

## Opinion 2/13 of the Court of Justice in the Context of Multilevel Protection of Fundamental Rights and Multilevel Constitutionalism

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**Abstract** In *Opinion 2/13* on the draft agreement on the European Union's accession to the European Convention on Human Rights (ECHR), the Court held that it was not compatible with European Union law (EU law), that is to say with Article 6(2) of

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the Treaty on European Union (TEU) or with Protocol No 8 relating to Article 6(2) TEU. This is without any doubt one of the most significant rulings in all history of the European integration, due to its legal and political consequences. However, in this study we will not elaborate on the future of the EU accession to the ECHR after Opinion 2/13. We will focus on the question whether the conclusions of the Court could have been different provided it had taken multilevel protection of fundamental rights and multilevel constitutionalism into account.

**Zusammenfassung** Im Gutachten 2/13 zum Entwurf des Abkommens über den Beitritt der Europäischen Union zur Europäischen Menschenrechtskonvention (EMRK) hat der Gerichtshof entschieden, dass er nicht mit dem Unionsrecht (EU-Recht) kompatibel sei, genauer mit Art 6 Abs 2 des Vertrags über die Europäische Union (EUV) oder mit Protokoll Nr 8 hinsichtlich Art 6 Abs 2 EUV. Dies ist aufgrund ihrer rechtlichen und politischen Konsequenzen ohne Zweifel eine der wichtigsten Entscheidungen in der Geschichte der europäischen Integration. In diesem Beitrag geht es jedoch nicht um die Zukunft des EU-Beitritts zur EMRK nach dem Gutachten 2/13. Der Fokus liegt auf der Frage, ob die Schlussfolgerungen des Gerichts anders ausgefallen wären, wenn es die Konzepte des Mehrebenen-Grundrechtsschutzes bzw -Konstitutionalismus berücksichtigt hätte.

**Keywords** Accession of EU to the ECHR; Court of Justice of the EU; European Court of Human Rights; multilevel constitutionalism; multilevel protection of fundamental rights; Opinion 2/13.

**Norms referred** Art 2, 4(3), 6(2) (3), 7, 49 TEU; Art 218(11), 267, 275, 344 TFEU; Art 52(3), 53 CFREU; Art 3, 4, 33, 53, 57 ECHR.

## I. Introduction

### A. Background of *Opinion 2/13*

On 18 December 2014, the Court of Justice of the European Union (CJEU) delivered *Opinion 2/13*<sup>1</sup> on whether the draft agreement on the European Union's accession to the ECHR was compatible with EU law, having concluded that it was not compatible with Article 6(2) of the Treaty on European Union (TEU) or with Protocol No 8 relating to Article 6(2) TEU.

For the second time in the history of its case law,<sup>2</sup> the Court refuted the possibility of the Union to accede to the ECHR, in spite of the explicit competence conferred to the Union by the TEU after Lisbon.<sup>3</sup> According to the Court, the draft agreement pro-

<sup>1</sup> ECLI:EU:C:2014:2454.

<sup>2</sup> See CJEU 28.03.1996, *Opinion 2/94*, ECLI:EU:C:1996:140

<sup>3</sup> Cf Article 6(2) TEU. On the EU accession to the ECHR in the Treaty of Lisbon compare *Lock Tobias*, Accession of the EU to the ECHR – who would be responsible in Strasbourg?, in Ashiagbor Diamond/Countouris Nicola/Lianos Ioannis (eds), *The European Union after the Treaty of Lisbon* (2012) 109 et seq; *Gaja Giorgio*, Accession to the ECHR, in Biondi Andrea/Eeckhout Piet/Ripley Stefanie (eds), *EU Law after Lisbon* (2012) 180 et seq; *Rangel de Mesquita Maria José*, *A União Europeia após o Tratado de*

viding to the accession is, *grosso modo*, contrary to the specific characteristics of the EU law<sup>4</sup> and its legal autonomy.<sup>5</sup>

Honestly speaking, this was not fully surprising, taking into account that some preceding rulings<sup>6</sup> went in a similar direction. Notwithstanding, most have expected that the Court had not applied that case law on human rights' matters and had also weighted the advantages of EU accession to the ECHR, which have been signalized by the scholarship<sup>7</sup> and by some European institutions, such as the Commission,<sup>8</sup> for decades. Among those advantages one should include more coherence to the multi-level protection of fundamental rights, since the EU would be substantially submitted to the same international catalogue of fundamental rights – the ECHR – and to the same international jurisdiction – the ECtHR – as its Member States. Furthermore, eventual gaps either of the national or of the European Union fundamental rights systems could be integrated by the ECHR. Finally, the individuals could hold the EU

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Lisboa (2010) 83 et seq; *Bribosia Emmanuelle*, Le traité de Lisbonne: un pas supplémentaire dans le processus de constitutionnalisation des droits fondamentaux, in Magnette Paul/Weyembergh Anne (eds), L'Union européenne: la fin d'une crise? (2008) 195 et seq; *Benoît-Rohmer Florence*, Valeurs et droits fondamentaux, in Brosset Estelle ea (eds), Le Traité de Lisbonne – Reconfiguration ou déconstitutionnalisation de l'Union européenne? (2009) 158 et seq.

<sup>4</sup> According to the Court, “these characteristics include those relating to the constitutional structure of the EU, which is seen in the principle of conferral of powers referred to in Articles 4(1) TEU and 5(1) and (2) TEU, and in the institutional framework established in Articles 13 TEU to 19 TEU” and “EU law is characterised by the fact that it stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States (see, to that effect, judgments in *Costa*, EU:C:1964:66, p. 594, and *Internationale Handelsgesellschaft*, EU:C:1970:114, paragraph 3; Opinions 1/91, EU:C:1991:490, paragraph 21, and 1/09, EU:C:2011:123, paragraph 65; and judgment in *Melloni*, C-399/11, EU:C:2013:107, paragraph 59), and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves (judgment in *van Gend & Loos*, EU:C:1963:1, p. 12, and Opinion 1/09, EU:C:2011:123, paragraph 65).” See para 165–166 of Opinion 2/13.

<sup>5</sup> On the autonomy of EU law see, among others *Pernice Ingolf*, The Autonomy of the EU Legal Order – Fifty Years After *Van Gend*, in Tizzano Antonio/Kokott Juliane/Prechal Sacha (org), 50<sup>ème</sup> Anniversaire de l'arrêt Van Gend en Loos 1963–2013 (2013) 55 et seq; *Gragl Paul*, The accession of the European Union to the European Convention on Human Rights (2013) 19–49; *Craig Paul*, EU Accession to the ECHR: Competence, Procedure and Substance, *Fordham International Law Journal* 36 (2013) 1142 et seq; *Terhechte Jörg Philipp*, Autonomie und Kohärenz – Die Eigenständigkeit der Unionsgrundrechte im Zuge des EMRK-Beitritts der Europäischen Union, in Iliopoulos-Strangas Julia/Pereira da Silva Vasco/Potacs Michael (eds), Der Beitritt der Europäischen Union zur EMRK (2013) 34 et seq; *Lock Tobias*, Walking on a tightrope: The draft ECHR accession agreement and the autonomy of the EU legal order, *Common Market Law Review* 48 (2011) 1028 et seq; *Schilling Theodor*, The Autonomy of the Community Legal Order: An Analysis of Possible Foundations, *Harvard International Law Journal* 37 (1996) 390 et seq; *Weiler J. H. H.*, The Autonomy of the Community Legal Order - Through the Looking Glass, *Harvard International Law Journal* 37 (1996) 411 et seq; *Dowrick Frank E.*, A Model of the European Communities' Legal System, in Jacobs F. G. (ed), *Yearbook of European Law* (1983) 169 et seq.

<sup>6</sup> See CJEU 14.12.1991, Opinion 1/91, ECLI:EU:C:1991:490; and 08.03.2011, Opinion 1/09, ECLI:EU:C:2011:123.

