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Integrated Rights Protection in the European and International Context

Some Reflections about Limits and Consequences

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Publication date

2017

Document Version

Final published version

[Link to publication](#)

Citation for published version (APA):

Eckes, C. (2017). *Integrated Rights Protection in the European and International Context: Some Reflections about Limits and Consequences*. (Amsterdam Law School Legal Studies Research Paper; No. 2017-40), (Amsterdam Centre for European Law and Governance Research Paper ; No. 2017-03). Amsterdam Centre for European Law and Governance. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3048781

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UNIVERSITY OF AMSTERDAM

INTEGRATED RIGHTS PROTECTION IN THE EUROPEAN AND
INTERNATIONAL CONTEXT: SOME REFLECTIONS ABOUT LIMITS
AND CONSEQUENCES

Christina Eckes

Amsterdam Law School Legal Studies Research Paper No. 2017 - 40

Amsterdam Centre for European Law and Governance Research Paper No. 2017 - 03



Integrated Rights Protection in the European and International Context

Some Reflections about Limits and Consequences

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To be published as a chapter in Sasha Garben & Inge Govaere (eds), *Interfaces
between EU and International Law* - Hart Publishing, forthcoming 2018

**Amsterdam Centre for European Law and Governance
Working Paper Series 2017 - 03**

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Special thanks to Minke de Haan and Sophie Dura for their research assistance

September 2017

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Abstract

The universal claim of human rights and the cultural and political dimension of fundamental right stand in an apparent tension. The same is true for different regimes of fundamental rights that govern the same substantive situations within the same territory. An integrated rights protection must ideally be able to put these tensions at work in order to attain a justified and adequate level of protection in the European, national and international context.

Different courts make claims about how the different rights regimes should relate to each other, which can be and are justified within the internal logic of their different legal orders. The protection of the individual is in this claim-making only one consideration amongst several. The claims are also strongly influenced by systematic considerations of how the particular decision fits into the specific system; in what way it may change the relationship between the different orders; and ultimately, what it may mean in terms of shifts of powers between different judicial actors or between the judiciary and the other branches of government.

These system specific considerations makes it unlikely that any satisfactory answer can be found in (exclusively) studying judicial practices to questions of how the different regimes should relate to each other or whether they should integrate to reach a more justified and adequate level of protection. This paper argues that the question of how the different regimes should interrelate requires explicating and developing general theoretical considerations of who should decide what a justified and adequate level of rights protection is.

In support of this central argument, the paper firstly explains why fundamental rights protection has been *the area* in which *most tensions* have arisen between the different legal orders. Secondly, it sets out the current judicial practice of pursuing rights coherence while keeping external rights regimes at an interpretational distance. Finally it develops its argument that the two central questions are ultimately questions of a theoretical nature: Who should determine the interpretation of human rights norms? How much integration of fundamental rights protection is justifiable and adequate?

Introduction

The universal claim of human rights and the cultural and political dimension of fundamental right stand in an apparent tension. So do different regimes of

fundamental rights that govern the same substantive situations within the same territory. An integrated rights protection must ideally be able to put these tensions at work in order to attain a justified and adequate level of protection in the European, national and international context.

Courts of different jurisdictions, i.e. the Court of Justice of the European Union (CJEU), the European Court of Human Rights (ECtHR), and national constitutional courts, have offered their interpretations of how the different legal regimes protecting fundamental rights in Europe relate to each other. Each of them considers these relationships from the perspective of their own legal order and aims to integrate external legal norms in ways that give priority to the internal coherence of their own legal order. While the different claims can be compared and contrasted with regard to the protection of fundamental rights, i.e. in terms of scope and substance, the different points of departure, i.e. each court from the perspective of their own legal order, make it impossible to weigh the underlying systemic considerations.

What are the roles of the CJEU, national constitutional courts and the ECtHR in ensuring that the different legal regimes protecting rights work together to achieve a justifiable and adequate level of protection? How much *integration* of fundamental rights protection is justifiable and adequate? How much room for *variation* in *fundamental rights* (protection) is justifiable and adequate? Does the argument differ within the EU legal order and internationally?

This paper argues that the courts make claims that can be justified within the logic of their different legal orders but that studying judicial practice does not help in finding an answer to the question of how the different regimes should relate and to what extent they should integrate for a justified and adequate level of rights protection. A search for the answer to this question must turn to theoretical considerations.

The increasing EU competence in human rights sensitive areas, mainly within the Area of Freedom, Security and Justice (AFSJ), i.e. criminal law, asylum law, securing the external borders, will more prominently bring to the fore questions about the harmonisation or integration of rights protection within the EU legal order, as well as tensions between EU law and international rights instruments. It will make it essential to find a satisfactory and workable answer to the question of who should interpret fundamental rights. This trend is strengthened by the normalisation of the AFSJ, in particular the full jurisdiction of the court over these policy areas since the end of the transition period in December 2014.

This paper is structured as follows. Section two sets out why fundamental rights are substantively different from other fields of law. Section three engages with the practice of how the different rights regimes in Europe relate to each other. It does so on the basis of a study of the codified law and case law of the relevant courts. Section four zooms in on the plausibility of the CJEU's autonomy concern, which led it to declare the draft agreement on the EU's accession to the ECHR incompatible with EU

law. Section five makes the central argument which theoretical considerations should guide the interrelations between different fundamental rights regimes. Section six draws conclusions for the adequate level of integration between the different rights regimes.

Prelude: Why are rights a special case?

Human rights are a special case when it comes to the interaction of different legal spheres. I would go as far as claiming that fundamental rights constitute the most difficult area when pondering questions of resilience, autonomy and porosity of one legal sphere vis-à-vis another. The following five substantive reasons support this position. They also explain why institutionally rights have proven so problematic within the history of EU integration.

Firstly, human rights are by definition a *'horizontal'* policy, in that they deploy their effects across all substantive policy areas. This makes it impossible to limit the effects of any given ruling to a particular policy area. Not only aspects of a ruling that relate to the scope and substance of rights but also aspects relating to the division of competence between the national and EU actors. At the same time it may also be undesirable that the scope and substance of rights protection is determined purely and from the perspective of the individual seemingly arbitrarily by institutional and competence considerations.

A concrete example of the tensions that this may create is the headscarves rulings by the CJEU of 14 March 2017.¹ For a long time EU law has made illegal discrimination on the basis of gender and discrimination of *EU citizens* on grounds of nationality. Since 2000, EU law also covers discrimination on grounds of ethnicity² and discrimination at work on grounds of disability, age, sexual orientation or religion.³ The CJEU regularly ruled on the first three of these grounds in the work environment. The recent headscarves cases were the first occasion for the CJEU to rule on non-discrimination at work on religious grounds. In its rulings, the CJEU on the one hand accepted the possibility of a general ban of religious symbols. On the other hand it ruled out that the wish of a particular client could justify relying on the occupational requirement exception.⁴ Because of the competence division between the EU and its Member States, EU law does not regulate other aspects of religious

¹ Case C-157/15, *Samira Achbita v. G4S Secure Solutions NV*, EU:C:2017:203 and Case C-188/15, *Asma Bougnaoui v. Micropole SA*, EU:C:2017:204.

² Directive 2000/43/EC implementing equal treatment irrespective of racial or ethnic origin [2000] OJ L180/22.

³ Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

⁴ See Art. 4 of Directive 2000/43 (n 3 above), specifically in Case C-188/15 Bougnaoui (n 1), para 34 ff *et seq.*

freedom, outside of the occupational environment. Consequently the CJEU could not for example rule on the religious symbols in an educational setting, as the ECtHR has in the past.⁵ At the same time, the CJEU could rule on discrimination on grounds of ethnicity across the board, since the Racial Equality Directive is not limited to the work environment. The particular limitation of the CJEU's powers with regard to religious symbols follows from the institutional and constitutional setup of the EU. This makes it difficult to justify this limitation in terms of substantive rights considerations. On the contrary, a consistent approach to the interpretation of the right to wear religious symbols could be expected to contribute to legal certainty and equality before the law.

