has decreased following the entry into force of the Lisbon Treaty. It is reasonable to ascribe this behaviour to the changed dynamics and increased friction between the CJEU and the ECtHR created by this Treaty.

In terms of solutions, this implies that if legal certainty about coherence of the EU and the ECHR standards is to be ensured and the possibilities for cross-fertilisation of standards offered by the Lisbon Treaty realised, the CJEU's apparent 'monologue'[179] on overlapping fundamental rights must be turned into a transparent dialogue with the ECtHR. A straightforward way for the CJEU to do so without undermining either its own authority or the constitutional integrity of the Charter is to clarify, once and for all, the obligations flowing from Article 52 (3) EUCFR and to make sure, in a more visible and consistent manner than at present, to internalise in its rulings on overlapping fundamental rights the consequences to the European fundamental rights area. In a case such as *Fransson* this could be done simply by referring openly to Article 52(3) EUCFR and noting that its conclusions are aligned with the Convention minimum standard. It is in that respect relevant to recall that transparency and reason-giving are EU law central principles.[180]

B. Balancing of fundamental rights and other legitimate objectives

Conflicts about the weight and understanding of human rights when such rights interact and/or collide with other legitimate objectives arise at the EU–ECHR interface because of the very different normative and institutional umbrellas of these two systems. They present complex problems because even though EU law and the ECHR are independent legal systems; they are also 'joined at the hip'[181] – even more so if the Union eventually accedes to the Convention. Still, the principally external nature of the relationship implies that, in cases where Union objectives of a non-human-rights nature warrant an EU fundamental rights approach which differs from that formulated by the Strasbourg Court, the CJEU must be aware that considerations for the uniformity and effectiveness of EU law do not carry same weight as regards the ECHR system as they do when EU law collides with national

[177] G de Búrca, see note 8 above, p 174.

[178] L Halleskov Storgaard, see note 12 above, pp 30–32, where it is demonstrated that the CJEU's substantive reasoning in *Fransson* relies closely on Strasbourg case law on the *ne bis in idem principle*.

[179] A Slaughter, see note 18 above, p 113.

[180] Cf G de Búrca, see note 8 above, p 180.

[181] D Halberstam, see note 162 above, p 143.

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constitutional law (cases such as *Melloni*).[182] Accordingly, in this type of case it is first and foremost vital that the CJEU displays attentiveness to Strasbourg by formulating its position in a manner which observes the principles of substantive awareness and a shared hermeneutic framework. This includes formulating its reasoning in a way which makes it cognisable to the ECtHR and the other stakeholders in the European fundamental rights area why and/or how considerations of broader EU objectives prevail or impact on the level of protection granted. Absence of such attentiveness to the ECHR regime can cause legal uncertainty about coherence of standards, in the individual case as well as in general, and thus compromise the effectiveness of the overall protection standard.

Arguably, the most obvious example of a conflict of this type is, as already mentioned, the one identified by the CJEU in *Opinion 2/13* between the EU principle of mutual trust and the Convention protection standard in cases concerning intra-EU transfers of asylum seekers under the Dublin regulation.[183] The CJEU, more precisely, here declared that the common values on which the EU is founded (Article 2 TEU) 'implies and justifies' the principle of mutual trust which is of 'fundamental' EU law importance because it allows an area without internal borders to be created and maintained.[184] The mutual trust principle entails that Member States implementing AFSJ measures only in 'exceptional circumstances' must verify whether other Member States in individual cases actually observe fundamental rights.[185] The fact that the Convention after an accession could obligate Member States to conduct a more thorough fundamental rights check, would, in the CJEU's view, upset the underlying balance of the Union and undermine EU law autonomy.[186]

Clearly, the CJEU's reasoning on this point relates to the question of the implications of an accession for the CJEU–ECtHR relationship which is addressed separately in the next section. However, the conflict in the AFSJ area in fact not only materialises in the event of an EU accession to the ECHR.[187] It follows from the ECtHR judgment in *Tarakhel* that the EU Member States already today are required to conduct an individual and thorough fundamental review in light of the ECHR standards before implementing a Dublin transfer.[188] This has been expressly confirmed by the UK Supreme Court in the *EM (Eritrea)* case.[189] It is equally important to note that the relevant Charter provision in these cases – Article 4 EUCFR (prohibition of torture and inhuman or degrading treatment or punishment) – falls within the scope of Article 52(3) EUCFR wherefore the Luxembourg Court, as it stands, is under a primary law duty to adapt its review of

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182 *Melloni v Ministerio Fiscal*, C-399/11, ECLI:EU:C:2013:107.

