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ACCESSION OF THE EU TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE LIGHT OF CONSTITUTIONAL PLURALISM

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To reconcile the irreconcilable

(Advocate General Maduro in Case C-127/07 [2008] *Arcelor Atlantique and Lorraine and Others* ECR I-9895, para.15)

Table of contents

- INTRODUCTION..... 2**

- 1. THE CURRENT RELATIONSHIP OF THE ECJ AND THE ECTHR..... 5**
 - The ECtHR’s approach to EU law 5

 - The ECJ’s view on the Convention 7

- 2. THEORETICAL BACKGROUNDS: CONSTITUTIONAL PLURALISM 10**
 - The explanatory shortage of the traditional conception of law 10

 - A “new” conception of law and legal order 10

 - Maduro’s Contrapunctual Law* 14

 - Critique of Constitutional Pluralism 16

- 3. THE ACCESSION OF THE EU TO THE ECTHR..... 18**
 - 3.1. APPROACHES TO ACCESSION: COMMON OBJECTIVE BUT COLLIDING DEMANDS..... 18**
 - Common objective: coherence and visibility in fundamental rights protection 18

 - Possible changes through accession: homogenisation and centralisation 19

 - Colliding demands: autonomy and exclusive jurisdiction versus equal footing 20

 - 3.2. RECONCILIATION MECHANISMS: CO-RESPONDENT & PRIOR-INVOLVEMENT..... 21**
 - The co-respondent mechanism 21

 - The prior-involvement mechanism..... 24

- CONCLUSION..... 26**

- BIBLIOGRAPHY I**

Introduction

In Europe, fundamental rights protection takes place in a multi-layered system of different legal spheres. Additionally to the national legal spheres, two European legal systems have been established after World War II: the legal system of the European Union (EU) and the legal system of the European Convention on Human Rights (ECHR). Today, the fundamental rights of an individual are provided for and protected not only by states, but also by the legal system of the EU and the legal system of the ECHR. The question of how these different systems interact in regard to their common objective of fundamental rights protection has provoked a lively debate among legal scholars. This paper contributes to this debate by taking into focus the relationship between the courts of the European legal systems, the European Court of Justice (ECJ) and the European Court on Human Rights (ECtHR), in regard to the prospective accession of the EU to the ECHR.

The European Court on Human Rights, initially founded in 1959 and re-launched as permanent court in 1998, was set up in Strasbourg to dispense justice within the framework of the European Convention on Human Rights. The Convention was signed in Rome on 4 November 1950 in the framework of the newly established Council of Europe and entered into force in 1953. Against the backdrop of their historical experience, European states wanted to establish an international agreement of fundamental rights that was accompanied by machineries assuring the obedience of obligations by contracting parties. Unlike the EU, the system of the ECHR never attempted to take the path of integration. It has always regarded itself as an international agreement, a platform to guarantee the minimum standard of human rights. It does not claim autonomy from its parties. It is for this reason that the status of the ECHR in the domestic legal orders of the High Contracting Parties solely depends on them and that the ECtHR works according to the principle of subsidiarity. Human rights can only be assessed in Strasbourg when domestic remedies are exhausted. Today, 47 European States as High Contracting Parties of the Convention have put themselves under the external control of the Strasbourg Court. The European Union originally was not intended to deal with fundamental rights. They have only gradually taken a central place in the EU legal order. In its milestone ruling *Internationale Handelsgesellschaft*¹, the ECJ found fundamental rights to form an integral part of the general principles of law. This decision was a first step on a path that

¹ Case 11/70 [1970] *Internationale Handelsgesellschaft* ECR 1125

increasingly put fundamental rights protection at the core of the EU legal order². For the time being, this development has reached its zenith in the coming into force of the Charter of Fundamental Rights (CFREU) in December 2009. Consequently, despite the diverging characteristics of the two European legal systems, the ECJ and the ECtHR, today, share the objective to safeguard fundamental rights in Europe. Their sources and jurisdictions overlap at least in the 28 national states that are party to both systems.

Formal accession of the EU to the ECHR was proposed for the first time in 1979³. The EU wanted to follow its member states by becoming party to the ECHR. However, amendments of the legal provisions on both sides were found to be necessary before the EU could accede to the ECHR. Eventually, after thirty years of discussion, accession was made an official aim for the EU under Article 6(2) of the Lisbon Treaty and in 2010, the ECHR opened up for this accession by amending its Article 59(2) by Protocol 14 to the ECHR. It took further three years of official talk⁴ to bring together the varying visions of the two parties for this revolutionary step in European fundamental rights protection. On 5 April 2013, the delegations of the Council of Europe and of the EU agreed on the *Draft Accession Agreement*⁵. It provides the basis for the accession of the EU to the ECHR. The *Draft Accession Agreement* will come into force after the ECJ has given an opinion on it and after it has been ratified by the EU institutions, EU member states and the High Contracting Parties of the ECHR.

With accession to the ECHR, the EU will be party to this instrument of fundamental rights protection. Thus, the actions and omissions of the EU institutions and member states will be subject to the external control of the ECtHR in cases where Convention rights are concerned. This step brings substantial changes to the relationship of the ECJ and the ECtHR. Therefore, during the official talks about the accession agreement, the two courts have been eager to ensure that their respective demands be respected when establishing this new form of relationship. In the finalized version of the *Draft Accession Agreement*, they have provided for procedural arrangements, including two mechanisms that shall regulate the post-accession relationship.

² For a more comprehensive account of human rights development in the European Union see Craig and de Búrca (2011/12).

³ Formal accession was first proposed by the Commission to the Council by the Memorandum on the accession of the European Communities to the Convention for Protection of Human Rights and Fundamental Freedoms of 4 April 1979.

⁴ Official talks on the EU's accession to the ECHR started on 7 July 2010

⁵ *Draft Revised Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms*, finally agreed on by the 47+1 working group in its final report to the CDDH, 5 April 2013.

This paper takes into focus these mechanisms. They shall be analysed in regard to their capability to bring together the colliding demands of the two parties before accession and in regard to their capability to prevent conflict between the jurisdictions after accession. This analysis shall be framed by a theoretical approach developed in the context of the European Union. Similar to its situation with the ECtHR, the ECJ is confronted with a situation of overlapping sources and jurisdictions inside the EU legal order. Here it competes with the national legal orders and national constitutional courts. In this context, new approaches to the understanding of legal orders and law have been developed to explain the coexistence of several autonomous but interdependent legal orders. These approaches can be assembled under the umbrella concept of Constitutional Pluralism. Constitutional Pluralism claims that plurality of legal orders and jurisdictions does not necessarily undermine the well-functioning of constitutionalised legal systems but, on the contrary, can be managed and coped with. This paper transfers the ideas of Constitutional Pluralism to the plurality found on the European level, due to the coexistence of the ECJ and the ECtHR. The following question shall serve as a guideline for this paper's analysis.

How can Constitutional Pluralism contribute to the understanding of the mechanisms of the prospective relationship between the ECtHR and the ECJ, which reconcile the conflicting demands to pave the way for the EU accession to the ECHR?

To answer this question, firstly, the backgrounds for the analysis shall be drawn by looking at the current, pre-accession, relationship of the two courts. They will show the already-established means of cooperation, and also their flaws that make accession necessary and wishful (Chapter 1). Secondly, a closer look at the theoretical framework of Constitutional Pluralism shall be taken. It serves to understand the current relationship of the courts and provides an outlook on the potential relationship after accession (Chapter 2). Thirdly, the paper shall zoom in on the objectives and demands of the EU and the ECHR towards the accession (Chapter 3.1.). It then analyses whether the two mechanisms serve to reconcile the colliding demands to achieve the common objective of enhanced fundamental rights protection (Chapter 3.2.).