Fragmentation of the competence to rule on the scope and substance of a particular right highlights in several ways the relevance of who rules on a particular fundamental rights issue. Firstly the power of framing an issue carries legal and political significance. In the headscarves ruling of March 2017 the CJEU chose, very different from its own ruling in *Nikolova*,⁶ not to engage with the political context of growing islamophobia in Europe. This may have many reasons but it does not open the door to a debate on the *legal* and political significance of this growing trend of othering Muslims. Secondly, the CJEU considers any fundamental rights issue within the logic of EU law. This necessarily introduces considerations relating to regulation and integration into the debate, such as prominently considerations of uniformity and effectiveness. This is very different before the ECtHR. The Strasbourg Court has the exclusive mandate to ensure minimum protection of human rights. It is not guided by a broader responsibility of ensuring a functioning legal order of a supranational nature. This point also relates to the overconstitutionalisation of EU law,⁷ which leaves little room for contestation or the co-existence of alternative models. The CJEU's involvement may hence arguably be expected to result in uniformisation of rights protection – at least in this particular way. Competence

⁵ *Lautsi and others v. Italy* [GC], no. 30814/06, ECHR 2011; *Aktas v. France*, no. 43563/08, *Bayrak v. France*, no. 14308/08, *Gamaleddyn v. France*, no. 18527/08, *Ghazal v. France*, no. 29134/08, *J. Singh v. France*, no. 2546/08 and *R. Singh v. France*, no. 27561/08; *Dogru v. France*, no. 27058/05 and *Kervanci v. France*, no. 31645/04, ECHR 4 December 2008; *Kurtulmus v. Turkey*, no. 65500/01, ECHR 2006-II; *Leyla Sahin v. Turkey*, no. 44774/98, ECHR 2005-XI; *Köse and 93 Others v. Turkey*, no. 26625/02, ECHR 2006-II; *Dahlab v. Switzerland*, no. 42393/98, ECHR 2001-V. For full summaries see:

http://www.echr.coe.int/Documents/FS_Religious_Symbols_ENG.pdf.

⁶ Case C-83/14, *CHEZ razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*, EU:C:2015:480, concerned the practice of CHEZ, the largest electricity company in Bulgaria, to place the electricity meters in districts where the majority was of Roma ethnicity at a height of 7 meters, which made it impossible for the inhabitants to monitor their electricity consumption. The practice only occurred in districts where the majority was Roma, to all the district's inhabitant irrespective of the individual meter was tempered with, enduring for nearly a quarter of a century. According to the Court, 'the compulsory, widespread and lasting nature of the practice at issue suggests (...) that the inhabitants of that district, which is known to be lived in mainly by Bulgarian nationals of Roma origin, are, as a whole, considered to be potential perpetrators of such unlawful conduct'. Accordingly, this made the practice offensive and stigmatising. See paras. 84 ff.

⁷ D Grimm, 'Does Europe Need a Constitution' (1995) 1 *ELJ* 282.

considerations and the particular legal framework, in which a particular case may determine whether it is argued as a case of discrimination (EU law) or human rights (ECHR). This may lead to different forms of fragmentation. Not only are the norms then interpreted by different actors. Also substantively the framing as a discrimination case, usually working with comparators, or a human rights case, usually working without a comparator, but balancing different rights, makes a significant difference.

Secondly, fundamental rights have a particular *cultural* dimension. While a general convergence and integration of rights norms between different legal contexts may be observed,⁸ the differences in terms of interpretation and application often go to the core of what members of a polity see as choices that define their identity.⁹ Freedom to religion is a good example in this context. While France is a state with a very strong commitment to secularity, Ireland or Poland for example emphasise the relevance of God or religion and both permit religious references in the oaths of public servants.¹⁰ All three make clear commitments to the freedom of religion; yet, when the specific question is posed of whether a civil servant may wear a religious symbol the answer may very well be different. An interesting case study in practical terms of what EU membership has on the scope and substance of national fundamental rights will be Brexit. Once the UK leaves the EU the EU Charter of Fundamental Rights will cease to apply within the legal order of the UK. The UK Equality Act 2010 will continue to exist as primary UK legislation. However, this does not mean that there are no changes in interpretation expected or that it is protected from being repealed in part or in full.¹¹

Thirdly, minimum standards of rights are difficult to maintain. Fundamental rights cases often require a specific determination of how to strike the balance between different rights and, hence, a weighing of different rights against each other. This results in a fairly precise determination of the scope of manoeuvre left for public policy makers. It often does not allow protecting one right at a higher level because

⁸ See E de Wet and J Vidmar, 'Conflicts between International Paradigms: Hierarchy versus Systemic Integration' (2013) 2 *Global Constitutionalism* 196.

⁹ For example regarding issues such as abortion in the public debate surrounding the Constitutional Treaty.

¹⁰ See e.g. Article 44 of the Irish Constitution: 'The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion.' See also more balanced the Preamble of the Polish Constitution: 'We, the Polish Nation - all citizens of the Republic, Both those who believe in God as the source of truth, justice, good and beauty, As well as those not sharing such faith but respecting those universal values as arising from other sources, ...'.

¹¹ R Wintemute, 'Goodbye EU Anti-Discrimination Law? Hello Repeal of the Equality Act 2010?' (2016) 27 *King's Law Journal* 387; [S Fredman, A Davies, M Freedland, J Fudge, M Campbell, 'The potential Challenges to Equality Law in the UK' \(Oxford Human Rights Hub, 2016\).](#)

this would result in an infringement of interpretation of another right by the competent judicial authority.¹²

Fourthly, rights catalogues usually give rights to individuals. The EU is the best example of how powerful and effective centrally controlled yet decentralised enforcement by private individuals may be. In the EU legal order this enforcement is based on the combination of primacy and direct effect with the preliminary ruling procedure. It is fundamentally based on the market freedoms but may also serve as a warning to the transformative potential of fundamental rights. International human rights instruments have already been declared as examples of great interference with state sovereignty.¹³ Yet, they should be considered as a hybrid in this regard. Consider for example the ECHR, which is built on a two-tier system of rights of individuals that individuals can assert before the ECtHR and an enforcement stage, after a country has failed to give effect to the ECtHR's ruling that may end with state responsibility.¹⁴

Fifthly, human rights are necessarily formulated in a particularly open-textured manner. They require interpreting and developing codified law further to allow application to the individual case. This interpretation is usually understood to be at least partially based on value choices. From a democratic perspective, such determination of the specific interpretation and application of rights by unelected judges may be and is seen as particularly problematic if those judges are external to the legal order whose norms are deemed to stand in conflict with a given fundamental right.

These particularities of rights go a long way in explaining why courts of different legal spheres have chosen to keep external rights control at bay in one way or another. Conferring the power to interpret and apply rights to an external legal sphere, including an external judicial authority, whose rulings are then binding within the domestic legal sphere in a potentially hierarchically superior manner, is seen as highly problematic. They also explain why fundamental rights have played and continue to play an important role in the debate on EU legal integration. On the one hand, national courts have pressured the EU to protect fundamental rights as a condition for them to accept the primacy of EU law. On the other hand, EU fundamental rights protection is a way of constitutionalising the European legal order, which is largely perceived as happening at the expense of national

¹² In the context of the Charter of Fundamental Rights: D Gudmundsdóttir, 'A renewed emphasis on the Charter's distinction between rights and principles: is a doctrine of judicial restraint more appropriate?' (2015) 52 *CML Rev* 685. S Greer, 'The Margin of appreciation: Interpretation and discretion under the European Convention on Human Rights' (Human rights files No. 17, Council of Europe Publishing, 2000).