<sup>7</sup> See, among others, *Cohen-Jonathan Gérard*, La Problématique de l'adhésion des Communautés européennes à la Convention européenne des droits de l'homme, in *Mélanges offerts à Pierre-Henri Teitgen* (1984) 82 et seq; *Jacqué Jean Paul*, The Convention and the European Communities, in Macdonald Ronald St. J./Matscher Franz/Petzold Herbert (eds), *The European System for the Protection of Human Rights* (1993) 889 et seqs.

<sup>8</sup> See Memorandum on the accession of the European Communities to the Convention for Protection of Human Rights and Fundamental Freedoms, COM (79) 200 final, 02.05.1979, Bulletin of the European Communities, Supplement 2/79.

itself and not only the Member States responsible in Strasbourg, which would contribute to a better protection of their fundamental rights and to increase of the legal certainty of the system.<sup>9</sup>

If so the legal and political significance of *Opinion 2/13* is unquestionable. It is “without a shadow of the doubt one of the most important rulings of the Court of Justice”<sup>10</sup> and few rulings of the CJEU had aroused many and faster critical remarks as *Opinion 2/13*.

## B. Scholarship’s Reactions

Apart from the blogosphere,<sup>11</sup> one of the most prestigious EU law review – *Common Market Law Review* – published an Editorial Comment claiming “[t]he Opinion of the Court, [...], appears to reflect a somewhat formalistic and sometimes uncooperative attitude in defence of its own powers vis-à-vis the European Human Rights Court (ECtHR)”.<sup>12</sup> *Steve Peers* characterises the Court’s Opinion as “a clear and present danger to human rights protection”<sup>13</sup> and *Sionaidh Douglas-Scott* agrees with him, adding that “Opinion 2/13 does not take rights seriously”.<sup>14</sup> *Piet Eeckhout* claims that “the CJEU’s objections to the Accession Agreement do not persuade, and are not in accordance with the limited conditions imposed by Art 6(2) TEU and by Protocol 8”.<sup>15</sup> For the author, “Opinion 2/13 is based on a concept of autonomy

<sup>9</sup> On the reasons for accession, see, among others, *Claes Monica/Imamović Šejla*, National Courts in the New European Fundamental Rights Architecture, in Kosta Vasiliki/Skoutaris Nikos/Tzevelekos Vassilis (eds), *The EU Accession to the ECHR* (2014) 164; *Steiner Elisabeth/Rătescu Ioana*, The Long Way to Strasbourg – The Impact of CJEU’s Opinion on EU’s Accession to the ECHR, in Benedek Wolfgang ea (eds), *European Yearbook on Human Rights* 15 (2015) 53–55.

<sup>10</sup> *Lazowski Adam/Wessel Ramses A.*, When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR, *German Law Journal* 16 (2015) 179–212, at 210 (also available at <<https://www.utwente.nl/bms/pa/research/wessel/wessel108.pdf>> [01.02.2016]).

<sup>11</sup> The blogosphere reacted immediately. See *Peers Steve*, The CJEU and the EU’s accession to the ECHR: a clear and present danger to human rights protection, *EU Law Analysis* 18.12.2014, available at <<http://eulawanalysis.blogspot.pt/2014/12/the-cjeu-and-eus-accession-to-echr.html>> (01.02.2016); *Wendel Mattias*, Mehr Offenheit wagen! Eine kritische Annäherung an das Gutachten des EuGH zum EMRK-Beitritt, *Verfassungsblog* 21.12.2014, available at <<http://verfassungsblog.de/mehr-offenheit-wagen-eine-kritische-annaeherung-das-gutachten-des-eugh-zum-emrk-beitritt/>> (01.02.2016); *Besselink Leonard F.M.*, Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13, *Verfassungsblog* 23.12.2014, available at <<http://www.verfassungsblog.de/acceding-echr-notwithstanding-court-justice-opinion-213/>> (01.02.2016).

<sup>12</sup> *N.N.*, Editorial Comments: The EU’s Accession to the ECHR – a “NO” from the ECJ!, *Common Market Law Review* 52 (2015) 1.

<sup>13</sup> *Peers Steve*, The EU’s Accession to the ECHR: the Dream Becomes a Nightmare, *German Law Journal* 16 (2015) 219 et seq.

<sup>14</sup> *Douglas-Scott Sionaidh*, Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice, *UK Constitutional Law Blog* 24.12.2014, available at <<https://ukconstitutionallaw.org/2014/12/24/sionaidh-douglas-scott-opinion-213-on-eu-accession-to-the-echr-a-christmas-bombshell-from-the-european-court-of-justice/>> (01.02.2016).

<sup>15</sup> *Eeckhout Piet*, Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue – Autonomy or Autarky?, *Jean Monnet Working Paper* 01/15, 39, available at <<http://jeanmonnetprogram.org/wp-content/uploads/2015/04/JMWP-01-Eeckhout1.pdf>> (01.02.2016).

which borders on autarky”.<sup>16</sup> *Paul Gragl* – who is an expert in EU accession to the ECHR – wrote that “Opinion 2/13 leaves a bitter taste and a fair share of pessimism among all those who are interested in human rights and their effective protection and enforcement”.<sup>17</sup> Even *Fisnik Korenica* – who recently wrote a PhD thesis on EU Accession to the ECHR where he oft agrees with the Court – opines “the opinion confirms [...] the very allergic tendency of the Luxembourg Court to recognize external control from an international court. Such aversion, as shown in this Opinion, goes far beyond the likely situations that may emerge in practice”.<sup>18</sup>

In fact, few scholars entirely supported *Opinion 2/13*.<sup>19</sup>

### C. Purpose of the Current Study

We are not intending to join our voice to this chorus of protests.<sup>20</sup> Our focus is another one. In fact, the main purpose of this study is neither criticising the Court’s views in general nor seeking for solutions<sup>21</sup> in order to solve the legal and political problems that *Opinion 2/13* has created either to the EU or to the ECHR. By contrast, bearing in mind two statements of the Court – the Union is not a State<sup>22</sup> but it has a “constitutional structure”<sup>23</sup> – we think that it makes perfect sense to assess whether the final decision of the Court is consistent with these two starting points. In other words, we

<sup>16</sup> *Eeckhout* (Fn 15) 39.

<sup>17</sup> *Gragl Paul*, The Reasonableness of Jealousy: Opinion 2/13 and EU Accession to the ECHR, Benedek Wolfgang ea (eds), *European Yearbook on Human Rights* 15 (2015) 47.

<sup>18</sup> *Korenica Finisk*, The EU accession to the ECHR – Between Luxembourg’s Search for Autonomy and Strasbourg’s Credibility on Human Rights Protection (2015) 408.

<sup>19</sup> See *Halberstam Daniel*, ‘It’s the Autonomy, Stupid!’ A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward, University of Michigan Public Law Research Paper No 432 (2015) available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2567591](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2567591)> (01.02.2016); *Halberstam Daniel*, A Constitutional Defense of CJEU Opinion 2/13 on EU Accession to the ECHR (and the way forward), *Verfassungsblog* 12.03.2015, available at <<http://www.verfassungsblog.de/a-constitutional-defense-of-cjeu-opinion-213-on-eu-accession-to-the-echr-and-the-way-forward/#.VgbS528g9dg>> (01.02.2016); *Krenn Christoph*, Autonomy and Effectiveness as a Common Concern: A Path to ECHR Accession After Opinion 2/13, *German Law Journal* 16 (2015) 147 et seq.

<sup>20</sup> In addition, see also *Nergelius Joakim*, The accession of the EU to the European Convention on Human Rights: A critical analysis of the Opinion of the European Court of Justice, *SIEPS* 2015:3, 27 et seq, available at <[http://www.sieps.se/sites/default/files/Sieps%202015\\_3%20web.pdf](http://www.sieps.se/sites/default/files/Sieps%202015_3%20web.pdf)> (01.02.2016); *Dubout Edouard*, Une question de confiance: nature juridique de l’Union européenne et adhésion à la Convention européenne des droits de l’homme, *Cahiers de droit européen* 51 (2015) 73 et seq.