1. The current relationship of the ECJ and the ECtHR

In the “broader European legal order” (Maduro, 2003, p. 524) of fundamental rights, that is the legal sphere including all national and both European legal systems, that of the EU and that of the ECHR, the ECJ and the ECtHR had to learn how to deal with their coexistence. They coexist, since the political community and the field of rights they govern, namely fundamental rights protection in Europe, overlap (*cf.* Blanke, 2011, p. 183). Although each of the courts has been created as jurisdictional instrument in a legal system of its own, grounded each on basic documents of their own, their shared goal of fundamental rights protection in Europe has led to reciprocal influence.

With regard to the EU legal system, fundamental rights protection has only recently been put at the core of the system. The EU legal system is of more comprehensive nature. The autonomy of its member states and its Treaties, which are now complemented by the Charter, constitute the special status of the EU legal system. This status allows considering the EU legal system, unlike the system of the ECHR, to be a legal order of its own. In consequence, unlike the ECtHR, the ECJ has more wide-ranging duties than fundamental rights protection. Therefore, this paper does not argue that duties of ECJ and ECtHR are congruent. On the contrary, it acknowledges that the ECJ is the highest court of an autonomous comprehensive legal order, whereas the ECtHR functions as a last resort to guarantee a minimum of human rights based on an international agreement in cases where national remedies are exhausted. In this regard, large parts of the two courts’ activities differ in substance and scope. Nonetheless, as this paper looks at fundamental rights protection, the ECJ’s activities in this area largely overlap with those of the ECtHR. This is even more obvious, since the Charter of Fundamental Rights was given into the hands of the ECJ, providing a new basis for review of fundamental rights.

The ECtHR’s approach to EU law

As 28 of the states that are party to the ECHR are also member states of the European Union, the ECtHR regularly had to deal with the compatibility of the obligations from the ECHR with obligations stemming from the Treaties of the EU. Thereby, taking a detour via the member states, the ECtHR could indirectly review EU acts.

In the *Matthews*-decision⁶ (para. 34 & 35) the ECtHR laid the grounds for the general compatibility of simultaneous membership in EU and ECHR. The Strasbourg Court held that the Convention allowed member states to partly transfer sovereignty to the EU. However, the transfer of certain aspects of sovereignty would not free the states from their obligation to secure Convention rights. This judgement points to the ECtHR's willingness to review acts and omissions of its High Contracting Parties, even if the legal basis of such actions was EU law. In other words, the ECtHR exercised an indirect review of EU law through the control of its implementation by the member states (*cf.* Craig & de Búrca, 2011/12, pp. 400 & 401). However, the ECtHR did so in a restricted manner. It prevented states being members to both, EU and ECHR from being faced with colliding obligations from the two systems. This position becomes even clearer in the *Bosphorus*-decision⁷. (*cf.* para. 152-154) Taking the view that the alleged violation was committed by the state, due to its compliance with a binding and non-discretionary EU law obligation, the ECtHR developed the presumption of *equivalent protection*. The court ruled that "state action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights [...] in a manner which can be considered at least equivalent to that for which the Convention provides." (para. 155) Thus, in general, the ECtHR presumes that a state complying with EU law does not depart from the Convention. It refrains from exercising scrutiny on implementations of EU law without discretionary power of the acting state. This approach of the ECtHR shows a large extent of openness towards other systems and a large amount of trust towards the EU. This act of self-restriction is taken deliberately by the ECtHR, as it is seen necessary to prevent conflict of obligations. In the words of Lock (2009, p. 380), the *Bosphorus* decision must be regarded as proof of the "silent cooperation" and "mutual respect" between the ECtHR and the ECJ. Nevertheless, the ruling continued that "any such presumption can be rebutted if [...] it is considered that the protection of Convention rights was manifestly deficient." (para. 156) It shows that the *Bosphorus* presumption and the ECtHR's acknowledgment of EU fundamental rights protection know limits. In the more recent case of *M.M.S. v. Belgium and Greece*⁸, on the transfer of asylum seekers within the EU, the ECtHR has shown that it does not fear to take action where it regards EU fundamental rights protection to be insufficient. The Strasbourg Court clarified that the presumption of equivalent protection was only valid where member states had no discretionary power (*cf.* Van Elsuwege. 2012, pp. 206 & 207). This was not the

⁶ *Matthews v. United Kingdom* [GC], Appl. no. 24833/94, ECHR 1999-I

⁷ *Bosphorus v. Ireland* [GC], Appl. no. 45036/98, ECHR 2005-VI

⁸ *M.M.S. v. Belgium and Greece* [GC], Appl. no. 30696/09 ECHR 2011

case for the object of the *M.S.S. case*, namely the implementation of the *Dublin II Regulation*⁹. Here, member states acted as EU “agents”. Accordingly, Greece and Belgium had to stand up before Strasbourg for their acts, which were found to be in violation of Article 3 ECHR. This case exemplifies that the ECtHR can hold member states responsible for acts stemming from EU law. But it also illustrates how limited the power of the ECtHR is, when it comes to the indirect review of EU law. EU acts can only be reviewed via the detour of member states’ implementation and cannot be challenged themselves. To put it into the words of Eckes (2013, p. 262), “even though the *M.S.S.* ruling questioned the blind mutual trust on which EU asylum law is built, it did not entail the judgment that the *Dublin II* system as such is unlawful”. In other cases, for example in *Connolly*¹⁰, the ECtHR could not hold member states accountable for EU acts. Where an alleged violation stems from an EU act directly, without a Member State being involved, there is a “gap in the external supervision by the ECtHR”. (cf. Lock, 2011, p. 1027) The closure of this gap will be one of the main functions of the prospective accession of the EU to the ECHR.

The ECJ’s view on the Convention

With the increasing integration of more and more policy fields, member states expected the EU to increasingly pay attention to fundamental rights. As a result, the ECJ gradually established general principles of fundamental rights. Hereby, it took into consideration national traditions of its member states as well as international agreements. The European Convention on Human Rights was an important “source of identification of general principles” (Weiß, 2011, p. 65).¹¹ In its judgements the Luxembourg Court regularly referred to Convention rights since the 1970s. It is in this light that Eckes (2013, p. 257) points to “the indirect impact that it [the ECHR] has had for a long time on the development of the EU’s own human rights standards”.

With the post-Lisbon era and the introduction of the Charter, fundamental rights got a new status within the EU, which is now equivalent to that of the Treaties. The Charter codifies the existing rights pointing at a plurality of equivalent sources, namely the Charter itself, general principles and the Convention. Harmonizing these different sources in one single document, the Charter reinforces fundamental rights within the EU and provides an improved ground for

⁹ Council Regulation No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national, *OJ* (2003) L 50/1.

¹⁰ *Connolly v. 15 Member States of the European Union*, Appl. No. 73274/01, 9 Dec. 2008

¹¹ The Convention was codified as source of inspiration in Art 6(2) TEU-Nice, now Art 6(3). See for a more detailed comprehension of the role of the Convention in the pre-Lisbon era, Weiß, 2011.

the ECJ to act as a fundamental rights court. However, the introduction of the Charter also increased the potential for conflict between the ECJ and the ECtHR. Sánchez' view moderates this argument. He argues that the Charter "provides the necessary elements for structuring its own relationship with the other instruments and systems" (2012, pp. 1610), in order to prevent such conflict. In relation to the ECHR such elements can be found in Article 52(3) and 53 CFREU.