¹³ See for the debate: J Delbruck, 'International Protection of Human Rights and State Sovereignty' (1982) 57 *Indiana Law Journal* article 3. See also: J Donnelly, 'State Sovereignty and International Human Rights' (2014) 28 *Ethics and International Affairs* 225. However, this arguments is made in context of state intervention by Mohammed Ayoob, 'Humanitarian Intervention and International Society' (2001) 7 *Global Insight* 225.

¹⁴ Article 46 of the European Convention of Human Rights (ECHR).

sovereignty. Fundamental rights remain the subject of continuous tug-of-war matches between the CJEU and the German Federal Constitutional Court (GFCC).¹⁵

Judicial Practice: Convergence at Distance

EU law and the ECHR

The ECHR is highly relevant for the determination of fundamental rights under EU law. The constitutional status of the ECHR within the EU legal order is codified in the EU Treaties. Article 6(3) TEU stipulates that the EU's general principles are based on the ECHR, together with the constitutional traditions of the Member States. The ECHR is also closely interlinked with the Charter of Fundamental Rights (CFR), which is the EU's binding catalogue of fundamental rights at primary law level. Indeed, Article 52(3) CFR and Article 53 CFR underline the particular relevance of the ECHR for the interpretation of the Charter. They declare that a Charter right that corresponds to a right under the Convention has the same meaning and scope as laid down by the ECHR and that nothing in the Charter may adversely affect rights protected under the Convention. Furthermore, while the Charter only refers to the Convention itself and not to the case law of the ECtHR (except in its Preamble),¹⁶ the CJEU has ruled in *J.McB. v L.E.* that where rights in the Charter correspond to rights in the ECHR it will follow the case law of the ECtHR.¹⁷ Hence, the ECHR as

¹⁵ In 2013, for example, the CJEU decided Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, EU:C:2013:105, paras. 19–21, explaining that the EU Charter of Fundamental Rights is applicable to Member States' actions within the 'scope of EU law'. The GFCC in *Counter-Terrorism Database*, 1 BVerfGE 1215/07, warned the CJEU not to interpret 'scope of EU law' too broadly (C, para. 91: 'for the questions ... which only concern German fundamental rights, the European Court of Justice is not the lawful judge according to Art 101 sec 1 GG. The ECJ's decision in the case *Åkerberg Fransson* does not change this conclusion. As part of a cooperative relationship between the Federal Constitutional Court and the European Court of Justice (cf. BVerfGE 126, 286 <307>), this decision must not be read in a way that would view it as an apparent ultra vires act or as if it endangered the protection and enforcement of the fundamental rights in the Member States (Art 23 sec 1 sentence 1 GG) in a way that questioned the identity of the Basic Law's constitutional order (cf. BVerfGE 89, 155 <188>; 123, 267 <353 and 354>; 125, 260 <324>; 126, 286 <302 et seq>; 129, 78 <100>). The decision must thus not be understood and applied in such a way that absolutely any connection of a provision's subject-matter to the merely abstract scope of Union law, or merely incidental effects on Union law, would be sufficient for binding the Member States by the Union's fundamental rights set forth in the EUCFR.'). Source (available in English and German): https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2013/04/rs20130424_1bvr121507en.html. The CJEU confirmed its position in Case C-418/11, *Texdata Software*, EU:C:2013:588, paras. 72–73.

¹⁶ Article 52(3) of the Charter of Fundamental Rights.

¹⁷ Case C-400/10 PPU, *J. McB. v. L.E.*, EU:C:2010:582. S Douglas-Scott interprets 'correspond' as 'the same' or 'identical', in 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 *Human Rights Law Review* 655, 655–656. This seems to be an overly strict

interpreted by the ECtHR is in many ways the prime source for EU fundamental rights, determining their scope and interpretation. Secondary law regularly refers to the ECHR.¹⁸

Convergence on Substance

Convergence in terms of substance is visible even in areas in which differences have emerged and resulted in an avalanche of scholarship on the potential of a clash between the CJEU and the ECtHR and of contradictory obligations of the Member States.¹⁹ An example of this is the case law of the ECtHR, the CJEU and the UK Supreme Court on the limits of the principle of mutual recognition/trust in a series of cases concerning the Common European Asylum System.

In 2011 in the *M.S.S.* case the ECtHR found Belgium in violation of Article 3 ECHR for sending an asylum seeker back to Greece where their rights under the Convention were blatantly infringed the ECtHR. It made clear that the obligations under the Convention impose limits to the principle of mutual recognition/trust under EU law, which establishes a presumption of compliance with EU fundamental rights. Shortly after, in the cases of *N.S.* and *M.E.*, the CJEU followed *M.S.S.* and reconciled EU law with the ECtHR's ruling by declaring that the transferring Member State was obliged to examine the asylum application itself in cases such as *M.S.S.*, where numerous clear indications pointing at a violation of the ECHR. In light of the wording of the Dublin-II-Regulation, this is quite a stretch, but it allowed Member States to reconcile their obligations under the Convention and under EU law. Two years later, in 2013, the CJEU introduced a higher threshold to justify departure from the Dublin II rules. In the case of *Abdullahi* a national court requested the CJEU to clarify the procedure for determining responsibility for asylum applications under the Common European Asylum System. The CJEU replied that when two Member States agreed which of them was the state that was responsible for the application under the Dublin II Regulation, the asylum seeker could 'only' challenge that decision by 'pleading *systemic deficiencies* in the asylum procedure and

reading. Indeed, the explanations to the Charter offer a list of 'corresponding rights'. This appears to offer a good interpretation of the scope of the Court of Justice's ruling.

¹⁸ E.g. Recital 1, Council Directive 2000/78/EC (n 3); Recital 1, Directive 2016/343/EU on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L65/1. Recital 5 *et seq.*, Directive 2012/13/EU on the right to information in criminal proceedings [2012] L142/1.

¹⁹ S Gáspár-Szilágyi, 'Joined Cases Aranyosi and Căldăraru. Converging Human Rights Standards, Mutual Trust and a New Ground for Postponing a European Arrest Warrant' (2016) 24 *European Journal of Crime, Criminal Law and Criminal Justice* 197. A Lübbe, 'Systemic Flaws' and Dublin Transfers: Incompatible Tests before the CJEU and the ECtHR?' (2015) 27 *International Journal for Refugee Law* 135. W Weiss, 'Human Rights in the EU: Rethinking the Role of European Convention on Human Rights After Lisbon' (2011) 7 *European Constitutional Review* 64. S Morano-Foadi and S Andreadakis, 'The Convergence of the European Legal System in the Treatment of Third Country Nationals in Europe: The ECJ and ECtHR Jurisprudence' (2011) 22 *European Journal of International Law* 1071.

in the conditions for the reception of applicants for asylum' in the responsible Member State.²⁰

Again one year later, in 2014, an Afghan family brought an application to the ECtHR challenging their transfer from Switzerland to Italy amongst others on the grounds that in Italy they would be treated in a way that violated Article 3 ECHR (*Tarakhel*).²¹ The Strasbourg Court accepted by a majority of 14 to 3 that Switzerland had indeed breached Article 3 ECHR. The Court relied on its usual test, which assumes that Article 3 ECHR stands in the way of a transfer if 'substantial grounds have been shown for believing' that a 'real risk' exists of treatment contrary to that article in the state of destination.²² In the following case of *Aranyosi* the CJEU brought its position again much more in line with the ECtHR by emphasising the 'real risk' test, which also places emphasis on the specific situation of the applicant rather than only systemic deficiencies.²³

This line of case law should be taken as evidence of the mutual willingness to avoid an open clash. In its development it demonstrates how mutual approximation in terminology and focus can lead to convergence that bridges the actual or putative differences.