<sup>21</sup> Some articles have already been published with this goal. See *Pernice Ingolf*, L’adhésion de l’Union européenne à la Convention européenne des droits de l’homme est suspendue – Remarques à propos d’un avis surprenant de la Cour de Justice de l’Union européenne du 18 décembre 2014, *Cahiers de droit européen* 51 (2015) 47 et seq; *Jacqué Jean Paul*, Pride and/or Prejudice? Les lectures possibles de l’avis 2/13 de la Cour de justice, *Cahiers de droit européen* 51 (2015) 19 et seq; *Lock Tobias*, The Future of the EU Accession to the ECHR after Opinion 2/13: Is It Still Possible and Is It Still Desirable?, *Edinburgh School of Law Research Paper* No 2015/18, available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2616175](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2616175)> (01.02.2016).

<sup>22</sup> See para 156 of the Opinion: “[...] the EU is, under international law, precluded by its very nature from being considered a State.”

<sup>23</sup> See para 165 of the Opinion: “[...] these characteristics include those relating to the constitutional structure of the EU [...]”

intend to assess whether an adequate constitutional theory, which includes multilevel protection of fundamental rights in Europe, could have led the Court to other conclusions.

Before pursuing, we would like to stress that, independently of the political consequences of *Opinion 2/13*, which are somewhat catastrophic for EU accession to the ECHR, since, according to Article 218(11) TFEU, the agreement may not enter into force, unless it is amended or the Treaties are revised, which will be a somewhat difficult task, the decision of the Court must be respected. That is to say, we cannot accept the idea that *Opinion 2/13* does not prevent the accession.<sup>24</sup> In our view, it does. In a political entity, such as the EU, submitted to the respect of the rule of law, the decisions of the courts must be respected regardless of their content pleasing us or not.

In the following sections we will start by a brief characterisation of the multilevel protection of fundamental rights in Europe in the context of multilevel constitutionalism. Afterwards we will briefly summarise the seven issues of the draft agreement that the Court's Opinion considers contrary to the Treaties. Finally, we will develop the reasons why we consider that should have the Court taken multilevel constitutionalism into account, it would have reached different conclusions.

## II. Multilevel Protection of Fundamental Rights in the Context of Multilevel Constitutionalism

### A. Multilevel Protection of Fundamental Rights and EU Accession to the ECHR

Before analysing *Opinion 2/13*, we shortly need to clarify what is meant by multilevel protection of fundamental rights and multilevel constitutionalism in this study, since the doctrine uses these expressions with different meanings.

Multilevel protection of fundamental rights seeks to express the idea that fundamental rights protection in the legal space of Europe is currently based on "three layers of norms and institutions which overlap and intertwine to ensure an advanced degree of protection of fundamental rights".<sup>25</sup> In fact, fundamental rights are protected and enforced by national, EU and international (in this study we will only take the ECHR into account) norms and institutions, having each layer a substantive catalogue of fundamental rights and institutional remedies (with special emphasis to judicial review by courts).

The multilevel protection of fundamental rights is supposed to bring many benefits to the individuals. First of all, it may "prevent gaps occurring in legal protection that may arise from the increasing complexity of societal life. [...]. Secondly, the plurality

<sup>24</sup> *Besselink* (Fn 11) proposed solving the accession with a "Notwithstanding Protocol" that should read: "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms, notwithstanding Article 6(2) Treaty on European Union, Protocol (No 8) relating to Article 6(2) of the Treaty on European Union and Opinion 2/13 of the Court of Justice of 18 December 2014."

<sup>25</sup> *Fabbrini Federico*, *Fundamental Rights in Europe – Challenges and Transformations in Comparative Perspective* (2014) 4.



of jurisdictions brings with it many advantages. Additional courts can give innovation impetus to a deadlocked jurisprudence and break new ground.”<sup>26</sup>

The relationship between national (*maxime* constitutional), EU and ECHR law has ever been simple and it is not expectable that it would have become easier with the accession.<sup>27</sup>

As the Advocate-General *Kokott* pointed out in her View, “the proposed accession of the EU to the ECHR will create a special, possibly even unique, constellation in which an international, supranational organisation – the EU – submits to the control of another international organisation – the Council of Europe – as regards compliance with basic standards of fundamental rights. As a result, in areas governed by EU law, not only national courts and tribunals and the EU Courts, but also the European Court of Human Rights (ECtHR) will be called upon to oversee the observance of fundamental rights.”<sup>28</sup>

The EU accession to the ECHR would have certainly permitted a better multilevel protection of fundamental rights in Europe. As *Adam Łazowski* and *Ramses A. Wessel* claim, exercising the European Union political power that might affect the human beings’ (EU citizens and foreigners) fundamental rights, they “will be better guaranteed when the acts of the EU Institutions are subjected to the same scrutiny as the acts of Member States’ organs. [...] [T]he current state of constitutional development of the EU legal order not only allows for, but perhaps even demands, external scrutiny.”<sup>29</sup>

## B. Multilevel Constitutionalism

European multilevel protection of fundamental rights is anything else but an element of the *constitutionalism beyond the state* theory. Some scholars had for a very long time tried to integrate the European Communities and their respective treaties in a broader constitutional theory that could not be solely anchored in the state. New concepts, like transnational constitutionalism,<sup>30</sup> constitutional pluralism,<sup>31</sup> multilevel

<sup>26</sup> *Voßkuhle Andreas*, Protection of Human Rights in the European Union, Multilevel Cooperation on Human Rights between the European Constitutional Courts, Our Common Future, Hannover/Essen 2–6 November 2010, 3–4, available at <[http://www.ourcommonfuture.de/fileadmin/user\\_upload/dateien/Reden/Vosskuhle.pdf](http://www.ourcommonfuture.de/fileadmin/user_upload/dateien/Reden/Vosskuhle.pdf)> (01.02.2016).

<sup>27</sup> In this direction *Claes/Imamović* (Fn 9) 159.

<sup>28</sup> View of the Advocate-General *Kokott* relating to Opinion 2/13, 13.06.2014, ECLI:EU:C:2014:2475, para 25.

<sup>29</sup> *Łazowski/Wessel* (Fn 10) 212.

<sup>30</sup> See *Neves Marcelo*, Transconstitucionalismo (2009) 83 et seq; *Guerra Martins Ana Maria*, A natureza jurídica da revisão do Tratado da União Europeia (2000) 303 et seq; *Guerra Martins Ana Maria*, Curso de Direito Constitucional da União Europeia (2004) 119 et seq; *Guerra Martins Ana Maria*, A igualdade e a não discriminação dos nacionais de Estados terceiros legalmente residentes na União Europeia – Da origem na integração económica ao fundamento na dignidade do ser humano (2010) 22 and 23; *Guerra Martins Ana Maria*, Manual de Direito da União Europeia (2012) 41 et seq.

<sup>31</sup> For further reading on constitutional pluralism, see Avbelj Matej/Komárek Jan (eds), Constitutional Pluralism in the European Union and Beyond (2012); *Weiler J. H. H.*, Prologue: global and pluralist constitutionalism – some doubts, in de Búrca Gráinne/Weiler J. H. H., The Worlds of European Constitutionalism (2012) 8 et seq; *Halberstam Daniel*, Local, global and plural constitutionalism: Europe meets the world, in de Búrca Gráinne/Weiler J. H. H., The Worlds of European Constitutionalism (2012) 150 et seq; *Krisch*

constitutionalism,<sup>32</sup> or, more recently, global constitutionalism,<sup>33</sup> have emerged and have rapidly circulated in the post-Westphalian world, not without being criticised by those who remain still faithful to state constitutionalism<sup>34</sup> and for those who draw special attention to the limits of these theories.<sup>35</sup>

Although this study is naturally not the appropriate place to elaborate on these issues, we would like to assert that we are rather closed to *Ingolf Pernice's* multilevel constitutionalism theory. However, in our opinion, it should also integrate the ECHR.