Article 53 CFREU prohibits any interpretation of fundamental rights in the context of the Charter restricting or adversely affecting human rights guaranteed by the Convention. Consequently, the Charter acknowledges the Convention rights as "minimum standards" for fundamental rights protection in its own legal system. Acknowledging the Convention rights to an even larger extent, Article 52(3) CFREU provides that Charter rights "which correspond to rights guaranteed by the Convention [...] shall be the same as those laid down by the said Convention." By this provision the Charter "materially incorporates core norms of the Convention" (Weiß, 2011, p. 64). This Charter provision aims to ensure the necessary coherence between Charter and Convention rights and between their respective interpretation by ECJ and ECtHR (*cf.* Lenaerts, 2012, p. 348 and Weiß, 2011, p. 69). This was also stressed by the then presidents of the two European Courts, Costa and Skouris (*cf.* 2011, p. 1). The two judges point to the value of "parallel interpretation" to achieve this aim of coherence. The courts, according to them, should mutually take into account their judgments on corresponding rights. Whether this also means that the ECJ is bound by ECtHR decisions is highly contested among scholars¹². In any case, these provisions undoubtedly show that the tightening of the relationship between the two fundamental rights instruments goes hand in hand with an increased systemizing of their interaction through the introduction of horizontal clauses. In short, the Charter demonstrates openness of the EU legal order to other sources but also reaffirms the ECJ's role as a guarantor of fundamental rights. It hereby ensures its autonomy from other fundamental right regimes. Having regard to the horizontal clauses, Article 52 (3) and 53 of the Charter, the relationship of the two courts as equally coexisting fundamental rights arbiters becomes evident. The EU recognizes the importance of the Convention and the Strasbourg Court, but seeks to maintain autonomy in the interplay of a "multifaceted regime of European human rights protection" (Voßkuhle, 2010b, p.3) by keeping an "arm length of appreciation".

¹² See Van Elsuwege, 2012, p. 211; Weiß, 2011, p. 81 and Lock, 2009

The present relationship between the two courts is characterised by great mutual awareness. The courts have developed ways of cooperation that show their self-perception as players in a broader European regime of fundamental rights. The ECtHR generally acknowledges the protection of fundamental rights in the EU as “comparable”, presuming that states which fulfil EU provisions act within their obligations of the ECHR (Bosphorus-doctrine). It hereby acknowledges the autonomy of the EU legal order, whilst at the same time imposing limits to this presumption to guarantee the protection of Convention rights. Within the EU legal order the ECHR bears several functions in different contexts. From “inspirational source”, the Convention has seen “partial integration” on virtue of Article 52(3) CFREU, becoming the “main substantial foundation of EU fundamental rights” (Weiß, 2011, p. 75). Simultaneously, the Charter has reinforced the ECJ’s position in its dimension as fundamental rights court and emphasized its status in the “broader European legal order”. To further contribute to a coherent jurisprudence and a harmonious development of the courts’ activities, joint meetings of the presidents of the two European Courts have been established¹³. This cooperation in form of judicial dialogue presents an important aspect of the informal relationship between the courts that goes beyond the mutual considerateness seen in the respective rulings. Despite the progressed informal cooperation between the two courts managing their functional overlap, gaps in fundamental rights protection and potentials for conflicts between the two orders exist. There are cases, e.g. *Connolly*, in which individuals cannot go to Strasbourg to complain an alleged violation of their rights, since the latter purely stems from EU law and action. Additionally, despite the Bosphorus presumption, member states may still be faced with situations where obligations stemming from the two systems collide.

Before looking at the accession attempted to formalize the current relationship to close the remaining gaps and further prevent potentials for conflicts, the next part is dedicated to the theoretical backgrounds against which the analysis is conducted. The questions of how the current relationship between the two European courts can be explained in theory and how this theory frames the context for the accession are asked.

¹³ The last joint meeting took place on 6 September 2013 in Helsinki.

2. Theoretical backgrounds: Constitutional Pluralism

The explanatory shortage of the traditional conception of law

The traditional conception of law and legal order, established in the context of Westphalian states, assumes that one political community is governed by one legal order. This assumption does not exclude the existence of more than one legal source and jurisdiction. However, it assumes these several entities to be arranged in strict hierarchy. A constitutional setting forms the basis for all further legal norms and jurisdictions and provides the constitutional court with the ultimate authority to review subordinated rights and acts. This ultimate authority is generally accepted to have binding character for all members of the political community. (*cf.* Giorgi & Triart, 2008, p. 694)

As the prior part of this paper has shown, the different legal systems in the “broader European legal order” on fundamental rights do not form a coherent legal order based on hierarchical structures. On the contrary, the EU legal order and the legal system of the ECHR both create a legal sphere of its own. The respective Courts, the ECJ and the ECtHR, each enjoy ultimate authority within its sphere. However, in the “broader European legal order” they both participate in the protection of fundamental rights. They are regarded as two different, yet equally legitimate jurisdictional players in this “broader European legal order”. The coexistence of courts and the structures of their cooperation cannot be explained in the light of the traditional conception of law and legal order. Their experience of cooperation, however, is expected to be decisive for the Courts’ approach to the accession of the EU to the ECHR. It can therefore be assumed that the prospective mechanisms to structure their relationship after the EU’s accession to the ECHR will at least partly built upon the shared history of the courts. As a result, an attempt at explaining the current situation of fundamental rights protection in Europe lays the grounds for the analysis of the prospective mechanisms.

A “new” conception of law and legal order

Constitutionalism in the context of EU integration

An alternative conception of legal orders has been developed against the backdrop of the history of European integration. Along other pluralist scholars¹⁴, the former Advocate General, Miguel Maduro (2003, p. 520) argues that the “European integration “attacks” the hierarchical

¹⁴ This approach is also taken by Avbelj and Komárek (2008a und 2008b)

understanding of law". The classical narrative of EU integration has described the development of the EU constitutional architecture alongside the establishment of its autonomy from member states and other international legal systems. The EU constitutional architecture is founded on the principles of direct effect and supremacy, complemented by further constitutional concepts such as fundamental rights. The gradual rise of constitutional dimensions in the EU and the accompanying horizontal and vertical expansion of the EU's influence extended the initial limits of the Treaties. (cf. Maduro, 2004, p. 7) This process of increasing constitutionalism in the EU tended to threaten national constitutions. Member states saw their national constitutional traditions challenged by the EU's claim to autonomy and supremacy. Thus, they started to question the EU's authority. Due to this, Chalmers (in Maduro, 2004, p.14) describes EU constitutionalism as "a constitutionalism whose authority was constantly questioned by national constitutions and dependent on the "veto right" of national courts." Similarly, Baquero Cruz (2008, p.290) argues that "there was a competing paradigm on integration that claimed a higher legitimacy than the European one: the national-constitutional perspective". This competing paradigm led to the development of a two sided narrative of constitutionalism in Europe. (cf. Maduro, 2003)

Colliding claims of ultimate authority between ECJ and national constitutional courts

In regard to the European Union, national constitutional courts tend to take the view that they have the competence to lastly decide over the maintenance of their national constitution, as it is their *raison d'être* in the logic of the national legal orders. Likewise, the European Court of Justice, bound to the constitutional setting of the EU, also claims ultimate authority within the logic of the European legal order. Accordingly, the question of ultimate authority among these players cannot be answered in consensus. On the contrary, the relationship of the national constitutional courts and the ECJ is characterized by a mutual claim to ultimate authority. These colliding claims to ultimate authority stem from the understanding of constitutional courts to be the "final arbiters"¹⁵ in the internal logics of their respective legal orders. In cases in which national constitutional courts and the ECJ disagree on the juridical outcomes, their colliding claims to ultimate authority put a risk to the coherent and uniform application of rights in Europe. Thereby, they challenge the well-functioning of the legal orders. The lack of clarity in cases of conflict undermines the classical conception of constitutionalism. It is for this reason that constitutional pluralists developed an alternative theoretical approach.