183 See Section III.B above.

184 *Opinion 2/13,* EU:C:2014:2454, paras 168 and 191.

185 Ibid, paras 191–192.

186 Ibid, para 194.

187 L Halleskov Storgaard, see note 6 above, pp 23–26; and J Polakiewicz, see note 11 above, p 3.

188 Ibid; and *Tarakhel v Switzerland*, see note 47 above.

189 *R (on the application of EM (Eritrea)) v Secretary of State of the Home Department* [2014] UKSC 12.

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Dublin cases in line with the minimum standard prescribed by the ECHR as interpreted by the ECtHR.

Since the CJEU in *Opinion 2/13* inexplicitly, yet very clearly, conveys the signal that Member States following the Strasbourg Court's lead in *Tarakhel* would be in breach of their EU law obligations, it is relevant to clarify how this complex conflict can be understood and potentially managed from a discursive pluralistic viewpoint. Although the contrapunctual principles do not bring about clear cut answers, they do offer useful perspectives on the root of the conflict and possible solutions hereto. Essentially, I hold that the CJEU's argument on this point is flawed for one reason in particular and that is the *de facto* lack of systemic compatibility between EU law and the Convention system in this area. It is clear that the Dublin system does not spread responsibility for asylum seekers evenly given that certain Eastern European Member States are simply more accessible than others. It is also clear that the CJEU's blind trust in formal human rights commitments is out of step with the reality facing asylum seekers in these overburdened and economically challenged Member States.[190] Because the Union presently is incapable of offering real and effective fundamental rights protection under the Dublin Regulation, the Strasbourg Court cannot and should not, pre- or post-accession, defer to the Union when reviewing this type of case. A somewhat comparable rationale was expressed in *Kadi I* where the CJEU refused to accept that the legitimate UN anti-terror concerns and the interest in international cooperation should lead it to comprise the EU standard of fundamental rights protection.[191]

By contrast, in so far as the Member States (ever) manage to resolve the sensitive problem of distribution of asylum seekers so that EU law and the CJEU can show that mechanisms are in place to ensure that the presumption of fundamental rights compliance underpinning the Dublin Regulation is functioning effectively in practice, then there are valid reasons for believing that the ECtHR would (and should) display institutional and substantial awareness and grant the Union a certain room for manoeuvre. This assumption finds support in the ECtHR's general deferential approach to the Union, including the fact that even in cases such as *MSS* and *Tarakhel* where it has implicitly held EU law practice to be at fault with the Convention, it has done so in a manner and language which demonstrates both attentiveness to and respect of Union law.

C. Post-accession relationship between the CJEU and the ECtHR

From the viewpoint of external contrapunctual law, EU accession to the ECHR would be the cherry on the cake which ensures the full systemic compatibility between the legal orders of the EU and the ECHR, and the progressive evolving EU law recognition of the ECHR would reach its formal peak when (if) the ECHR obtains the status as an integral source of the Union's legal order. However, having regard to the CJEU's reasoning in *Opinion 2/13*, the prospects of this happening are slim. The main objective of the

[190] C Costello, 'Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored' (2012) *Human Rights Law Review* 287, p 339, notes that there is a 'chasm' between EU legal standards and the reality for asylum seekers.

[191] *Kadi I*, C-402/05, ECLI:EU:C:2008:461.

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following remarks is to outline the general discursive pluralistic approach to the question of the post-accession relationship between the Luxembourg and Strasbourg courts.