Diving further into multilevel constitutionalism theory, we would say that constitutionalism in Europe also includes the EU and, in our view, concerning the field of fundamental rights, it is also and, at least partially, anchored in the Council of Europe, particularly in the ECHR. As *Christian Tomuschat* argues the ECHR “is not a treaty like another bilateral treaty that the EU concludes with other subjects of international law, especially third States [...] it is a parallel or ‘neighbor’ constitution”.<sup>36, 37</sup>

The concept of multilevel constitutionalism was “suggested by Ingolf Pernice in 1995 in order to describe and explain the constitutional specific nature of European integration”.<sup>38</sup> However, *Ingolf Pernice's* original thought did not emphasise protection of fundamental rights, as it was mainly focused on the existence of a European Constitution outside the state,<sup>39</sup> which “arises from both national and European constitutional levels”,<sup>40</sup> forming two levels of a unitary system – a composed constitu-

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*Nico*, The case for pluralism in postnational law, in de Búrca Gráinne/Weiler J. H. H., *The Worlds of European Constitutionalism* (2012) 203 et seq; *Poiares Maduro Miguel*, *A Constituição Plural – Constitucionalismo e União Europeia* (2006) 15 et seq.

<sup>32</sup> On multilevel constitutionalism see, above all, *Pernice Ingolf*, Multilevel Constitutionalism and the Crisis of Democracy in Europe, *European Constitutional Law Review* 11 (2015) 541 et seq; *Pernice Ingolf*, The Treaty of Lisbon: Multilevel Constitutionalism in Action, *The Columbia Journal of European Law* 15 (2009) 349–407; *Pernice Ingolf*, Multilevel Constitutionalism in the European Union, *European Law Review* 27 (2002) 511–529; *Pernice Ingolf*, Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited?, *Common Market Law Review* 36 (1999) 707 et seq.

<sup>33</sup> On global constitutionalism see, above all, *Walker Neil*, Constitutionalism and Pluralism in Global Context, in Avbelj Matej/Komárek Jan (eds), *Constitutional Pluralism in the European Union and Beyond* (2012) 17 et seq.

<sup>34</sup> See *Barents René*, The Fallacy of Multilevel Constitutionalism, in Avbelj Matej/Komárek Jan (eds), *Constitutional Pluralism in the European Union and Beyond* (2012) 153 et seq.

<sup>35</sup> Compare *Harmsen Robert*, The (Geo-)Politics of the EU Accession to the ECHR: Democracy and Distrust in the Wider Europe, in Kosta Vasiliki/Skoutaris Nikos/Tzevelekos Vassilis (eds), *The EU Accession to the ECHR* (2014) 199 et seq; *Lixinski Lucas*, Taming the Fragmentation Monster through Human Rights? International Constitutionalism, ‘Pluralism Lite’ and the Common Territory of the Two European Legal Orders, in Kosta Vasiliki/Skoutaris Nikos/Tzevelekos Vassilis (eds), *The EU Accession to the ECHR* (2014) 219 et seq.

<sup>36</sup> *Tomuschat Christian*, Der Streit um die Auslegungshoheit: Die Autonomie der EU als Heiliger Gral, *EuGRZ* 5-8/2015, 136.

<sup>37</sup> In the original: “ist kein Vertrag wie jeder sonstige bilaterale Vertrag, den die EU mit anderen Völkerrechtssubjekten, insbesondere dritten Staaten, abschließt [...] sie ist eine Parallel- oder ‚Neben‘verfassung”.

<sup>38</sup> *Mayer Franz C./Wendel Mattias*, Multilevel Constitutionalism and Constitutional Pluralism – Querelle Allemande or Querelle d’Allemand?, in Avbelj Matej/Komárek Jan (eds), *Constitutional Pluralism in the European Union and Beyond* (2012) 127.

<sup>39</sup> *Pernice*, Multilevel Constitutionalism in the European Union (Fn 32) 511–529; *Pernice*, Multilevel Constitutionalism and the Treaty of Amsterdam (Fn 32) 707 et seq.

<sup>40</sup> *Mayer/Wendel* (Fn 38) 130.



tional system (*Verfassungsverbund*,<sup>41</sup> *constitution composée*<sup>42</sup>) – in terms of substance, function and institutions. Multilevel constitutionalism is a process that affects national and European law simultaneously. “Both constitutional levels are in permanent interdependency”.<sup>43</sup> The European constitutional process encompasses both national and primary EU law as “two interdependent, interwoven, and reciprocally influential parts of one unit”.<sup>44</sup>

In the most recent essays,<sup>45</sup> the author apparently shifts the focus “on the correlation of national and European law from the perspective of both states and citizens”.<sup>46</sup> That means the EU integration has an impact both in the states and in their citizens.<sup>47</sup> “The EU is an instrument of the states and their peoples for meeting new challenges and for achieving certain common political goals”.<sup>48</sup> Following this line of reasoning, *Ingolf Pernice* stresses that “multilevel constitutionalism, thus, encourages conceptualizing the European Union from the perspective of its citizens”.<sup>49</sup> This element strengthens “the need to ensure an effective protection of the rights of the individuals”,<sup>50</sup> which, according to *Giancinto della Cananea*, suggests a very important shift of paradigm.<sup>51</sup>

Nevertheless, as far as we can understand, *Ingolf Pernice*’s definition of multilevel constitutionalism only comprises two layers of normativity and institutions – national law (*rectius*, constitutional law) and EU law.

Or, in our opinion, taking into account the role that the individuals currently play in the political power legitimation, the multilevel protection and enforcement of fundamental rights should be envisaged as anything but a central element of multilevel constitutional theory. Once accepted this premise, everyone will admit that the ECHR law is without any doubt a relevant source of fundamental rights in Europe. Consequently, multilevel constitutionalism should also integrate that level of normativity and institutional tools.

In other words, in the fundamental rights arena, ECHR law and ECHR institutions – that is to say a third level – cooperate, collaborate, intervene and interact within the European constitutional process. How do the intervention and the interaction take place is hardly conceivable, since there is no historical experience.<sup>52</sup>

Pursuing with the characterization of multilevel constitutionalism, according to *Ingolf Pernice*, it comprehends a vertical relationship between the EU and its Mem-

<sup>41</sup> *Pernice Ingolf*, *Europäisches und nationales Verfassungsrecht*, VVDStRL 60 (2001) 163 et seq.

<sup>42</sup> *Pernice Ingolf/Mayer Franz C.*, *De la Constitution composée de l’Europe*, *Revue Trimestrielle de Droit Européen* 36 (2000) 623–648.

<sup>43</sup> *Pernice*, *The Treaty of Lisbon: Multilevel constitutionalism in action* (Fn 32) 373.

<sup>44</sup> *Pernice*, *The Treaty of Lisbon: Multilevel constitutionalism in action* (Fn 32) 374.

<sup>45</sup> See *Pernice*, *Multilevel Constitutionalism and the Crisis of Democracy* (Fn 32) 544 et seq.

<sup>46</sup> *Pernice*, *The Treaty of Lisbon: Multilevel constitutionalism in action* (Fn 32) 372.

<sup>47</sup> In our PhD thesis, fifteen years ago, we characterised the EU as a union of states and people. See *Guerra Martins* (Fn 30) 303 et seq.

<sup>48</sup> *Pernice*, *The Treaty of Lisbon: Multilevel constitutionalism in action* (Fn 32) 376.

<sup>49</sup> *Pernice*, *The Treaty of Lisbon: Multilevel constitutionalism in action* (Fn 32) 376.

<sup>50</sup> *della Cananea Giacinto*, *Is European Constitutionalism Really “Multilevel”?*, *ZaöRV* 70 (2010) 300.

<sup>51</sup> *della Cananea* (Fn 50) 300.