¹⁵ A term borrowed from Kumm (1999).

(Constitutional) Pluralism

Acknowledging the plurality of legal sources and jurisdictions in the EU, pluralist scholars argue for the existence of an alternative way for legal systems to function even without the settlement of the question of ultimate authority. This alternative requires “a different understanding of law” and a broader vision of constitutionalism (Maduro, 2003, p. 502). In the absence of ultimate authority, the major challenge is, what Maduro calls, “to reconcile the irreconcilable” (Maduro, 2008b) - to reconcile the need to protect the different national identities and traditions with the need to guarantee a uniform and coherent application of EU law. When national and EU ideas correspond, the plurality of sources and jurisdictions do not pose problems to the well-functioning of the respective legal orders. In cases where different provisions collide, plurality poses a risk to the functioning of the legal orders. Although, collision is the exception, Craig and de Búrca (2011/12, p.268) point to the fact that the increasing complexity and concreteness of EU law make it more likely for EU laws to collide with national constitutional norms. In contrast, as most conflicts concern the interpretation rather than the validity of norms, reconciliation of colliding, even constitutional, norms is possible in the view of pluralist scholars. Accordingly, plurality does not necessarily undermine constitutionality. In pluralist approaches, plurality is recognised and worked with. Where plurality opens a field of potential conflict, pluralism is the tool to prevent and manage this conflict. It is the attitude of embracing and recognising plurality, shared by all participating actors, which is referred to as pluralism. (*cf. e.g.* Walker in Avbelj & Komárek, 2008a, p.10)

The constitutional dimension of the ECHR

Before entering into a more in depth study of Constitutional Pluralism, a short excursion to the theory's suitability for this paper's purpose seems necessary, since the constitutional character of the ECHR is questionable. , Why could a theory on constitutionalism developed in the EU context be suitable to analyse the relationship of the two European courts? In the EU context, Constitutional Pluralism seeks to explain the relationship of the national constitutional setting with the EU constitutional setting. This paper, in contrast, zooms in on the relation between the ECJ and another international court, namely the ECtHR. It has to be discussed whether the ECtHR can even be considered a *constitutional* court.

A classical approach to constitutionalism can be found in the works by Rosenfeld (in Stone Sweet, 2009a and Shaw, 1999). According to him, constitutionalism “requires imposing limits on the power of government, adherence to the rule of law, and the protection of fundamental rights”. The existence of the last aspect in the ECHR context is self-explanatory. Similarly, the

adherence to the rule of law by the ECHR system is obvious, as the principle is explicitly stated in the preamble of the Convention and is constantly mirrored in the basic document and the court's judgements. The third dimension seems to be the most questionable, as the system of the ECHR itself does not know a government. Nevertheless, the judgements of the ECtHR on basis of the Convention have a power limiting effect on the national institutions – including governments – of the High Contracting Parties. In this sense, the ECtHR exercises the functions attributed to a constitutional court. The president of the German Federal Constitutional Court, Andres Voßkuhle (2010a) and American pluralistic scholar Alec Stone Sweet (2009b) both argue for the constitutional nature of the ECtHR. According to the authors, the ECtHR is comparable to the one of national constitutional courts, since their functions are comparable. In a more critical view, one may argue that fields in which the ECtHR dispenses justice are far more limited. Nevertheless, as this paper focuses on fundamental rights, this specific dimension of constitutionalism is shared by the ECtHR with other national constitutional courts. Therefore, when analysing the relationship of ECJ and ECtHR, the constitutional character of the ECtHR can be assumed at least in this regard. With some precaution the analysis follows Giorgi's approach (*cf.* 2009, p.14) "that almost everywhere where it is question of fundamental rights, there is a sign of constitutionalisation".

Constitutional Pluralism and Global Legal Pluralism

Though, accordingly, the question of the constitutional nature of the ECtHR is settled – at least for the purposes of the following analysis – it is still questionable, if the theoretical conception of Constitutional Pluralism should be taken from its original context of the EU and be applied to the relationship of the EU to another European legal system. One could argue that the more general theory of Global Legal Pluralism would better serve to understand the interplay of the ECJ and the ECtHR when looking at the accession.

Like Constitutional Pluralism, Global Legal Pluralism deals with "spheres of complex overlapping legal authority" (Schiff Berman, 2007, p. 1162). It embraces a very similar approach to plurality. It is understood to "deliberately seek to create or preserve spaces for conflict among multiple, overlapping legal systems" (Schiff Berman, 2007, p. 1164). However, in comparison to Constitutional Pluralism, Global Legal Pluralism is a far more general theoretical approach, referring to global interactions of states, international and non-state actors.¹⁶ This paper, however, deals with a question focussing on the European fundamental

¹⁶ For a detailed approach to Global Legal Pluralism, see also Teubner (1997)

rights protection. Constitutional Pluralism seems to incorporate more specified theoretical approaches to deal with this topic, since it “recognises that the European order [...] has developed beyond the traditional confines of inter-*national* law and now makes its own constitutional claims, that exist alongside the continuing claims of state” (Walker, 2002, p. 337). Conceptions of Constitutional Pluralism are capable of taking into account the specific nature of the EU between federal state and international organisation and focus on its constitutional aspects. As the specific nature of the EU is expected to play a major role in the arrangements of the EU accession to the ECHR, it seems suitable to apply a theory, which is able to consider these specificities. Furthermore, although developed in the EU context, the theoretical approach of Constitutional Pluralism can be applied to situations beyond its original context. Kumm and Maduro (in Avbelj & Komárek, 2008b, p.527) explicitly point to their view that “constitutional thinking is not restricted to the relationship between national and European practice, rather it covers the relationship between European and international practice as well”. By looking at the accession through the lenses of Constitutional Pluralism, this paper’s analysis is able to pay attention to the specific nature of the EU, while also testing the suitability of Constitutional Pluralism to explain the EU’s practice with an international *constitutionalised* system.

Maduro’s *Contrapunctual Law*

Pluralist scholars disagree on the exact contours of Constitutional Pluralism and have come up with a multitude of different ideas.¹⁷ As space is limited, this paper concentrates on the often-quoted approach of former Advocate General, Miguel Maduro’s *Contrapunctual Law*. His “pluralist vision of integration” suits the purpose of this paper, as “it refers to a pluralism of constitutional jurisdictions” and takes a “mere-court oriented focus” (Avbelj & Komárek, 2008a, pp. 3 & 5). Furthermore, Maduro, as Giorgi and Triart (2008, p. 716) put it, “is one of the few to propose passing from theory to practice”. His theory does not merely seek to explain the constitutional reality found in Europe, but offers ideas on the conditions under which pluralism can work effectively. The analysis of the mechanisms laid down in the *Draft Accession Agreement* to regulate the ECJ’s relationship with the ECtHR after accession shall demonstrate if, and how these ideas work in practice.