Keeping Interpretational Distance

Opinion 2/13 on the EU's accession to the ECHR gave the CJEU the opportunity to engage with the potential tension between the EU principle of mutual trust and obligations under the ECHR at an abstract level, unrestrained by the concrete facts of a particular case.²⁴ The Opinion could be considered the clearest and most consequential expression of the CJEU's attempts to keep the ECHR at *distance* to the EU legal order.²⁵

In Opinion 2/13, the CJEU found that the agreement setting out the legal framework for EU accession to the ECHR was incompatible with EU law, essentially because it endangered the autonomy of the EU legal order.²⁶ Indeed, the CJEU treats the

²⁰ Case C-394/12, *Shamso Abdullahi v. Bundesasylamt*, EU:C:2013:813, at para. 60 [emphasis added].

²¹ *Tarakhel v. Switzerland* [GC], no. 29217/12, ECHR 2014.

²² See *Soering v. the United Kingdom*, no. 14038/88, ECHR 1998-VII, Series A no. 161.

²³ Joined Cases C-404/15 and C659/15 PPU, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*, EU:C:2016:198, para. 88.

²⁴ Opinion 2/13, Accession of the EU to the ECHR, EU:C:2014:2454.

²⁵ See on the pre-accession distance: C Eckes, 'EU Accession to the ECHR: Between Autonomy and Adaptation' (2013) 76 *Modern Law Review* 254.

²⁶ See also: N Jaaskinen and A Sikora, 'The exclusive jurisdiction of the Court of Justice of the European Union and the unity of the EU legal order' in M Cremona et al. (eds), *The EU and International Dispute Settlement* (London, Hart Publishing, 2016); T Lock, 'The Not So Free

concern over autonomy as a second-order reason in the Razian sense of a meta-consideration that displaces all first-order reasons.²⁷ In other words, in the view of the CJEU, the protection of the autonomy of the EU legal order must be ensured, not on a balance of interests but as an absolute value. By autonomy the CJEU understands that EU law is valid in itself without the intervention or recognition of national or international law. The CJEU regards protecting the autonomy of the EU legal order as identical to protecting its own ability to maintain *from the authoritative perspective of EU law* that EU law ‘stems from an *independent source of law*’.²⁸ This unilateral claim of the CJEU, while remaining unconfirmed by national courts, is central to the balance of powers within the EU legal order. The mutually agreed suspension of the decision over the ‘last word’ between the CJEU on the one hand and national constitutional and supreme courts on the other depends on the ability of each of the judicial actors (the CJEU and the national constitutional courts) to make their own claims within the logic of their own legal order. If the CJEU’s absolute claim of original validity of EU law could be challenged, not only from the perspective of national and international law, but *within the logic of EU law*, this would allow national courts to end the suspension and make a universally valid claim.

In fact post-accession, the CJEU could reasonably expect greater pressure from the highest national courts if it was legally bound and had to enforce external determinations of fundamental rights standards that clashed with the internal, national and/or European interpretations of these rights. Yet with regard to the determination of the scope or substance of rights the EU’s position is not essentially different from the position of states. The margin of appreciation may equally ensure the EU’s autonomy to make interpretative choices of substance. The great difference between the position of the EU and a state pertains to the ECtHR’s ability to make a binding determination of the hierarchical relations between norms belonging to different legal spheres, and thus interfere with the power relations within the EU.²⁹

European and International Rights Instruments in National Law

In the EU’s compound legal order, not only the CJEU but also, and even primarily, national courts are confronted with the task of delimiting and reconciling the

Choice of EU Member States in International Dispute Settlement’ in M Cremona et al. (eds), *The EU and International Dispute Settlement* (London, Hart Publishing, 2016).

²⁷ Raz calls first-order considerations: ‘reasons for action’ that have been drawn directly from ‘considerations of interest, desire or morality’ and second-order considerations: ‘reason[s] to act on or refrain from acting on a reason’, see J Raz, *Practical Reason and Norms* (Oxford, Oxford University Press, 1975) at 34 and 39, respectively. Raz’s framework of first and second-order considerations is often used in the human rights context as an argument against balancing and a justification for giving rights priority over other considerations, see, for example, RH Pildes, ‘Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law’ (1994) 45 *Hastings Law Journal* 711.

²⁸ Opinion 2/13 (n 23), para 166. Emphasis added.

²⁹ See for more detail Section four below, which examines the plausibility of the CJEU’s autonomy concern.

different obligations that flow from different legal expressions of rights, such as the UDHR, the ECHR, the EU Charter and national bills of rights. This section will turn to some examples of how national constitutional courts choose the approach of convergence at distance.

An example of convergence at distance is the interpretative value given to the EU Charter under Spanish constitutional law. Both the Romanian Constitution and the Spanish Constitution expressly give the UDHR interpretative value and align their corresponding constitutional provisions to this instrument.³⁰ The Spanish Constitutional Court extended this rule to EU law and held that even if EU law lacked constitutional status EU law provisions that have fundamental status (including the Charter) should be treated the same way as the sources that have formally been vested with interpretive value.³¹

The UK Supreme Court dealt in 2014, only two months after the above-discussed case of *Abdullahi*, with the exact question of whether and to what extent national authorities are required to check the circumstances of asylum seekers after their transfer to another Member State. The Supreme Court held in the case of *EM* that, irrespective of whether 'systemic deficiencies' existed in the reception system for asylum seekers in Italy, the Court of Appeal should examine on a case-by-case basis the risk that appellants would be subjected to treatment contrary to the Convention if they were returned to Italy.³² The parties had based their arguments on the case law of the ECtHR but had not referred to the case law of the CJEU at all. The UK Supreme Court did not mention *Abdullahi* either. This case demonstrates the important role that national courts play in giving authority to the reading of either the ECtHR or the CJEU.

The German Federal Constitutional Court (GFCC) has for long made much noise about the relationship between fundamental rights protected under national and EU law. The GFCC has a tradition of on the one hand encouraging the CJEU to protect

³⁰ Art 20(1) of the Romanian Constitution: 'Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to.'

³¹ Art 10(2) of the Spanish Constitution: 'The principles relating to the fundamental rights and liberties recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain'. M de Visser, 'National Constitutional Courts, the Court of Justice and the Protection of Fundamental Rights in a Post-Charter Landscape' (2014) 15 *Human Rights Review* 39, 43. (The case is not translated to English.)

³² *R (on the application of EM (Eritrea)) (AE (FC) (Appellant)) v Secretary of State for the Home Department (Respondent)*, [2014] UKSC 12.

fundamental rights³³ and on the other delimiting the applicability of the EU Charter of Fundamental Rights and the case law of the CJEU.³⁴ It consistently excludes that constitutional complaints could be based on a violation the ECHR or the Charter, but limits the application of these instruments to situations where they are invoked in conjunction with a violation of a fundamental right protected under the German Constitution.³⁵

In 2013, the CJEU had linked Article 51(1) CFR, which sets out that the provisions of this Charter are addressed to [...] the Member States only when they are *implementing* Union law, to the CJEU's pre-Charter case law on when Member States are bound by EU fundamental rights and interpreted it to mean '*applicable in all situations governed by European Union law*' (*Akerberg Fransson*).³⁶ The GFCC considered in the same year whether *Akerberg Fransson* was *ultra vires*, came to the conclusion that it was not and it also did not violate the constitutional identity of the German basic law. In this ruling the GFCC explained that *Akerberg Fransson* cannot be understood in a way that '*absolutely any connection of a provision's subject-matter to the merely abstract scope of Union law, or merely incidental effects on Union law, would be sufficient for binding the Member States by the Union's fundamental rights set forth in the EUCFR. Rather, the European Court of Justice itself expressly states in this decision that the European fundamental rights under the Charter are "applicable in all situations governed by European Union law, but not outside such situations"*'.³⁷ In other words the GFCC demonstrated that it considers itself the arbiter of whether the CJEU acts *ultra vires* and also set out how the case law of the CJEU could not be interpreted because *if the CJEU did so, it would act ultra vires*. A large body of case law confirms the GFCC's self-understanding as an autonomous guardian of fundamental rights protection in Germany, who even has the obligation of holding the CJEU at distance. The GFCC held for example in another case that it was reasonable for the Federal Supreme Court (*BGH*) to establish that Art 50 CFR was to be interpreted in the same way as Art 54 of the Schengen Convention without making a reference to the CJEU, because the Explanations to the Charter state that Art 50 CFREU corresponds to Art 54 to 58 of the Schengen Convention.³⁸ In yet another case the GFCC elaborated on the obligations of national courts to contribute to an effective fundamental rights protection under Union law, including their obligation to interpret national

³³ *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, BVerfGE 37, 271 (*Solange I*); *Re Wünsche Handelsgesellschaft*, BVerfGE 3 CMLR 225 (*Solange II*).