<sup>52</sup> *Wendel* (Fn 11).

ber States and a horizontal cooperation and mutual recognition between the Member States.<sup>53</sup> As it does not presuppose any hierarchical relationship between national and European level of law,<sup>54</sup> this relationship is pluralistic and cooperative.<sup>55</sup>

In our opinion, this pluralist and cooperative relationship should be extended to ECHR law. That means, as regards fundamental rights, multilevel constitutionalism presupposes a cooperative and mutual recognition not only within two layers but within three layers of protection and enforcement – national law, EU law and ECHR law.

Taking into account that the functioning of the system is not based on a hierarchical relationship, but it depends on mutual trust between the institutions of each layer, with special emphasis to the courts, every single highest court is the guardian of fundamental rights within the layer to which it belongs. As a consequence, multilevel constitutionalism in Europe presupposes several guardians of fundamental rights that could have different views of the same problem and that have all aspiration to pronounce the last word, which can lead to divergent decisions. By now there is no definitive solution for this problem, but one of the means to prevent the proliferation of conflicts is the judicial dialogue. This is not the appropriate place to develop this issue.<sup>56</sup>

Much more could be said about the protection and enforcement of fundamental rights in the context of multilevel constitutionalism. However, in the economy of this study we can no longer elaborate on this issue. We have to turn to *Opinion 2/13* itself, starting by a brief summary.

### III. Summary of the Court's *Opinion 2/13*

Firstly, we would like to point out that the task of the Court in this case was relatively clear: it had to control whether the draft agreement was in accordance with Article 6(2) TEU and Protocol No 8, which previewed the specific conditions of EU accession to the ECHR.<sup>57</sup>

Secondly, however, it is to underline that Article 6(2) TEU does not only state that the EU has the power to accede to the ECHR, but it imposes EU accession. To put it in other terms, the EU has no choice to accede or not.<sup>58</sup> In our opinion, the Court should have also taken this duty more into consideration.

<sup>53</sup> Pernice, The Treaty of Lisbon: Multilevel constitutionalism in action (Fn 32) 379 383.

<sup>54</sup> Pernice, The Treaty of Lisbon: Multilevel constitutionalism in action (Fn 32) 383.

<sup>55</sup> Pernice, The Treaty of Lisbon: Multilevel constitutionalism in action (Fn 32) 383.

<sup>56</sup> For further developments see *Cartabia Marta*, Fundamental Rights and the Relationship among the Court of Justice, the National Supreme Courts and the Strasbourg Court, in Tizzano Antonio/Kokott Juliane/Prechal Sacha (org), 50<sup>ème</sup> Anniversaire de l'arrêt Van Gend en Loos 1963–2013 (2013) 155 et seq; *Guerra Martins Ana Maria/Prata Roque Miguel*, Judicial Dialogue in a Multilevel Constitutional Network – the Role of the Portuguese Constitutional Court, in Andenas Mads/Fairgrieve Duncan (eds), Courts and Comparative Law (2015) 300–328.

<sup>57</sup> These conditions were: i) the accession shall not affect the Union's competences as defined in the Treaties; ii) the accession shall not affect the powers of the institutions; iii) the accession agreement shall make provision for preserving the special characteristics of the Union and Union Law.

<sup>58</sup> Developing the reasons why should the Union accede to the ECHR, cf Editorial Comments (Fn 12) 4.

After a rather brief motivation, the CJEU concluded that “it must be held that the agreement envisaged is not compatible with Article 6(2) TEU or with Protocol No 8 EU in that:

- it is liable adversely to affect the specific characteristics and the autonomy of EU law in so far it does not ensure coordination between Article 53 of the ECHR and Article 53 of the Charter, does not avert the risk that the principle of Member States’ mutual trust under EU law may be undermined, and makes no provision in respect of the relationship between the mechanism established by Protocol No 16 and the preliminary ruling procedure provided for in Article 267 TFEU;
- it is liable to affect Article 344 TFEU in so far as it does not preclude the possibility of disputes between Member States or between Member States and the EU concerning the application of the ECHR within the scope *ratione materiae* of EU law being brought before the ECtHR;
- it does not lay down arrangements for the operation of the co-respondent mechanism and the procedure for the prior involvement of the Court of Justice that enable the specific characteristics of the EU and EU law to be preserved; and
- it fails to have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in CFSP matters in that it entrusts the judicial review of some of those acts, actions or omissions exclusively to a non-EU body.”<sup>59</sup>

By contrast, the View of Advocate-General *Kokott*, seems to be much more constructive, concluding that “[t]he draft revised agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms presented in Strasbourg on 10 June 2013 is compatible with the Treaties, provided it is ensured, in such a way as to be binding under international law, that:

- having regard to the possibility that they may request to participate in proceedings as co-respondents pursuant to Article 3(5) of the draft agreement, the European Union and its Member States are systematically and without exception informed of all applications pending before the ECtHR, in so far and as soon as these have been served on the relevant respondent;
- requests by the European Union and its Member States pursuant to Article 3(5) of the draft agreement for leave to become co-respondents are not subjected to any form of plausibility assessment by the ECtHR;
- the prior involvement of the Court of Justice of the European Union pursuant to Article 3(6) of the draft agreement extends to all legal issues relating to the interpretation, in conformity with the ECHR, of EU primary law and EU secondary law;
- the conduct of a prior involvement procedure pursuant to Article 3(6) of the draft agreement may be dispensed with only when it is obvious that the Court of Justice of the European Union has already dealt with the specific legal issue raised by the application pending before the ECtHR;
- the principle of joint responsibility of respondent and co-respondent under Article 3(7) of the draft agreement does not affect any reservations made by contracting parties within the meaning of Article 57 ECHR; and

<sup>59</sup> Opinion 2/13, ECLI:EU:C:2014:2454, para 258.

- the ECtHR may not otherwise, under any circumstances, derogate from the principle, as laid down in Article 3(7) of the draft agreement, of the joint responsibility of respondent and co-respondent for violations of the ECHR found by the ECtHR.”<sup>60</sup>

In this study we will mainly analyse the Court’s Opinion. The View of Advocate-General *Kokott* will also be referred to where appropriate.<sup>61</sup>

A closer look at the Court’s Opinion permits us to identify three groups of objections. The first one is the possibility that EU accession to the ECHR may in general violate the integrity and autonomy of EU law, the second one concerns the institutional innovations; and the last one refers to the CJEU jurisdiction over the Common Foreign and Security Policy (CFSP).

To be honest, we have to admit that throughout the negotiations<sup>62</sup> of the draft agreement<sup>63</sup>, the scholarship<sup>64</sup> and some European institutions<sup>65</sup> had frequently

<sup>60</sup> View of the Advocate-General *Kokott* realting to Opinion 2/13, para 280.

<sup>61</sup> For an overview of the position of the Advocate-General and the Opinion 2/13 of the CJEU, see, among many others, *Nergelius* (Fn 20) 17 et seq; *Berger Maria/Rauchegger Clara*, Opinion 2/13: Multiple Obstacles to the Accession of the EU to the ECHR, in Benedek Wolfgang ea (eds), *European Yearbook on Human Rights* 15 (2015) 61–73; Editorial Comments (Fn 12) 7–11; *Peers* (Fn 13) 215–217; *Odermatt Jed*, A Giant Step Backwards? *Opinion 2/13* on the EU’s Accession to the European Convention on Human Rights, Leuven Centre for Global Governance Studies Working Paper No 150 (February 2015) 5–10, available at <<http://www.fp7-frame.eu/wp-content/materiale/w-papers/WP150-Odermatt.pdf>> (01.02.2016); *Spaventa Eleanor*, A Very Fearful Court? The protection of Fundamental Rights in the European Union after Opinion 2/13 (ny) 12–21, available at <[http://www.corteappello.milano.it/allegato\\_corsi.aspx?File\\_id\\_allegato=1862](http://www.corteappello.milano.it/allegato_corsi.aspx?File_id_allegato=1862)> (01.02.2016); *Gragl* (Fn 17) 31–36; *Douglas-Scott* (Fn 14).