¹⁷ For some of the most popular different accounts of Constitutional Pluralism see Giorgi & Triart (2008), Krisch (2008), Kumm (1999), Shaw (1999), Stone Sweet (2012), Voßkuhle (2010a), Walker (2002), Weiler & Wind (2003)

Maduro's metaphor of *Contrapunctual Law*, taken from polyphonic music, refers to bringing in harmony autonomously playing voices. For him, this technique of contrapunctual music, applied to law, offers an answer to his main theoretical concern of "how to ensure that the admittedly pluralist, heterarchical integration remains in harmony" (Avbelj & Komárek, 2008a, p. 3). In contrapunctual music, harmony is maintained by the application of clear rules. For Maduro, Constitutional Pluralism "stands for the *rules of engagement* underpinned by certain *meta-principles* allowing for coherence in the absence of those classical requirements of clear-cut hierarchy and one ultimate source of authority"¹⁸ (Maduro in Avbelj & Komárek, 2008b, p. 526). What are these *rules of engagement*, what are these *meta-principles* he refers to?

Meta-Principles - Basic Requirements for the Functioning of Contrapunctual Law

The single mechanisms that bring in harmony different voices can only be effective if there is a "basis set of principles shared by all participants". For Maduro, this basis set incorporates "*mutual recognition, discourse and compatibility*"¹⁹. (Maduro, 2003, p. 524) It is a "basis for discourse", a condition for pluralism, that makes "communication between legal orders necessary and requires courts to "conceive to their decisions in the light of a broader European legal order" (Maduro, 2003, p. 524). One can understand these *meta-principles* of this basis set as the tools for plurality to become pluralism. Only if the plurality of players is accepted by all players, can mechanisms of communication step in to regulate interaction. The basis set provides the framework in which pluralistic jurisdiction can contribute to coherent outcomes, since the common objective – a pluralistic but coherent broader legal order – is agreed upon.

Rules of Engagement – "the Harmonic Principles of Contrapunctual Law"

Maduro establishes four principles, which he calls "the harmonic principles of Contrapunctual Law", namely *pluralism, coherence and uniformity, universality* and *institutional choice* (cf. Maduro, 2003, pp. 526-531). They are said to contribute to harmony among autonomous voices. The first, *pluralism*, is about respect for and recognition of the other legal systems, their identities and equally legitimate claims of authority. It is reflected in the equal participation of all actors in a process. The second principle, *consistency and coherence*, requires each legal decision to be coherent with the previous. This principle is shown in the self-restraint of courts granting a large degree of discretion for other courts' interpretations. As the third principle, Maduro refers to *universality*. Decisions of different courts shall be integrated in one "broader legal order". Therefore, each court must feel "bound" by the

¹⁸ Highlights added by the author

¹⁹ Highlights added by the author

decisions of its counterparts. Mutual reception of case law is necessary. The fourth principle, *institutional choice*, serves to allocate resources and responsibilities among the different actors in an appropriate way. Hence, mutual understanding of each other's virtues and malfunctions is a condition. The borders between these principles are flux. Each of the four partly overlaps with the others. In their entity, though, the respect of these principles can pave the way to cooperation of coexisting legal orders. Maduro's approach to Constitutional Pluralism offers a new perspective on the current situation of European constitutionalism. It is suitable to explain the current structures between the courts. It also normatively approaches the pre-conditions for pluralism to unfold its reconciling nature and to function more effectively.

Critique of Constitutional Pluralism

Critics of Constitutional Pluralism, in a rather radical way, question the reconciling power of pluralism. In their view, concepts such as "autonomy", "universality", "coherence" and "constitutionalism" directly oppose pluralism. For them, a pluralistic approach finally undermines these concepts. Baquero Cruz (*cf.* 2008, pp. 414 & 415) criticises the "pluralistic movement" as he fears that the lack of clear relationships among judicial institutions may endanger the rule of law, legal certainty and the effective protection of individual rights. These, however, manifest the most important characteristics of constitutionalism and lay the basis for any legal order. He doubts that the interface between legal orders can be pluralistic (*cf.* Avbelj & Komárek, 2008a, p. 7), as a "minimum degree of predictability with regard to its [of the legal order] application" (Baquero Cruz, 2008, p.414) is necessary for the upholding of legal orders. Concrete conflicts between legal orders and their jurisdictions could not be avoided through consistent interpretation alone. In the end, Baquero Cruz (2008, p. 414) argues "the 'contrapunctual' law of Miguel Maduro may easily degenerate into dissonance and outright cacophony, with negative consequences for the legal situation of individuals".

In addition to the external critique that pluralistic conceptions of European constitutionalism must face, critical aspects of Constitutional Pluralism can be found in the works of nearly all pluralist scholars themselves. This illustrates that pluralist scholars themselves are quite aware of the fields of tension in which pluralism takes place. They are mindful of the challenges put to the balance that is sought by pluralism. In their view, pluralism is understood as a tool to strike a balance between the claims of different concepts. Concepts such as "autonomy" and "constitutionalism" of each of the internal orders are to be reconciled with "universality", "coherence" and "constitutionalism" of the broader, common legal order. However, pluralist scholars admit that, as Constitutional Pluralism tends to be built on dynamic structures and

flux arrangements, the balance between these poles are always at the risk of collapsing. Nevertheless, in regard to the most fundamental criticism, the alleged incompatibility of constitutionalism and pluralism, Maduro argues to the opposite by stating that “pluralism is inherent in constitutionalism” (in Avbelj & Komárek, 2008a, p. 5) as “the underlying purposes and goals of constitutionalism require taking into account the scope and intensity of participation but also the differentiated impact of different decisions on different people”. According to him, a constitution as such is a means to bring together a plurality of actors with their ideas and attitudes. Therefore, pluralism is not necessarily the antithetical to constitutionalism. On the contrary, the two concepts can be reconciled.

Reviewing Maduro’s principles of contrapunctual law, Giorgi and Triart (2008, p. 717) question whether the principle of *pluralism* asking for the recognition of each actor, is applicable despite the actors’ respective claims to autonomy. Similarly, the authors challenge Maduro’s principle of *universalism* as they fear that universalism in jurisprudence may erase the aims of pluralism. This risk is also seen by Voßkuhle (2010b, p. 4). He assesses the benefits and challenges of plurality in fundamental rights protection and comes to the conclusion that the uniformity of fundamental rights and their universal character may easily be challenged by a quantity of codifications. These critical approaches to Constitutional Pluralism all revolve around the major risk that is contained in the reconciling nature of pluralism. Pluralism as a tool, tries to strike a balance between possibly contracting conceptions. It attempts to establish a bridge between those, to profit from their respective advantages. This bridge, however, is likely to collapse. It is likely to give way to one conception to the detriment of the other. Avbelj and Komárek (2008b, p. 526), summarizing Walker’s conception of Constitutional Pluralism, get to the heart of this challenge stating that “when talking about constitutional pluralism there is always a chance that too much insistence on consistency and coherence [...] can end up in a hierarchical solution, whereas on the other hand [...] it can conversely lead to an uncontrolled fragmentation.” Despite these risks, they continue to argue in line with probably most advocates of Constitutional Pluralism, that “there is a middle path between the two unfortunate solutions, which can be argued for but never ultimately and definitely guaranteed”.