³⁴ See *Counter-Terrorism Database* (n 14 above) on the constitutionality of a counter-terrorism database.

³⁵ BVerfG, 1 BvR 2329/15. Available in German at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2015/10/rk20151015_1bvr232915.html.

³⁶ See *Åkerberg Fransson* (n 14 above), para. 19.

³⁷ See *Counter-Terrorism Database* (n 14 above).

³⁸ BVerfG, 2 BvR 148/11. Available in German at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2011/12/rk20111215_2bvr014811.html.

provisions adopted to give effect to EU law in light of the Charter. It emphasised its own role as the guardian who ensures that national courts apply the Charter and safeguard fundamental rights protection.³⁹

The EU Charter also has interpretative influence beyond the scope of EU law.⁴⁰ One illustrative example is a recent case, in which the Spanish Constitutional Court supported that a minor is able to have the name of his mother in the first place (rather than the name of his father) with the CJEU's ruling case of *Sayn Wittgenstein* that the name of a person is part of her identity and privacy, despite the fact that the case at hand was missing any link to EU law.⁴¹

The CJEU's ruling on the permissibility of a general ban on religious symbols may hence in this very way have effects beyond the actual scope of EU law. It is likely to have an influence on how German courts assess similar cases. Until now the understanding had been that religious symbols could not be banned from the

³⁹ BVerfG, 1 BvR 1585/13. Available in German at:

https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/05/rs20160531_1bvr158513.html, paras 120-124.

⁴⁰ Bulgaria: Supreme Cassation Court/1524/2014 (court used Art 1 CFREU besides universal declarations to establish that the obligation to constitute every person as an accused before starting the investigation does not violate the private sphere of the accused); Czech Republic: Constitutional Court/ II.ÚS 164/15 (The Czech Constitutional Court used Art 24 CFREU in order to conclude that the prohibition of an anti-abortion demonstration near an elementary school was lawful); The Supreme Court/ 30 Cdo 3223/ 2011 (Court used besides the UDHR Art 1 CFR to establish that the protection of human dignity is not lower for disabled persons); Denmark: High Court/ B - 1753 - 08 (Art 1 and 3 CFREU do not include the right of persons to have a sign prohibiting nude bathing); Italy: Constitutional Court/ Judgement No. 178/2015 (Measures restricting the collective bargaining for civil servants is in breach with Art 39 Italian Constitution, international law and Art 30 CFREU); Court of Cassation (Labour Section)/ 41 C.V. v Radio dimensione suone (Court established that the case was outside the scope of EU law but the Italian Court used Art 30 CFREU as a source of 'free interpretation'); Lazio Regional Administrative Tribunal/ Judgement No 201509411 (Court used Art 41 CFREU in conjunction with national rules to establish that a decision of the ministry of Justice did not comply with the minimum conditions of transparency necessary to act understandable for citizens and ensure the right to justice and good administration - need to state reasons - a decision concerning the bar examination board); Lithuania: Supreme Administrative Court of Lithuania/ A-82281265/2014 (The Supreme Court used Art 41 CFR as 'an additional source of interpretation' to annul an administrative provision because the right to be heard was infringed.); Poland: Appellate Court in Wrocław / I ACa 1337/11 (Proceedings between an individual and her health insurance, the Polish Court used the EU Charter together with international charters (e.g. Art 11 European Social Charter) to stress the importance of the correspondent constitutional right); Appellate Court in Białystok / II AKzW 665/13 (interruption of 25-year prison sentence to receive medical treatment outside the prison, the court used Art 4 CFREU and Art 3 ECHR to stress the importance of the relating Polish Constitutional right); Portugal: Constitutional Court / 578/2014 (Court used Charter on Fundamental Rights to stress the importance of the freedom of thought, religion and conscience in a case concerning compulsory moral and religious education in school).

⁴¹ Spanish Constitutional Tribunal 167/2013.

workplace, except for safety considerations. It will be interesting to see how national courts square this with the ECtHR's decision in *Eweida*, in which the Strasbourg Court found that a rule must be appropriate and necessary and a fair balance must be struck between the wish of an employee to wear a cross at the workplace in order to manifest her religious belief and the employer's wish to protect a neutral corporate image.⁴²

The Plausibility of the CJEU's Autonomy Claim⁴³

The core reason why the CJEU holds the ECtHR at distance is the CJEU's concern for the autonomy of the EU legal order and its own monopoly of jurisdiction. Accession could indeed be a threat for the EU's autonomy for three interconnected reasons. Firstly, the ECtHR enjoys an exceptional status within the EU legal order. It is not only one of the sources of the general principles of EU law, but has over time been vested with an elevated status that requires that the EU Treaties are interpreted in conformity with the ECHR. Secondly, EU law is of international origin. This makes the relationship between the ECHR and EU law different from the relationship between the ECHR and national law in that the 'domestic nature' of EU law is contested. Both the foundations of the EU legal order and the CJEU's claim to dualism are essentially contested and contestable. Thirdly, the EU is a compound rather than unitary actor, with numerous internal parts. From the perspective of international law and the ECtHR, all states are monolithic while the EU can ultimately be dissolved into its Member States, which all possess full international personality and may equally contest the original validity of EU law.

As to the first point, the ECHR enjoys a supreme status within the EU legal order. As explained above⁴⁴ the Treaties codify the ECHR's constitutional status and the CJEU has extended it to the case law of the ECtHR. Moreover, EU fundamental rights, which are not only inspired but interpreted in line with the ECHR and the case law of the ECtHR, are part of the 'foundations' of EU law. In the case of *Kadi I* the Court ruled that these foundations constitute a layer of law that is hierarchically superior to the rules codified in the Treaties.⁴⁵ This particular case concerned the right of Member States to derogate from EU law under Article 351 TFEU, which the Court held to be limited by these foundations. As a consequence, the foundations are vested with a status supreme to 'ordinary' primary law. This reading of the legal hierarchy between the foundations of the Union and EU primary law, is confirmed

⁴² *Eweida and Others v. the United Kingdom*, no. 48420/10, ECHR 2013, para. 94.

⁴³ This section draws from: C Eckes, 'International Rulings and the EU Legal Order: Autonomy as Legitimacy?' (CLEER Papers 2016/2, T.M.C. Asser Institute, 2016).

⁴⁴ Section 3.2 above 'EU law and the ECHR'.

⁴⁵ Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, EU:C:2008:461 (*Kadi I*), paras. 303–04.

by the *Cresson* and *Ocalan* cases.⁴⁶ In both cases, the CJEU held that EU primary law must be read in the light of the ECHR.