<sup>62</sup> On the negotiations of the draft agreement see *Korenica* (Fn 18) 106 et seq; *Drzemczewski Andrew*, EU accession to the ECHR: The Negotiation Process, in Kosta Vasiliki/Skoutaris Nikos/Tzevelekos Vassilis (eds), *The EU Accession to the ECHR* (2014) 17 et seq; *De Schutter Olivier*, L’adhésion de l’Union européenne à la Convention européenne des droits de l’homme: feuille de route de la négociation, *Revue trimestrielle des droits de l’homme* 2010/83, 540 et seq; *Sanz Caballero Susana*, Crónica de una adhesión anunciada: algunas notas sobre la negociación de la adhesión de la Unión Europea al Convénio Europeo de Derechos Humanos, *Revista de Derecho Comunitario Europeo* 38/2011, 99–128.

<sup>63</sup> On the draft agreement itself see *Korenica* (Fn 18) 108 et seq; *Gragl Paul*, A Giant Leap for European Union Human Rights? The Final Agreement on the European Union’s Accession to the European Convention on Human Rights (2014) 1 et seq, available at <[www.academia.edu](http://www.academia.edu)> (01.02.2016); *Lock* (Fn 5) 1025 et seq.

<sup>64</sup> See, among many others, *Gragl* (Fn 63) 3 et seq.; *Craig* (Fn 5) 1115 et seq; *Martin y Pérez de Nanclares José*, The accession of the European Union to the ECHR: More than Just a Legal Issue, Working Papers on European Law and Regional Integration No 15 (2013) 1 et seq; *Terhechte* (Fn 5) 37 et seq; *Guerra Martins Ana Maria*, A Portuguese Perspective of the Accession of the European Union to the European Convention of Human Rights, in Iliopoulos-Strangas Julia/Pereira da Silva Vasco/Potacs Michael (eds), *Der Beitritt der Europäischen Union zur EMRK* (2013) 205 et seq; *Rangel de Mesquita Maria José*, Remarques sur la ‘valeur ajoutée’ de l’adhésion de l’Union européenne à la Convention européenne de Droits de l’Homme pour la protection des droits fondamentaux des particuliers en Europe, in Iliopoulos-Strangas Julia/Pereira da Silva Vasco/Potacs Michael (eds), *Der Beitritt der Europäischen Union zur EMRK* (2013) 277 et seq; *Obwexer Walter*, Der Beitritt der EU zur EMRK: Rechtsgrundlage, Rechtsfragen und Rechtsfolgen, *EuR* 2/2012, 119 et seq; *Gragl* (Fn 5) 87 et seq; *Jacqué Jean Paul*, The accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms, *Common Market Law Review* 48 (2011) 1012 et seq; *Bertrand Brunessen*, Cohérence normative et contentieux – à propos de l’adhésion de l’Union européenne à la Convention européenne des droits de l’Homme, *Revue du Droit Public* 128 (2012) 190 et seq; *Lock* (Fn 5) 1025 et seq; *O’Meara Noreen*, A More Secure Europe of Rights? The European Court of Human Rights, the Court of Justice of the European Union and EU Accession to the ECHR, *German Law Journal* 10/2011, 1818 et seq; *De Schutter* (Fn 62) 547 et seq; *Ladenburger Clemens*, Vers l’adhésion de l’Union européenne à la Convention européenne des droits de l’homme,

pointed out several difficulties and potential incompatibilities between that draft agreement and EU primary law. In this study we will not return to this subject.<sup>66</sup> We will concentrate on the objections of the CJEU.

#### A. Violation of the integrity and autonomy of the EU Law

The first concern of the CJEU relates to Article 53 ECHR that gives authorisation for Member States to have higher rights than the Charter on Fundamental Rights of the EU (CFREU), when the EU has fully harmonised the law. According to the Court, Article 53 ECHR shall be coordinated with Article 53 CFREU, as interpreted by the Court in *Melloni*.<sup>67</sup> That means where the EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness are not thereby compromised. The Court considered that EU Member States could use Article 53 ECHR to adopt higher standards of fundamental rights in matters covered by harmonised Union law. For the Court, it is necessary to ensure the coordination between Article 53 CFREU and Article 53 ECHR, as long as it could affect the autonomy of the EU law.<sup>68</sup>

The second objection of the Court concerns the principle of “mutual trust” between EU Member States in the Area of Freedom, Security and Justice (AFSJ), which obliges the Member States to presume that all other Member States are in compliance with EU law and particularly with the fundamental rights recognised by EU law, except for exceptional circumstances as interpreted by the CJEU.<sup>69</sup> EU accession to the ECHR, according to the Court, would require a Member State to check that

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Revue trimestrielle de droit européen 47 (2011) 21 et seq; *Lock Tobias*, EU Accession to the ECHR: Implications for Judicial Review in Strasbourg, *European Law Review* 35 (2010) 777 et seq.

<sup>65</sup> Cf “Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms”, 05.05.2010, available at <[http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention\\_en.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en.pdf)> (01.02.2016), and “Joint communication from Presidents Costa and Skouris”, 24.01.2011, available at <[http://www.echr.coe.int/Documents/UE\\_Communication\\_Costa\\_Skouris\\_ENG.pdf](http://www.echr.coe.int/Documents/UE_Communication_Costa_Skouris_ENG.pdf)> (01.02.2016).

See also European Parliament resolution of 19 May 2010 on the institutional aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, OJ 2011 C 161E/72. On the position of the European Parliament see *Passos Ricardo*, The protection of Fundamental Rights in Europe before and after the Accession of the European Convention on Human Rights: A View from the European Parliament, in Iliopoulos-Strangas Julia/Pereira da Silva Vasco/Potacs Michael (eds), *Der Beitritt der Europäischen Union zur EMRK* (2013) 125 et seq.

<sup>66</sup> We have already written on this subject – *Guerra Martins Ana Maria*, O Parecer n.º 2/13 do Tribunal de Justiça relativo à compatibilidade do projeto de acordo de adesão da União Europeia à Convenção Europeia dos Direitos do Homem, in *Liber Amicorum Professor Doutor Fausto de Quadros* (to be published).

<sup>67</sup> CJEU 26.02.2013, Case C-399/11 (*Melloni*) ECLI:EU:C:2013:107, para 60.

<sup>68</sup> See Opinion 2/13, paras 187–189.

<sup>69</sup> See CJEU 21.12.2011, Joined Cases C-411/10 and C-493/10 (N.S. and M.E.) ECLI:EU:C:2011:865, paras 78–80.

another Member State has observed fundamental rights, which would undermine the autonomy of the EU law.<sup>70</sup>

The third worry of the Court evolves Protocol No 16, which was opened to signature in 2013 and has not yet entered into force. This protocol provides for national highest courts of High Contracting Parties the possibility to send questions to the ECtHR on interpretation of the ECHR. The CJEU is particularly concerned about the impact that this procedure might have in the autonomy and effectiveness of the preliminary reference procedure.<sup>71</sup>

The fourth concern of the CJEU was that Article 33 ECHR allows for inter-state disputes between ECHR High Contracting Parties regarding alleged breaches of the Convention. The Court found that this possibility violated Article 344 TFEU, which prohibits the EU Member States to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for in the EU Treaties. This possibility could undermine the autonomy of the EU law. Only the express exclusion of the EU Member States to bring disputes connected with the EU law before the ECtHR would be compatible with Article 344 TFEU.<sup>72</sup>

## B. Institutional Innovations

Concerning institutional innovations the Court was particularly worried with the correspondent mechanism that creates a new procedure where the EU and a Member State could be parties to an ECtHR case. The Court found this procedure incompatible with EU law for several reasons. First, it would give the ECtHR the power to interpret EU law when assessing the admissibility of requests to apply this procedure, and consequently, the ECtHR could assess rules of EU law concerning the division of powers between the EU and the Member States; second, a ruling by the ECtHR on the joint responsibility of the EU and its Member States could impinge on Member State reservations to the Convention, and the ECtHR should not have the power to allocate responsibility for breach of the ECHR between EU and Member States, since only the CJEU can rule on EU law.<sup>73</sup>

The other institutional innovation that disturbed the Court was the prior involvement mechanism included in the draft agreement to take into account the concerns of the Presidents of both Courts in their Joint Communication mentioned above. The Court found the design of this mechanism would violate EU law, as long as it does not reserve to the EU the power to rule on whether the CJEU has already dealt with an issue or not. On the contrary, the ECtHR would be called up to decide whether the CJEU has already ruled previously on the same question of law. Moreover, this procedure would permit the ECtHR to rule on interpretation of the EU Treaties and the case law of the CJEU.<sup>74</sup>

<sup>70</sup> See Opinion 2/13, paras 190–195.