It shall be to the concern of the following part whether this “middle path” between “hierarchical solution” and “uncontrolled fragmentation” has been taken when developing the mechanisms of the ECJ’s and ECtHR’s prospective relationship on the way to the EU accession to the ECHR.

3. The accession of the EU to the ECtHR

3.1. Approaches to accession: common objective but colliding demands

Common objective: coherence and visibility in fundamental rights protection

The already-established structures to manage plurality in the current relationship of the two courts leave room for conflict and uncertainty. It is in this light that accession of the EU to the ECHR was pursued by both sides. Accession is perceived necessary to “put in place the missing link in Europe’s system of fundamental rights protection” and to “ensure better protection for individuals, as well as legal certainty and coherence of standards all over Europe” (Polakiewicz, 2013). One goal of the accession was to prevent potential conflicts between the obligations of the two systems for EU member states by making the EU itself comply with the Convention (*cf.* Craig & de Búrca, 2011/12, p. 405). In the words of Eckes (2013, p. 284), “accession will substantively contribute to the on-going process in which European systems of human rights protection become increasingly interwoven and interlocked.” Thereby, accession will not only reinforce the EU’s commitment to fundamental rights but will also create greater harmony between the two systems. (*cf.* Craig & de Búrca, 2011/12 and Lock, 2010, p. 778)

The expectations of the two systems towards accession become clear in the official documents preparing accession. The European Parliament (2009) in its *draft report to the institutional aspects of the accession* argues in favour of the accession since it will “send a strong signal concerning the coherence”, “enhance the credibility of the Union”, “afford citizens protection against the action of the Union” and “will contribute to the harmonious development of case law of the two European courts”. The system of the ECHR (Council of Europe, 2013a, p.2) welcomes the accession as it “will close gaps in human rights protection by guaranteeing that any person, non-governmental organisation or group of individuals [...] can bring a complaint against the EU before the Strasbourg Court” and will “reduce the risk of divergence and ensure consistency between human rights case law of the Strasbourg and the Luxembourg Courts”. Although the parties agreed on the goal of the accession and on the need to obtain it, they feared the consequences of the accession for their relationship. The complex negotiations and especially their long duration illustrate the challenges the two actors were facing when preparing the accession.

Possible changes through accession: homogenisation and centralisation

After accession, the Convention rights and their interpretation through ECtHR decisions will become formally binding on all EU institutions and EU member states by virtue of Article 216(2) TFEU and under international law. Jacqu  (2011, p. 1005) points to the fact that “the consequence of accession is to submit the action of the Union to control of compliance with the Convention”. The ECtHR will thus have external control over EU law in regard to its compliance with the Convention.

For the negotiating parties it was clear that accession would bring change to their current relationship. The ECJ would hardly be able to continue its approach of “arm length of appreciation” towards the Convention once it is legally bound by this source or rights (cf. Eckes, 2013, p.284). Further, after accession, the *Bosphorus* presumption could no longer be applied. According to Lock (2010 p. 798), after accession, the ECJ decisions will “be subject to the scrutiny by the ECtHR” and the “ECJ will be a “domestic court” and therefore no longer deserves special treatment”. The current informal structures of cooperation, the “arm length of appreciation” approach and the *Bosphorus* presumption, had kept a distance between the two systems that allowed them to coexist while guarding their autonomy. With accession this distance would shrink. In this perspective, accession could be perceived to be a step that would lead to more homogenisation and centralisation of fundamental rights protection. Submitting the ECJ to the external control of the ECtHR would introduce more hierarchical structures between the two courts and would thereby increase visibility and legal certainty and would close the current gaps of responsibility. This path would challenge the current positioning of the two courts towards each other. It would render the pluralistic structures unnecessary by setting an end to the informal plurality of sources by creating formalized structures.

This perspective on the consequences of accession deviates from the current pluralistic approach shared by the two systems and their courts. It is therefore little surprising that the two have developed strong demands towards the implementation of the accession and the structures of their prospective relationship. Although the EU and the ECHR system agreed on accession to be necessary to achieve their common objective, they both had clear visions of the path accession should take. Their respective demands differed and partly collided.

Colliding demands: autonomy and exclusive jurisdiction versus equal footing

The EU had huge concerns about the accession. It feared for its autonomy and the exclusivity of the jurisdiction of the ECJ once its actions could be subject to the external control of the ECtHR. Prior to accession, the informal relationship between the two legal systems had not challenged the EU's autonomy. In contrast, a formalised relationship that would legally bind the Union was perceived to may challenge the EU's autonomy of other international legal spheres. (cf. Lock, 2009 & 2011). In the preparation process, the European Parliament (2009) was clear on the EU's demand to preserve its autonomy in the prospective relationship. It claimed that the "accession will not in any way call into question the principle of autonomy of Union law, as the Court of Justice will remain the sole supreme court adjudicating on issues relating to EU law." In regard to the specific characteristics of the EU legal order, where competences are distributed between EU and member states, the EP further recalled that the accession shall not entail an expansion of EU competences. For the EU, accession presented the challenge of submitting itself to the external control of an international legal system without losing its autonomous status. Nonetheless, the system of the ECHR insisted that the EU would accede on equal footing with the other contracting parties. It allowed only as many amendments of its own provisions "as strictly necessary" (Council of Europe, 2013a, p.3). Especially the High Contracting Parties that are non-EU member states point to the principle that there shall be no difference neither between EU member states and non-EU member states nor between those contracting parties that are states and the EU (Council of Europe, 2013a, p.3).

The fact that the demands of the EU and the system of the ECHR collide, results from the two systems' unwillingness to give up their well-established statuses. In regard to the internal order of each system, accession should bring as little change as possible. The EU was keen to guard autonomy and exclusive jurisdiction for the ECJ and the system of the ECHR wanted to prevent any unnecessary change. Homogenisation and centralisation were not wanted by the parties. On the contrary, in the perspective of the two parties, accession should lead to a situation in which fundamental rights protection be enhanced while the principles of autonomy and jurisdictional exclusivity as well as equal footing are preserved.

The finalization of the *Draft Accession Agreement* on 5 April 2013 shows that the EU and the system of the ECHR have agreed on a way for the EU to accede. To attain their common objective they have come together. The agreement demonstrates that the two had been capable to reconcile their colliding demands towards the new structures of their relationship in

some way. Whether the agreed procedural structures for the relationship between the two courts will be able to “strike the right balance between the European Union’s autonomous legal system and the ECJ’s jurisdiction, on the one hand, and the need for an effective human rights protection for the individual on the other” (Lock, 2010, p. 798) will be analysed in the following. Do the agreed structures reflect the “middle path”, taken between hierarchy and fragmentation?

3.2. Reconciliation mechanisms: co-respondent & prior-involvement

Two interdependent mechanisms have been introduced in the *Draft Explanatory report to the Accession* “to accommodate the specific situation of the EU as a non-State entity with an autonomous legal system that is becoming a party to the Convention alongside with its own member states” (Council of Europe, 2013c, p. 22). The co-respondent mechanism and the prior-involvement mechanism shall provide the bridge between the EU’s autonomy, including the ECJ’s exclusive jurisdiction over EU law and the ECHR’s demand to equal footing of the EU with all other parties.