Post accession, the ECHR would be legally binding on the EU and the EU institutions, both under international and EU law. Furthermore, the ECtHR's rulings in cases to which the EU is a party would become directly binding on the EU. In practice, national courts take account of the ECtHR's case law more broadly, not only in cases to which their state was a party. For the Member States, in addition to their international legal obligations, the ECHR would become binding as a matter of EU law. Applying the same hierarchy developed by the CJEU, the EU courts, as well as national courts, would have to enforce the ECHR and the binding decision of the ECtHR above EU law.⁴⁷ At the same time, the CJEU would, of course, continue to hold the monopoly of judicial interpretation over the EU fundamental rights and the foundations of EU law. Technically, this would allow the CJEU to insist on an interpretation that lowers the status of the ECHR within the EU legal order. Yet in the light of the clear choices of Article 6(3) TEU and Articles 52(3) and 53 CFR, as well as the high level of acceptance of the ECHR's authority, it would be difficult for the CJEU to change its position on the elevated status of the ECHR.

As to the second point, the 'domestic' nature of the EU legal order, its 'separateness' from international law and its 'original validity' claim are constructions of the CJEU. The CJEU and most EU legal scholars conceive of the EU legal order as a (quasi-)constitutional system.⁴⁸ By contrast, international law and international legal scholars understand EU law as a special and potentially self-contained subsystem of public international law.⁴⁹ Moreover, while the primacy of EU law is in practice widely accepted, national constitutional and supreme courts, national governments and national legal scholars dispute the Court's original validity claim. This constellation, in which the international legal framework imposes limits and national actors call the autonomy of EU law into question, makes the EU legal order as constructed by the CJEU, including its dualist approach vis-à-vis international law, *essentially contested and contestable*.

⁴⁶ Case C-432/04, *Commission of the European Communities v. Édith Cresson*, EU:C:2006:455, para 112; Case C-229/05 P, *Osman Ocalan, on behalf of the Kurdistan Workers' Party (PKK) and Serif Vanly, on behalf of the Kurdistan National Congress (KNK) v. Council of the European Union*, EU:C:2007:32, conclusion in para. 83.

⁴⁷ Art 46(1) ECHR; see the discussion of the status of the ECHR within the EU legal order above.

⁴⁸ For the CJEU, see *Kadi I* (n 45 above); Case 294/83 *Parti écologiste 'Les Verts' v. European Parliament*, EU:C:1986:166. For legal scholars, see e.g. R Schütze, *European Constitutional Law* (Cambridge, Cambridge University Press, 2012).

⁴⁹ See e.g. the attempts to accommodate the EU in the Draft Articles on the International Responsibility of International Organisations (ARIO).

As to the third point, the EU's claim to autonomy from international law is further *legally limited* by the fact that the Member States collectively have the power to amend the treaty framework. Individually Member States can be subject to state responsibility claims and be brought before the ECtHR. They can hence be forced to take a legally binding stand in an external forum on how they construct the relationships between international, EU and national law. The situation of the EU is in this regard very different from the situation of federal states. While federate units may politically challenge the federal level, they are part of a hierarchical legal and judicial structure and cannot essentially contest the federal structure *within its own logic*. Moreover, they do not—as long as they are part of the federation—enjoy an independent status as subjects of international law for purposes of state responsibility. On the contrary, under international law (including before the ECtHR) federal states are treated as one unitary unit. This also means that federate units cannot actively rely on international law to challenge the status or existence of the federal level.

In practice, the different *essentially irreconcilable* positions of what the EU legal order is, have amounted to a delicate system of checks by national constitutional and supreme courts and balances of different political forces, in which all actors 'bark but not bite'.⁵⁰ This delicate equilibrium of irreconcilable claims to sovereignty and autonomy functions because none of the actors holds the *monopoly* of interpreting the nature of EU law or the relationship between the different legal spheres. None of the actors is able to legally bind the other within their own legal order. Each actor can only make claims reasoned on the terms of their own legal order, which are consequently only valid within the logic of their own legal order. This of course does not exclude *persuasive* powers beyond this legal order.

This separation of logical frameworks for legal reasoning would change after accession. The ECtHR sees the EU as an 'international organization' to which the states 'have transferred part of their sovereignty'.⁵¹ It refers to EU law as 'international legal obligations' of the contracting parties.⁵² Indeed, the core of its argument in *Bosphorus*, justifying the presumption of equivalent protection, is based on a view of the CJEU as an 'international machinery for supervising fundamental rights'.⁵³ Hence, the ECtHR's deference to the CJEU is closely interlinked with its understanding that EU law is of an international nature. Indeed, the ECtHR accepts 'that compliance with European Union law by a Contracting Party constitutes a legitimate general-interest objective'.⁵⁴ Post accession, the *Bosphorus* doctrine would,

⁵⁰ See differently: N Petersen, 'Karlsruhe Not Only Barks, But Finally Bites – Some Remarks on the OMT Decision of the German Constitutional Court' (2015) 15 *German Law Journal* 321.

⁵¹ *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*, no. 45036/98, ECHR 2005-VI, para 154 and following case law.

⁵² *Ibid.*

⁵³ For example *Michaud v France*, no. 12323/11, ECHR 2012.

⁵⁴ *Bosphorus* (n 51), paras 150–51.

logically, no longer be applicable,⁵⁵ but this does not mean that it should be expected that the ECtHR changes its reading of EU law as international law. Already at present (pre-accession) Member States and, in particular, national courts, can rely on international law (including rulings of the ECtHR) in order to challenge the CJEU's construction of the EU legal order. Post-accession, rulings of the ECtHR that challenge the CJEU's perspective of the EU as an autonomous legal order would be an exceptionally powerful tool in the hands of the Member States and national courts. National courts could use these rulings, including those directly binding on the CJEU, to challenge the EU legal order from within. Hence the core difference is that the ECtHR's view of EU law as international law, with the attached consequences both for the relation between EU law and international law (no dualism possible) and EU law and national law (dualism possible), would directly be binding on the CJEU in cases to which the EU is a party. This would potentially allow national courts to drive a wedge into the judicial construction of the EU as an autonomous legal order.

By way of conclusion, after accession the ECtHR would exercise constitutional review over fundamental political choices made by the EU institutions. Human rights under the ECHR not only allow the ECtHR to make value choices, but with their indeterminacy they even *require* such choices. Yet, even more relevant for the autonomy of the EU is the fact that the ECtHR would also rule on the relationship between legal spheres, which is interpreted very differently by the ECtHR (EU law as international law) and the CJEU (autonomous domestic legal order). Post accession, the ECtHR's interpretation would be *binding on the EU and the CJEU* and in principle even enjoy *an elevated status within the EU legal order*. This would allow national courts to challenge the core relationship between national, international and EU law from *within the logic of EU law*. This would also allow national courts to undermine the CJEU's monopoly of interpretation of EU law by relying on rulings on the ECtHR, which are part of the EU legal order.

All this brings me to the conclusion that accession, because it allows national courts to rely in a very different fashion on international law and the case law of the ECtHR, would impact on the delicate equilibrium of irreconcilable claims to sovereignty and autonomy within the EU legal order. I must hence agree with the CJEU that making the ECHR and the case law of the ECtHR directly binding on the EU has the potential to undermine the status quo of the suspended irreconcilable claims to sovereignty and autonomy. This would challenge the CJEU's ability to interpret EU law as if the

⁵⁵ C Eckes, 'EU Accession to the ECHR: Between Autonomy and Adaptation' (2013) 76 *The Modern Law Review* 254. Considering the application of *Bosphorus* post-accession as uncertain: L Besselink, 'The Protection of Fundamental Rights post-Lisbon: The Interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and National Constitutions' (*FIDE*, 2012). Available at: www.fide2012.eu/index.php?doc_id=94.

EU legal order was a domestic and autonomous legal order. I should add that I do not argue that the CJEU's reading of the original validity of EU law is any more convincing than the national or international narratives. I only argue that its internal validity appears necessary to maintain the *status quo*, which is built on an equilibrium of irreconcilable claims about the nature of EU law. It would be sufficient to threaten the system if several national supreme or constitutional courts, such as those of Germany, Poland or the Czech Republic, made a credible and serious threat that they start challenging the EU from within. It would by no means require a challenge by all national systems.