In normative terms, the Draft Accession Agreement establishes the foundation for an external contrapunctual discourse: although the co-respondent and prior involvement mechanisms (Article 3 of the Draft Accession Agreement) should be slightly modified so as to better accommodate EU law autonomy,[192] they essentially set up formal channels for judicial dialogue between the ECtHR and the CJEU in those future cases where the Union and EU law will stand trial in Strasbourg. These mechanisms offer procedural privileges to the Luxembourg Court and they are drawn up so as to 'preserve both the powers and final jurisdictional role of the Strasbourg Court as well as the key functions of the [CJEU] in the European integration process'.[193] This procedural foundation is complemented by the intention to strengthen the institutional awareness of both courts through a continued and potentially reinforced extra-judicial dialogue between their judges.[194]

In hierarchical terms, accession will not alter the equal standing of EU law and the ECHR; on the contrary, the Luxembourg Court and the Strasbourg Court will remain in their positions as the ultimate judicial authorities on the interpretation (and in the case of the CJEU, validation) of the legal norms of their respective legal regimes. There is, however, one important exception which follows logically from the very purpose of the accession, namely that EU law and institutions can be reviewed directly by the ECtHR for compliance with the Convention. The consequence is that the CJEU will be subordinated to the ECtHR on its interpretation of the ECHR. In many ways this legal position is not any different from the one arising within the domestic orders of the other Contracting Parties to the ECHR where the decisions of national courts of final instance in human rights matters also can be challenged before the ECtHR. Still, this situation is more complex because the normative bond between the Charter and the Convention entails that accession, if viewed from a sovereigntist perspective, can been seen as triggering a struggle between the CJEU and the ECtHR on ultimate European fundamental rights authority. This was what happened in *Opinion 2/13* where the CJEU's classic constitutional approach led it to place an undue and largely unwarranted emphasis on EU law autonomy in a manner which openly challenged the authority of the ECtHR and the pluralistic conception of the European human rights sphere.

Had the CJEU adhered to the discursive pluralistic mindset, the outcome of *Opinion 2/13* would have been different and much along the lines of the approach suggested by Advocate General Kokott, both in terms of language and ultimate conclusion.[195] Thus, discursive pluralism offers the possibility of a shift

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[192] L Halleskov Storgaard, see note 12 above, pp 15–19; and D Halberstam, see note 162 above, pp 12–14.

[193] R Baratta, see note 175 above, p 8.

[194] Declaration 2 to Article 6(2) TEU.

[195] Opinion of Advocate General Kokott in *Opinion 2/13*, ECLI:EU:C:2014:2475 who recommended an approval of the DAA conditioned upon minor modifications or additions to the procedural mechanisms.

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in focus: from a conflict-orientated perspective where the central question is which court 'owns' fundamental rights primacy in Europe, to a broader, more constructive, perspective where the pivotal question is whether accession will be carried out in a way that preserves the CJEU's and the ECtHR's equally valid claims of authority and, crucially, facilitates the allowance of competitive sovereignty without compromising the overall protection standard. As just argued, the Draft Accession Agreement does precisely that as it did leave enough room for the Union's specific characteristics to remain unaltered. Accordingly, the vast majority of the Luxembourg Court's concerns for EU law autonomy could have been dispelled if it had encouraged judicial cooperation by way of observance of the external contrapunctual principles and emphasised: (i) the international law character of the ECtHR's rulings; (ii) the fact that the Strasbourg Court is competent to rule solely on the ECHR; and (iii) the duties incumbent on the Member States pursuant to the principle of sincere cooperation (Article 4(3) TEU).[196]

Also the CJEU's much criticised qualms about its own EU law monopoly being jeopardised if the ECtHR is granted jurisdiction over Common Foreign and Security Policy (CFSP) activities could have been eased, had it looked to the external contrapunctual principles for guidance.[197] Thus, the principle of a shared hermeneutic framework would instruct the CJEU to reason in a manner which is mindful of the broader European fundamental rights area and, thereby, encouraged this court to pay due attention to the fact that the very purpose of this aspect of the Draft Accession Agreement is to ensure enhanced fundamental rights protection and accountability in the Union's external relations. Furthermore, the principle of institutional awareness could serve to remind the CJEU that it itself has declared that the Convention, as interpreted by the ECtHR, forms part of EU constitutional law.[198] For that reason and having regard also to the ECtHR's lenient approach to the Union in general, the CJEU could soundly entrust the Strasbourg Court with the task of enforcing the 'constitutional principle' that all Union acts must respect fundamental rights.[199] These remarks do not strive to downplay the fact that this indeed is a complex issue from the perspective of EU law autonomy, but merely to demonstrate that discursive pluralism offers tools which perhaps can contribute to resolving it. It must in this respect be recalled that the CJEU's recourse to EU law autonomy on this point, as explained by Advocate General Kokott, has no basis in the existing case law on the Union's external autonomy claim.[200] It is therefore also imperative, as regards this aspect of the question of EU accession to the ECHR, that the CJEU does not confuse its own judicial authority with the integrity of Union law.