The co-respondent mechanism

The co-respondent mechanism is codified in Article 3(2), (3), (5) and (7) of the draft accession agreement. It opens the way for the EU and one or more Member State(s) to join each other as respondents in cases where EU law and national law are at stake. Article 3(2) provides that “where an application is directed against one or more member states of the European Union, the European Union may become a co-respondent to the proceedings in respect of an alleged violation notified by the Courts if it appears that such allegation calls into question the compatibility with the Convention rights at issue of a provision of EU law [...] notably where that violation could have been avoided only by disregarding an obligation under European Union law”. Likewise, Article 3(3) provides the same for the case where the application is directed against the EU and one or more the member state(s) become co-respondent. In both scenarios, the co-respondent mechanism is triggered either on the request of a High Contracting Party or by a High Contracting party accepting the invitation of the ECtHR to become co-respondent (Article 3(5)). “If the potential violation in respect to which a High Contracting Party is a co-respondent to the proceedings is established, the respondent and co-respondent shall be jointly responsible for that violation, unless the Court [...] decides that only one of them be held responsible” (Article 3(7)).

“With the accession of the EU, the unique situation arises that the Contracting Party enacting a legal act and the Contracting Party implementing that act may differ from each other.” (Polakiewicz, 2013) Accordingly, a potential violation of Convention provisions may not only stem from the party that acted or omitted to act against the applicant, but also from another party that provided the legal basis for the action or omission (cf. Council of Europe, 2013b, par. 43). In these cases, the question of the right respondent arises. Protocol no 8 to the Treaty of Lisbon, according to which individual applications should be “correctly addressed to Member States and/ or the Union, as appropriate”, emphasises the need to pay attention to the internal dynamic interplay of EU and national competences when deciding on the right addressee. In order to answer this question, the ECtHR would have to “attribute responsibility to and appropriation that responsibility between the EU and its Member States”. Thereby, it “would simply not be able to disregard the power division between the EU and its Member States” (Eckes, 2013, p. 265). By doing so, however, the ECtHR would have to enter into the analysis of the EU legal order and would thereby challenge the ECJ’s exclusivity of jurisdiction on EU law.

The establishment of the co-respondent mechanism is an opportunity to avoid the external control by the ECtHR of internal questions of EU law while it is also an opportunity to avoid gaps in participation, accountability and enforceability (cf. Polakiewicz, 2013) In this light, according to Jacqué (2011, p. 1014), “the establishment of such a mechanism is all the more important in that cases in which the responsibility of Member States and that of EU is closely intertwined are frequent.” By opening the way for the EU and member states to be addressed equally and to be held responsible in solidarity, the co-respondent mechanism assures accountability for alleged violations but renders unnecessary to decide on the right addressee in each case. Thereby, it takes into account that the internal order of the EU as such is pluralistic. It simultaneously makes the ECtHR refrain from entering into the analysis of the distribution of competences in the EU legal order. Due to this mechanism, the ECtHR is able to regard the EU internal legal system as a “black box”, just like any other domestic legal system of the High Contracting Parties. It thereby grants the ECJ the demanded exclusivity of jurisdiction in the internal order of the EU law.

On the one hand, the “black box” approach to EU law allows for the specific characteristics within this legal order – especially the distribution of competences and responsibilities – to be accepted and protected. This aspect of the mechanism reflects the general recognition of the EU legal order as an autonomous system. It has provided the basis for the former interplay of

the two systems and shall further characterise their relationship. In the light of Maduro's *Contrapunctual Law*, this *mutual recognition* is part of the basic set, vital for any pluralistic relationship. On the other hand, the co-respondent mechanism, allows the participation of all actors concerned in a case. Despite the acceptance of the EU as integrated legal order, the mechanism grants member states the possibility to participate on their own behalf. The co-respondent mechanism thereby corresponds to Maduro's idea of *pluralism*, in the stricter sense, of participation of all actors. By the option to jointly hold responsible the EU and one or more member states, the co-respondent mechanism contributes to the allocation of responsibilities among the different actors. Accordingly, it can be considered to reflect Maduro's idea of *institutional choice*. Whether joint responsibility is the suitable means to allocate "appropriate", as demanded by Maduro (2003, p. 530), is questionable. In some cases responsibility may be allocated differently to better reflect the impact of the actors on the violation established in the respective cases. The mechanism foresees a possibility to do so (*cf.* Eckes, 2013, p. 267). Deviating from the general rule of shared responsibility, the ECtHR may decide on the grounds brought forward by the respondent or co-respondent "that only one of them be held responsible" (Article 3(7)). While in special cases this derogation from the rule enables a more concrete attribution of responsibility, in line with Maduro's conception, it seems to challenge the approach to the EU legal order as "black box", which should be outside of the external review of the ECtHR. Although the *Draft Explanatory report* points out that the decision of apportioning responsibility separately to the respondent and co-respondent will not entail the risk of internal analysis of EU law as long as only grounded on the reasons of EU and/ or Member State(s), the outcome in practice may be different. To judge the justification behind the grounds brought forward by the respondent or co-respondent it will be hardly possible for the ECtHR to completely ignore the internal legal order of EU law. The Court will not be able to rule decisions without analysing at least to a small extent the interplay of competences within the EU legal order. Consequently, although exclusive jurisdiction on EU law is generally granted to the ECJ, a small possibility to limit the ECJ's exclusivity to interpret internal questions of the EU legal order is left open to the ECtHR. This exception to the rule is likely to lead to uncertainty in the application of the co-respondent mechanism. It is questionable under which conditions co-respondent and/ or respondent will be able to seek separate responsibility attribution. Does not this exception risk undermining the general rule of shared responsibility? Neither EU nor member states will be keen to stand up for a violation that they consider less to be their own fault than that of others. The exception to apportion responsibility separately may risk becoming the rule, as in the smallest number of cases violation will equally stem from EU and national legal order. The latter situation, however,

would certainly make the ECtHR decide on the distribution of competences despite its self-restraint laid down on paper. If that was going to be the predominant situation in future, the ECJ's exclusivity to interpret EU law would be at risk. In such cases conflict is likely to arise, challenging the otherwise reconciling nature of the mechanism.

The prior-involvement mechanism

The principle of prior-involvement is laid down in Article 3(6) of the draft agreement: "In proceedings to which the European Union is a co-respondent, if the Court of Justice of the European Union has not yet assessed the compatibility with the Convention rights at issue [...], sufficient time shall be afforded to the Court of Justice [...] to make such an assessment".

The reason for the introduction of this mechanism becomes clear when looking at the conditions for applicability of an individual complaint before the Strasbourg Court in the special case where the EU is triggered as co-respondent. For a case to be admissible, in general, the applicant has first to exhaust the domestic remedies available in the national courts of the responding state. This is also true for cases concerning EU law. For the responding state, the applicant must fulfil this criterion. In regard to the EU, acting as co-respondent, the exhaustion of domestic remedies may not be possible. Whether or not, during the domestic proceedings, national courts refer questions to the ECJ for a preliminary ruling on the interpretation of the EU law at issue is not in the hands of the applicant. Therefore, it is argued by the 47+1 working group (cf. Council of Europe, 2013b, para. 65) that an applicant cannot be held responsible for this lack of exhaustion of remedies. In such a case, where the national courts did not ask for a preliminary ruling, the EU would be faced with external control without the ECJ having had the opportunity to assess the compatibility of the respective EU legal basis with the Convention. As this situation is considered to contradict the procedure of the exhaustion of domestic remedies, which allows a participation of all actors, the prior-involvement mechanism puts in place an "internal EU procedure" (Council of Europe, 2013b, para. 66) to grant the ECJ the opportunity of internal assessment.