<sup>71</sup> See Opinion 2/13, paras 196–200.

<sup>72</sup> See Opinion 2/13, paras 201–214.

<sup>73</sup> See Opinion 2/13, paras 215–235.

<sup>74</sup> See Opinion 2/13, paras 236–248



### C. The CJEU Jurisdiction over the Common Foreign and Security Policy

The last point of the draft agreement the Court considered incompatible with EU primary law – this was perhaps the most complex issue faced by the Court – was the potential ECtHR jurisdiction over some CFSP acts.

As a matter of fact, the Court of Justice does not have jurisdiction with respect to the CFSP with certain narrow and strictly-defined exceptions, provided for in Article 275 TFEU. Otherwise, the draft agreement would have created the situation whereby the ECtHR would have jurisdiction over certain acts that are not reviewable by the CJEU.

According to the Court, this possibility violates EU law, as long as a non-EU court cannot be given the power of judicial review over EU acts, even though the CJEU has no jurisdiction itself regarding most CFSP issues.<sup>75</sup>

After this brief overview, we will look at *Opinion 2/13* with the glasses of multilevel constitutionalism.

## IV. *Opinion 2/13* in the perspective of multilevel constitutionalism

### A. General Framework

Recalling that the Court drew attention to the constitutional structure of the EU,<sup>76</sup> accepting “the fact that the EU has a new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles, a particularly sophisticated institutional structure and a full set of legal rules to ensure its operation, has consequences as regards the procedure for and conditions of accession to the ECHR”<sup>77</sup> and some scholars even considered that the reasoning of the Court might be justified by an attempt to defend the constitutional nature of the Union<sup>78</sup>, we will start by clarifying what are, in our opinion, the consequences of multilevel constitutionalism within the scope of the protection and enforcement of fundamental rights.

Solely afterwards we will be able to assess, firstly, whether the CJEU had actually in mind any kind of constitutionalism and, secondly, whether it took in consideration multilevel constitutionalism theory.

In our view, one of the major goals of every constitutional theory – and multilevel constitutional could not be any exception – should be the achievement of a higher

<sup>75</sup> See *Opinion 2/13*, paras 249–257.

<sup>76</sup> See *Opinion 2/13*, para 157 – “As the Court of Justice has repeatedly held, the founding treaties of the EU, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals (see, in particular, judgments in *van Gend & Loos*, 26/62, EU:C:1963:1, p. 12, and *Costa*, 6/64, EU:C:1964:66, p. 593, and *Opinion 1/09*, EU:C:2011:123, paragraph 65)”.

<sup>77</sup> *Opinion 2/13*, para 158.

<sup>78</sup> *Dubout* (Fn 20) 75; *Labayle Henri/Sudre Frédéric*, L’avis 2/13 de la Cour de Justice sur l’adhésion de l’Union européenne à la Convention des droits de l’homme: pavane pour une adhésion défunte?, *Revue française de droit administrative* 31 (2015) 4–9 and 15.

level of protection and enforcement of fundamental rights of the individuals. Provided multilevel constitutionalism contributes to racing the fundamental rights to the bottom instead of levelling them up, it would be very hard to convince the individuals to adhere to and to legitimate a constitutional network that undermines their rights.<sup>79</sup> Therefore, in our opinion, the protection and enforcement of fundamental rights in multilevel constitutionalism should achieve a higher level than each isolated constitutional layer.

As a result, each constitutional layer should respect fundamental rights protected and enforced by other constitutional layers. That is to say EU law and the CJEU shall respect fundamental rights protected and enforced by national constitutional layers and by ECHR law, and *vice versa*. This is actually the meaning of Article 53 CFREU and of Article 53 ECHR. We will come back to this argument.

In conclusion, since the protection of fundamental rights in Europe is currently based on national law, EU law and (at least) ECHR law, a comprehensive multilevel constitutional theory should be able to guarantee a better enforcement and effectiveness of fundamental rights and a higher standard of fundamental rights' protection.<sup>80</sup>

And it is possible to achieve this goal in multilevel constitutionalism, once national law, EU law and ECHR law are founded on common values and principles. In fact, in Europe the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights are shared by the states and the EU, as it clearly results from Article 2 TEU<sup>81</sup>, but also by the Council of Europe, as evidenced by the following excerpt of the ECHR preamble: "[r]eaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend; [...] the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law [...]".

That is to say that national law, EU law and ECHR law are altogether based on similar values, which propitiates a mutual interpenetration, interdependence, interaction and reciprocal influence from one to another and a progressive convergence of fundamental rights. Otherwise, conflicts will emerge so oft that they will become the norm rather than the exception and they will destroy the constitutional order in a relatively short time. That does not mean there are no punctual divergences, but they are not the rule.

Actually, the mutual interpenetration, interdependence, interaction and reciprocal influence among the different levels of normativity and judiciary should be envisaged as another characteristic of multilevel constitutionalism in the field of fundamental

<sup>79</sup> In a similar direction, but without mentioning multilevel constitutionalism, see *Franzius Claudio*, *Strategien der Grundrechtsoptimierung in Europa*, EuGRZ 5-8/2015, 152.

<sup>80</sup> In the same vein *Labayle/Sudre* (Fn 78) 20.

<sup>81</sup> Article 2 TEU reads: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

rights. That means the participation either of a state or the EU in the international human rights law system implies necessarily an interference of this system in the domestic affairs of that state and *a fortiori* in the EU affairs.<sup>82</sup>

To put it in other words, if the EU accedes to the ECHR, none can seriously expect that EU law will remain untouched, as long as the treaties on human rights intend always supplementing the lack of protection of the states and so it will be with the EU. "There is no doubt that being bound by the ECHR under international law will impose restrictions on the exercise of its existing competences".<sup>83</sup> The accession of the EU to the ECHR, having, among many others, the consequence of submitting the EU to the jurisdiction of the ECtHR, would by nature affect the autonomy of the EU legal order, as it affects the autonomy of the domestic legal order of every single Member State.<sup>84</sup>

In addition, the accession to a human rights treaty by a state implies always interference in domestic affairs of this state. That is to say the international law principle of non-interference in internal affairs does not apply to human rights matters. Otherwise, the states could prevent the enforcement of human rights international law.<sup>85</sup> If the EU accedes to the ECHR, it shall be submitted to the same rules as the states.

In the case of the European Union, this interference would not be so deep as in other cases, because, according to the case law of the CJEU, fundamental rights, as guaranteed by the ECHR (and as they result from the constitutional traditions common to the Member States) shall already constitute general principles of Union's law (Article 6(3) TEU).<sup>86</sup>

As a consequence, the EU shall currently apply (albeit only substantially) the fundamental rights contained in the ECHR and in its protocols and, in addition, under the terms of Article 52(3) CFREU, in so far as the Charter contains rights guaranteed by the ECHR, the meaning and the scope of those rights shall be the same as those laid down by the ECHR, admitting, however, that Union law provides more extensive protection.