The Commission seems to be keenly aware of the challenges. Its suggestion to treat EU law as domestic law in international trade agreements, which has already been incorporated in CETA,⁵⁶ is one step to address these tensions. Establishing an explicit understanding that the EU is domestic law and can take a dualist position vis-à-vis international law that is binding both on the external court (i.e. the ECtHR) and on the Member States may help to address the described threat to the EU's autonomy.

Theories of Rights

The moral appeal of human rights at a certain level of abstraction is difficult to dispute. They have a universal vocation and presume that people have rights unconditionally by virtue of their human nature. Fundamental rights by contrast are community specific and defined within and for a particular polity and jurisdiction. The latter require at least *prima facie* a justification that goes beyond the human nature. This discussion can be conducted in isolation from specific legal expressions of rights, i.e. the EU Charter of Fundamental Rights, the ECHR or national bills of rights, if rights are understood as *moral*⁵⁷ demands rather than *legal* rights. Furthermore, if the existence of certain rights, or even their specific stipulation, is agreed, this still leaves room for genuine and reasonable disagreement on how these rights are to be interpreted or applied in the specific case, or how they are weighed against each other. Similarly, genuine and reasonable disagreement is likely on which standard of protection, i.e. which fundamental rights catalogue, should prevail where different standards of protection are agreed that overlap in substantive and territorial scope, as it is for example the case for the Charter, the ECHR and national rights instruments. Besides legal disagreement, which is contingent on starting from the perspective of one legal sphere or order, there can hence be moral disagreement about in which context rights should be determined and filled with meaning.

⁵⁶ See Article 8.31(2) CETA: 'The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the *domestic* law of the disputing Party.' [emphasis added].

⁵⁷ Moral and ethical are here used in a way broadly following Habermas and Dworkin, i.e. that moral indicates an independent justification, while ethical is ultimately connected to a conception of the good.

I argue that since contingent legal decisions do not help us to decide in which contexts rights should be determined it is useful to turn to theory. Theories of rights may indeed be useful in determining the scope within which genuine disagreements can be reasonably argued. In order to support this argument it is necessary to identify and explicate at least in a rudimentary fashion the consequences of different theories of rights for the question of how different rights catalogues and their authoritative interpretations should be reconciled.

Any theory of (human) rights is to some extent a function of what its objective is. Theories of human rights must above all justify human rights' claim to universality and ability to trump other considerations. Fundamental rights theories must additionally justify the existence of rights that are developed and applicable within a certain polity rather than to all humans because they are humans. They hence face different challenges to justify their universality and relativism respectively.

This is not the place to give even a concise overview of different human rights theories. It suffices to point out that human rights theories have tackled an array of questions from foundational to categorical ones: whether rights are based on duties or whether duties derive from rights;⁵⁸ whether natural rights exist;⁵⁹ the distinction and relationship between moral rights and legal rights;⁶⁰ the distinction between rights and interests;⁶¹ the relevance of a taxonomy between positive and negative rights;⁶² the distinction between rights to freedom and social contract rights, and how they relate to principles of distributive justice;⁶³ the relative importance of rights vis-à-vis principles and rules; their inherent authority over competing political values;⁶⁴ and the relationship between group and individual rights.⁶⁵ Some broad strands can be identified, such as those based on a utilitarian understanding;⁶⁶ those based on an

⁵⁸ See e.g. P Montague, 'Two Concepts of Rights', J Waldron, 'Rights in Conflict' and F Kamm, 'Conflicts of Rights: Typology, Methodology, and Nonconsequentialism' all in CL Ten (ed), *Theories of Rights*, The international library of essays on rights (Aldershot, Ashgate Publishing Limited, 2006).

⁵⁹ As is well known, T Hobbes; J Locke; HLA Hart prominently argued in favour of natural rights; challenged e.g. by: J Bentham, 'Anarchical Fallacies' in J Waldron (ed), *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man* (New York, Methuen, 1987) 53: 'Natural rights is simply nonsense: natural and imprescriptible rights, rhetorical nonsense, nonsense upon stilts'.

⁶⁰ See e.g. Waldron, 'Rights in Conflict' (n 55).

⁶¹ See e.g. J Raz, 'On the Nature of Rights' in CL Ten (ed), *Theories of Rights* (n 55).

⁶² Kamm, 'Conflicts of Rights' (n 55).

⁶³ R Peffer, 'A Defense of Rights to Well-Being' in CL Ten (ed), *Theories of Rights* (n 55).

⁶⁴ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977); see also: Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press, 2011).

⁶⁵ E.g. P Jones, 'Group Rights and Group Oppression' in CL Ten (ed), *Theories of Rights* (n 55).

⁶⁶ Jeremy Bentham, 'Anarchical Fallacies' (1824), in *The Works of Jeremy Bentham*, ed. John Bowring (Edinburgh, 1843), Vol II.

ethical understanding;⁶⁷ and a legal understanding which considers ‘human rights’ to be a term of art under positive law.⁶⁸ Many of the debates about the nature and origin of rights are relevant for their interpretation and existence but do not necessarily give any guidance to the question of who should interpret them, who should apply them, or when several differing codifications exist in different legal spheres how these should relate to each other. Yet, none of the different approaches gives us appropriate guidance on how the different legal spheres should relate and which standard of integration may be seen as adequate as a result. Considerations of a utilitarian nature can – as a matter of principle – be applied to all the different spheres or polities – the national, European, and even the international. On a simplified level it may be read as justifying a focus on the legal sphere that governs the greater number (i.e. international law) to increase the benefits from human rights for a greater number. Human rights theories grounded in an ethical understanding presuppose an agreement on what the good life is (contenders would be happiness, well-being, autonomy). This is in fact difficult to establish in either context – national, European or international. The positive law approach is subject to the same limitations explained above for the judicial practice. I hence argue that in particular those theories of rights that link rights to public reasoning⁶⁹ or justification⁷⁰ are most capable of giving us guidance on how the different legal spheres should relate to each other.

The positive law as expressed in the common traditions of national constitutions and the EU Treaties makes a clear and express commitment to the principle of democracy. It could further be argued that even international law and international relations make a commitment to (democratic) self-determination, albeit in a far weaker manner.⁷¹ This makes the choice for a theory of rights that links rights to public reasoning and justification sit coherently with the law. This also makes such theory particularly apt to give guidance on how the different legal spheres should connect.

Rainer Forst has developed a theory of human rights as originating in a right to justification.⁷² His theory falls into the strand of theories that point to human dignity as the common underlying reason for the existence of rights that all persons enjoy because they are humans. Forst understands dignity as a relational concept and argues that the core of the human rights discourse is the understanding that being a

⁶⁷ E.g. James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008). A Sen, ‘Elements of a Theory of Human Rights’ (2004) 32 *Philosophy & Public Affairs* 315.

⁶⁸ Christian Tomuschat, *Human Rights: Between Idealism and Realism*, 3rd edn (Oxford, Oxford University Press, 2013). HLA Hart, ‘Are there any Natural Rights?’ (1955) 64 *Philosophical Review* 175.

⁶⁹ A Sen, ‘Elements of a Theory of Human Rights’ (2004) 32 *Philosophy & Public Affairs* 315.

⁷⁰ J Cohen, ‘Minimalism about Human Rights’ (2004) 12 *Journal of Political Philosophy* 190.

⁷¹ C Eckes, ‘The reflexive relationship between internal and external sovereignty’ (2015) 18 *Irish Journal of European Law* 33.