Under the premise that a responding party should have the opportunity to assess the compatibility of the legal basis with the Convention itself, before being set under the external review of the ECtHR, the prior-involvement mechanism is the logical complementation of the co-respondent mechanism. Where the EU is triggered as co-respondent and accordingly jointly held responsible, it shall have the same right as the responding state. On the one hand, this principle can be seen as an attempt of the ECtHR to attain equal footing of the participating

parties. Each responding party should have had the opportunity of internal assessment. On the other hand, one could argue exactly to the contrary. EU member states may be privileged compared to non-EU member states, as the latter have no possibility of being defended by the decision of a second party. In regard to the relation between the EU and the other High Contracting Parties, one may argue that the EU is privileged as no other party has the possibility to prior-involvement. In contrast, no party other than the EU is triggered as responding party without its domestic remedies having been exhausted.

Analysing the mechanism in the light of Maduro's *Contrapunctual Law*, prior-involvement can be seen as a reflection of the contrapunctual principles of *coherence and uniformity* and *universalism*. To prevent conflict after the decision of the ECtHR has been spoken, the ECJ can deliver its view on the individual case. Thereby, it is guaranteed that the ECtHR knows the ECJ's interpretation of the case before ruling its own interpretation. The former interpretation, its genesis and reasons, can be taken into account, serving to promote coherence in the case law between the two courts and therefore to promote consistency in fundamental rights protection. The prior-involvement mechanism seems to be the most obvious step one could take to guarantee mutual reception of case law. In this scenario the prior-involvement displays its reconciling nature. Small differences in interpretation can be brought in harmony by knowledge and reception of the other's interpretation. But there is also the other side of the coin. Eckes (2013, p. 269) points out that the establishment of the prior-involvement mechanism "will force the Court of Justice to deliver in the individual case. It will not be able to rest on a general presumption of equivalent protection [*Bosphorus* presumption]." -What will happen if the ECJ delivers an interpretation that the ECtHR does not want to support in the same manner? Two scenarios are conceivable. As a first possibility, if coherent interpretation is the proclaimed aim, the prior-involvement mechanism will lead to a situation in which the ECtHR is not *de jure* but at least *de facto* bound to the judgment of the ECJ. This situation, however, would undermine the ECtHR's independence most extensively. An informal structure of hierarchy would be created, in passing. In the alternative scenario the ECtHR would guard its interpretation and independence and speak a judgment opposing the prior judgment of the ECJ. This scenario does not seem extraordinary, because, in the end, the ECtHR would only make use of its position to review EU acts in the light of the Convention. However, as the ECJ was clear that it would maintain its autonomy even after accession, the situation may risk resulting in an act of non-compliance of the EU with the ECtHR decision. The ECtHR decision may just not be accepted in the internal legal order of the EU, which would then undermine the purpose of accession itself. In neither of these two scenarios can the prior-involvement

mechanism unfold its reconciling nature. On the contrary, placing of two judgments in juxtaposition is likely to emphasise the differences, which will potentially provoke more conflicts than it will prevent.

The above play of thought demonstrates that the application of the two mechanisms in practice may become more ambiguous than one might consider at first glance. Both mechanisms are built in the light of a pluralistic understanding of fundamental rights protection in Europe. The mechanisms mirror the reciprocal willingness of the two actors to make concessions on the way to accession. They both constitute “paving stones” for the “middle way” that has been taken by the EU and the system of the ECHR to structure the prospective relation of the ECJ and the ECtHR. However, these “paving stones” seem likely to become shaky when confronted with more difficult situations in practice. The major challenge of Constitutional Pluralism, pointed to in the theoretical approaches, seems to be also inherent in these two mechanisms. Co-respondent and prior-involvement mechanism as “paving stones” of the “middle path” may risk giving way to the more unfortunate situations of “hierarchical solution” or “uncontrolled fragmentation”.

Conclusion

Constitutional Pluralism offers a conception of constitutionalism that can contribute to the understanding of the multi-layered system of fundamental rights sources and jurisdictions in Europe. In a nutshell, it claims that there is a “middle path” between hierarchy and fragmentation of different actors on the same legal scene. In other words, plurality and coherence are reconcilable.

This paper has argued that the prospective accession of the EU to the ECHR was attempted to be taken on the “middle path” as the common objective that asked for more harmonisation was to be reconciled with the colliding demands to autonomy and the maintenance of two different legal systems. The procedural arrangements of the accession were read in the light of Constitutional Pluralism to analyse their reconciling nature. A closer look was taken at the *Contrapunctual Law* of former Advocate General Miguel Maduro who considers Constitutional

Pluralism to be able “to reconcile the irreconcilable” and to bring in harmony autonomous voices through principles of contrapunctual law based on a shared set of *meta-principles*.

In the light of Maduro’s *Contrapunctual Law*, it has been further reasoned that the two mechanisms laid down as the procedural arrangement in the prospective relationship of the two courts, are able to unfold a reconciling nature. With the mechanisms in place, the external control of the ECtHR over EU law and actions will not challenge plurality. The EU in the co-respondent mechanism and the ECJ in the prior-involvement mechanism are included into the jurisdictional process of the ECtHR. Therefore, they can present their proper interpretations of legal norms and of the contested actions to defend the EU before the Court in Strasbourg. Thereby, participation of all actors, mutual reception of case law and appropriate allocation of responsibilities, presented by Maduro as elements of contrapunctual principles, are enforced. To this point, Maduro’s theoretical conception of *Contrapunctual Law* can help to understand the principles on which the mechanisms are constructed and the purposes they have. On paper these two mechanisms seem to be a good example for Constitutional Pluralism in practice. However, it has been also pointed to the flaws of the mechanisms. If in a certain case, ECJ and ECtHR follow controversial interpretations of an action or of its legal basis, it is questionable whether the reconciling nature of the mechanisms will be strong enough to prevent conflict. In special cases the ECtHR can derogate from the equal allocation of responsibility as laid down in the co-respondent mechanism. Similarly, despite the prior involvement of the ECJ, the ECtHR may deliver a contradicting judgement. In such cases, the mechanisms can hardly unfold their reconciling nature. In this light, the presented example of cooperation between courts in practice can also contribute to a better understanding of the theoretical approach. The mechanisms represent the contrapunctual principles. From what has been shown in the paper, the mechanisms should be understood as guidelines for the courts’ actions towards each other. They are only tools in the hands of the courts. Whether and how they will be applied will lastly depend on the courts’ will. As seen in Maduro’s theoretical conception, the functioning of the contrapunctual principles depends on the basis set of principles shared by all participants. Therefore, only if the ECJ and the ECtHR stick to this common basis set, namely *mutual recognition*, *discourse* and *compatibility*, can the mechanisms of reconciliation unfold their purpose. Therein lie both the challenge and the opportunity of Constitutional Pluralism. Constitutional Pluralism is indeed a conception that builds on dynamic structures and flux arrangements which can never be manifested through fix structures on paper. It is the challenge of Constitutional Pluralism that it may easily collapse at any point. It is its opportunity that it can reconcile harmony with plurality.

I want to end with my personal expectation towards the accession and the functioning of the mechanisms. In regard to the interplay between the two European Courts established so far, I think it is likely that the two will be able and willing to apply the co-respondent and the prior-involvement mechanisms to the advantage of a more coherent and consistent fundamental rights protection in Europe. In the end, it is the *raison d'être* of the Courts to contribute to coherent jurisdiction and legal certainty and it is their well-recognized status that will be put at risk otherwise.

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