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196 L Halleskov Storgaard, see note 12 above, pp 27–28 and 35–37.

197 *Opinion 2/13*, EU:C:2014:2454, paras 249–257.

198 *Kadi I*, C-402/05, ECLI:EU:C:2008:461; and Section II.B above.

199 Ibid, para 285.

200 Opinion of Advocate General Kokott in *Opinion 2/13*, ECLI:EU:C:2014:2475, para 190.

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VI. CONCLUSION

As early as 1974, the ECtHR expressed the view that the CJEU's newly acquired fundamental rights competences were 'impinging' on the domain of human rights and that the co-existence of the Convention and the EU could lead to complexities 'which [are] far more decisive for the destiny of the Convention than the problem of conflicts of jurisdiction with the United Nations' machinery'.[201] Now, 40 years later, these questions have gone from theory to practice and although the broader context has changed, the ECtHR's observations carry even greater weight today where it is not only the future effectiveness of the Convention which is challenged, but also human rights protection in Europe as such.

With its significant restructuring of the European fundamental rights landscape, the Lisbon Treaty has shaken the premise of the harmonious relationship between the CJEU and the ECtHR, and the Luxembourg Court's handling of its reinforced human rights powers and authority has left European fundamental rights protection at a crossroads. This article has identified a path for the CJEU and the ECtHR to move forward out of the present situation of inter-systemic conflicts, tensions and consequent legal uncertainty about coherence of standards. In order not to create two parallel pan-European fundamental right standards, both courts – and particularly the CJEU – must adjust their perspectives in light of the current legal realities so that they also include considerations for the wider impacts of their rulings in fundamental rights cases.

This article builds on the works of Maduro when it proposes an heterarchical, discursive pluralistic approach to the relationship between the CJEU and the ECtHR. Based on the conception that EU law and the Convention system are self-standing and equal-footed pieces in the puzzle of the broader European fundamental rights area, this approach consists, first and foremost, of four meta-principles (the external contrapunctual principles) which can function as the framework for understanding the two courts' interaction as well as for guiding their judicial reasoning when considering cases at the EU law–ECHR interface so as to ensure the strong and coherent standard within this broader area envisaged by the Lisbon Treaty. The core content of this framework is an emphasis on the unifying function of mutual accommodation and perspective taking.

This article has demonstrated that this proposal, despite the conclusions and formulations of *Opinion 2/13*, cannot be brushed aside as wishful thinking, because the CJEU and the ECtHR have a long tradition of engaging with each other in a discursive pluralistic manner and because, by normatively encouraging substantive harmony, the Lisbon Treaty provides the legal basis for them to continue to do so.

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[201] COE CM(74)180, Appendix IV, Opinion of the European Court of Human Rights on the Draft Short- and Medium-term programme for the Council of Europe in the General Field of Human Rights, dated 4 September 1974 (document on file with the author), pp 17–18. This opinion was issued by the ECtHR in the course of the initial discussions on a reform of the ECHR control mechanisms. On this, see A Kjeldgaard-Pedersen, 'The Evolution of the Right of Individuals to Seise the European Court of Human Rights' (2010) 12 *Journal of the History of International Law* 267, pp 288–293.

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It has also been demonstrated how the external contrapunctual principles offer useful perspectives on how to understand and manage three of the most pertinent challenges to European fundamental rights protection today, and how the CJEU could contribute to resolving them through a discursive pluralistic approach informed by these principles.

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