⁷² Rainer Forst, *Kritik der Rechtfertigungsverhältnisse. Perspektiven einer kritischen Theorie der Politik* (Berlin, Suhrkamp Verlag, 2011) 54.

person ('Personsein') depends on being treated as a being with a right to justification ('Rechtfertigungswesen').⁷³ This creates the necessity to accept all individuals as persons to whom one owes reasons⁷⁴ and requires that all individuals be treated as persons whose rights and interests are respected both in the process of decision-making and in the substantive decision.⁷⁵ Reflexiveness is at the core of what distinguishes Forst's theory from other human rights theories.⁷⁶ It in fact makes it a theory of fundamental rather than human rights within the meaning of these words as they are used in this paper.⁷⁷

Accepting a reflexive right to justification as the origin of all rights has consequences for the present discussion of the justifiable and desirable level of harmonisation and variation. As a consequence of the right to justification those exercising public power in a way that restricts rights have to offer their citizens legitimate reasons.⁷⁸ Human rights play in this reason-giving process the role of a language of critique ('Sprache der Kritik'), which protects citizens from unjustified societal and political circumstances of oppression.

The choice between universal human rights and jurisdiction-bound fundamental rights is an expression of the choice between universalism and relativism. It imposes a hierarchy between the standard of a cosmopolitan or at least more inclusive moral community and the standard of one's own cultural home community. Forst considers his theory as a matter of theory agnostic on the question of what the appropriate political or societal framework for realising rights is.⁷⁹ He maintains that 'the question at issue between globalists and statistes have to be decided elsewhere, namely with reference to a conception of transnational justice [...]'.⁸⁰ However, I would argue that in lack of even emerging political structures at the international level that allow meaningful participation or even communication structures that could make justification possible it seems difficult to imagine a reflexive discourse that allows realisation of human rights in the way Forst appears to imagine it. I would hence further argue that Forst's theory speaks in favour of political structures that are built on democratic legitimacy and participation.

⁷³ Ibid., 67.

⁷⁴ Ibid., 66.

⁷⁵ Ibid., 77.

⁷⁶ R Forst, 'The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach' (2010) 120 *Ethics* 711.

⁷⁷ See also: R Forst, 'The Justification of Basic Rights: A Discourse-Theoretical Approach' (2016) 3 *Netherlands Journal of Legal Philosophy* 7.

⁷⁸ Ibid., 76.

⁷⁹ Forst, 'A Reflexive Approach' (n 73), 738.

⁸⁰ Ibid.

Standards of human rights and fundamental rights differ, both in law and in practice. I propose to analyse the relevance of these differences or variations on the basis of a distinction between the existence of rights, their interpretation and their implementation.⁸¹ The three categories of variations stand in a hierarchical relationship with each other: existence and wording of a right sets the limit to differences in interpretations, interpretation sets the limits for differences in implementation. Variation in the existence and wording of rights is limited by the reason of existence for these rights, which is here understood as ultimately being a right to justification. The core question is what are the limits of these variations and deviations. Any deviation not only from universal human rights but arguably a more inclusive fundamental rights standards and practice must be justified in this light in order to be legitimate. Forst's theory leaves room for justified variation between rights standards. It can even explain such variation. Rights, understood as ultimately based in a moral right to justification, link the determination of the precise interpretation and content of these rights to the process of reason-giving in any given polity. The processes of reason-giving may then come to different outcomes in different polities and in different contextual settings. This may justify some room for variation in fundamental rights protection.

The most problematic case in this regard are fundamental rights standards and practices that may be and are justified within a particular jurisdiction pursuant to the internal standard, but are not the most defensible choice in light of an external evaluation. Pursuant to Forst's theory this only becomes problematic if this leads to domination or oppression. As long as all rights-holders are also norm-givers any particular choice does not have to be the 'most-defensible' and the theory that grounds rights in a right to justification rejects external standards of what is 'good'.

Human rights are an expression of a moral standard. The three categories of variation: substantive rights, interpretation and implementation start from the highest level of hierarchy and generality moving to the hierarchically inferior and more specific. The more specific any universal prescription is the closer it moves to a claim of moral objectivity. Moral relativism by contrast is concerned with cultural differences and sets limits to the legitimacy of imposing contingent norms across the boundaries of jurisdictions. A distinction must be made between the possibility, depending on authority, and the legitimacy, i.e. moral defensibility of imposing such standards. The discussion here is concerned with the latter. In short, a moral reason to justify departure from a more inclusive standard is self-determination. Self-determination is a human right accepted both by moral relativists and moral universalists. The reading that the very reason for existence of human rights is justification of the exercise of power, i.e. the imposition of limits on behaviour, shifts the focus to those to whom the rights are owed. This connects to Forst's theory that

⁸¹ This distinction is borrowed from: J Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6 *Human Rights Quarterly* 400, at 402.

treating individuals as persons to whom reasons are owed is the common ground justifying the existence of human rights.

Conclusions

Positive law within the compound European legal order contains a number of procedural mechanisms and substantive clauses in order to avoid clashes between different conceptions of fundamental rights. Examples under EU law are the preliminary ruling procedure and Articles 51 to 53 CFR. Section 3 demonstrated that in practice national courts within the compound European legal order, as well as the CJEU vis-à-vis international law (ECHR) opt, when they are confronted with external rights systems, for a combination of substantive convergence and keeping autonomous control, i.e. a monopoly of interpretation within their own legal system.

The plausibility of the CJEU's autonomy concern confirms with regard to the specific relationship of the EU legal order and the ECHR that it may be justified to keep at distance an external legal sphere that may impose a binding interpretation of fundamental rights. This may even be required to protect not only the internal choices of how fundamental rights should be interpreted but necessary to maintain the autonomy of the whole legal order. The specific example of the EU's accession to the ECHR was also discussed to place a question mark behind the reasoning that more integration of fundamental rights is necessarily better (i.e. resulting in a higher level of protection). Essentially it justifies a certain level of distance between different instruments protecting fundamental rights with the possibility of resulting in variation. Rights are *inter alia* means to ensure inclusiveness. Yet inclusiveness is not determined, or at least not exclusively determined, by the number of humans that are governed by any given legal sphere. Problematic in this context are also institutional limitations. Jurisdictional limitation and the principle of conferral do not allow the CJEU to develop a coherent level of protection across different policies.

Studying judicial practices does not allow us to draw conclusion on what particular level of integration is desirable from a rights perspective. Each court justifies its decisions within the logic and on the terms of its own legal order. Any decision is strongly influenced not only by rights considerations but also by structural considerations particular to the individual legal order. The different institutional starting points limit discourse and make convergence a matter of judicial choice. This justifies turning to theory for finding guidance on the most desirable level of fundamental rights integration from a rights perspective. Forst's theory of rights originating in a right to justification is particularly well suited in this context because it builds on the Kantian tradition of individual agency, which is also reflected in the positive legal structures of the compound European legal order.

The aim of this paper was not to offer answers to the questions of who should determine rights and what variations are justified. The aim was to argue in favour of a particular way of thinking about these questions, namely starting from theory rather than judicial practices.

In light of a theory of rights that presumes that a right to justification lies at the core of all other rights, the level of integration that is justified and adequate cannot be established in abstract. More integration is not necessarily more adequate. The level of integration should depend on the ability of the political structures to make reflexive *justification* possible. An *interactive process of reason-giving* is necessary to allow for justification. This is only rudimentary in the international context, in which decision-making is based on representation through governments, a large number of which do not internally meet any standard of justification, but stay in power through oppression and coercion. As a matter of principle this is possible in the state context within modern democracies. I would further argue that the European Union not only possesses structures that would allow for reflexive justification but that it could make a credible argument that it is better suited to include those who are affected by the externalities of the political decisions within any given state within a globalized world. Indeed, the EU's enhanced ability to address rights relevant consequences that occur external to the legal order, in which the political decision for a particular measure is taken, i.e. the national context, could speak in favour of the EU context for the deliberation of fundamental rights standards.