Or, the material scope of the draft agreement is much more restrictive – the EU solely accedes to the ECHR, the Protocol, and Protocol No 6, that is to say, to the two protocols to which all Member States are already parties. Consequently, the impact

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<sup>82</sup> According to *Callewaert Johan*, *Der Beitritt der EU zur EMRK: Eine Schicksalsfrage für den europäischen Grundrechtsschutz*, StV 8/2014, 505: "Beim Beitritt der EU geht es also darum, dass auch die EU es akzeptiert, sich von Zeit zu Zeit etwas 'stören' bzw. ihre Handlungen und Konzepte hinterfragen lassen." (EU accession to the ECHR means that from time to time the EU should let the ECtHR to "trouble" her, that is to say their actions and concepts may be questioned by the ECtHR).

<sup>83</sup> View of the Advocate-General *Kokott* relating to Opinion 2/13, para 40.

<sup>84</sup> *Krenn* (Fn 19) 162 considers that autonomy is not only a concern of the EU, but also domestic systems are autonomous and they care about their autonomy.

<sup>85</sup> See *De Schutter Olivier*, *International Human Rights Law: Cases, Materials, Commentary*<sup>2</sup> (2015) 113 et seq.

<sup>86</sup> Before the Treaty of Lisbon, the CJEU had already built a firm and consistent case law in this direction. See, among many others, CJEU 14.05.1974, Case 4/73 (Nold) ECLI:EU:C:1974:51; 15.06.1986, Case 222/84 (Johnston) ECLI:EU:C:1986:206; 13.12.1979, Case 44/79 (Hauer) ECLI:EU:C:1979:290; 28.10.1975, Case 36/75 (Rutili) ECLI:EU:C:1975:137; 29.05.1997, Case C-299/95 (Kremzow) ECLI:EU:C:1997:254.

of the ECHR in the EU would be less significant than if the EU had never established any relationship with the ECHR.

Furthermore, the *jus cogens*<sup>87</sup> nature of some human rights' provisions, such as the prohibition of torture<sup>88</sup> (Article 3 ECHR) or the prohibition of slavery (Article 4(1) ECHR), bind either the states or the EU. That means, independently of the EU accession to the ECHR, the EU is cogently bound by these provisions.<sup>89</sup>

Finally, the real binding effect of international human rights law depends on the submission of the states, in the fields regulated by the human rights treaties, to an international jurisdiction, abdicating from the monopoly of its own jurisdiction.<sup>90</sup> Or, if it is the case within the states, it cannot be different when the EU is concerned.

Nevertheless, multilevel constitutionalism does not imply nor a hierarchy of legal orders that participate therein neither a hierarchy of judiciary. Consequently, there are several courts that control the enforcement of fundamental rights and none of them can be faced as the only one which has the last word.

Taking this situation into account, the cooperative judicial dialogue between the highest national courts (especially the constitutional courts), the CJEU and the ECtHR assumes a huge importance in order to prevent conflicts between the different highest courts.<sup>91</sup> In fact, the principle of cooperative judicial dialogue between constitutional courts, the CJEU and the ECtHR is already underway for a long time<sup>92</sup> and the CJEU has always contributed and benefited from this dialogue. However, this dialogue will only be fruitful if the Courts trust each other. That is to say cooperative judicial dialogue implies a judicial mutual trust between the highest courts. Moreover, multilevel constitutionalism presupposes a sincere cooperation between all players, and not only between the EU and its Member States.

Having said this, one has to underline that the obligations of the EU Member States founded on EU law will not change because of EU accession to the ECHR. To put it in other words, EU Member States – that are also Contracting Parties of the ECHR – will not be authorized by EU accession to violate EU law. As a result, the

<sup>87</sup> According to Article 53 of the Vienna Convention on the Law of Treaties (1969) and Article 53 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986), a *jus cogens* norm is a peremptory norm of general international law accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

<sup>88</sup> *De Schutter* (Fn 85) 299 et seq.

<sup>89</sup> It is disputable whether a regional *jus cogens* does actually exist. This is not the right place to discuss this issue.

<sup>90</sup> For further developments, see *Guerra Martins Ana Maria/Prata Roque Miguel*, Chapter 18 – Universality and Binding Effect of Human Rights from a Portuguese Perspective, in Arnold Rainer (ed), *The Universalism of Human Rights* (2013) 310 et seq.

<sup>91</sup> Underlining the judicial dialogue in the fundamental rights context, cf *Grabenwarter Christoph*, The Cooperation of Constitutional Courts in Europe – Current Situation and Perspectives, in XVI<sup>e</sup> Congrès de la Conférence des Cours Constitutionnelles européennes – La coopération entre les Cours Constitutionnelles en Europe – Situation actuelle et perspectives I (2014) 35 et seq; *Popov Athanase*, L'avis 2/13 de la CJUE complique l'adhésion de l'Union européenne à la CEDH, *Revue des Droits de l'Homme* 2015 (online), 8, available at <<http://revdh.revues.org/1065>> (01.02.2016); *Cartabia Marta*, Europe and Rights: Taking Dialogue Seriously, *European Constitutional Law Review* 5 (2009) 21 et seq.

<sup>92</sup> On judicial dialogue see our study *Guerra Martins/Prata Roque* (Fn 56) 300–328.

EU Member States obligations towards the EU remain untouchable, unless EU law rules otherwise.

Concluding, in the field of protection and enforcement of fundamental rights, in our view, multilevel constitutionalism implies the respect of the following principles:

- a) the principle of a higher protection of fundamental rights;
- b) the principle of common values between the Member States, the EU and the Council of Europe and its Member States;
- c) the principle of cooperative judicial dialogue;
- d) the principle of sincere cooperation and mutual trust.

In the next sections, we will scrutinise *Opinion 2/13* on this basis.

## B. Principle of a Higher Protection of Fundamental Rights

Starting with the principle of a higher protection of fundamental rights, in our view, the Court does not follow this constitutional perspective and this is rather visible in several parts of *Opinion 2/13*. The Court seems to be stuck in a more traditional constitutional view that does not establish any or, at least, sufficient bridges between the three levels of norms and institutions that interact in European territory concerning fundamental rights.

To put it in other words, the Court seems to adhere to an “exclusivist” constitutionalism that envisages the EU as a rather formal entity almost isolated in the legal world and not a multilevel constitutionalism that considers the EU legal order as a part of a wider and multi-layered constitutional order.

As *Henri Labayle* and *Frédéric Sudre* argued, “since the hierarchical path is closed, the Court of Justice reasons in terms of exclusivity”.<sup>93</sup> In fact, *Opinion 2/13* is anchored in a rather formalistic, restrictive and exclusivist constitutional vision of the EU, which will be hardly acceptable by other players, such as the ECtHR and the constitutional courts, which seem to be the privileged interlocutors of the CJEU.

In our mind, this perspective explains why the Court is so concerned with its own interpretation of the CFREU, the primacy and the autonomy of EU law and apparently less engaged in the protection and enforcement of fundamental rights.<sup>94</sup> Paraphrasing *Piet Eeckhout*, “the CJEU hardly mentions that objective of strengthening the fundamental rights protection of real human beings”.<sup>95</sup>

We are not arguing that the Court did not care about the enforcement of fundamental rights as some have supported since the beginning of European integration. Our point of view is another one: multilevel constitutionalism principle of a higher level protection of fundamental rights would have, in principle, permitted an interpretation of the draft agreement in conformity with EU law in the following cases.

<sup>93</sup> “La voie hiérarchique étant fermée, la Cour de Justice raisonne en termes d’exclusivité” – *Labayle/Sudre* (Fn 78) 15.

<sup>94</sup> *Lazowski* and *Wessel* counter-argue that the Court took fundamental rights seriously, but it needed more time to explore the Charter and its potential. According to these authors, “it seized the opportunity to start building a wall of case law based on the Charter before the European Union accedes to the ECHR. Looked at from this perspective, *Opinion 2/13* is undoubtedly an important element in this jigsaw puzzle.” – *Lazowski/Wessel* (Fn 10) 209.

<sup>95</sup> *Eeckhout* (Fn 15) 7.

### 1. Coordination between Article 53 CFREU and Article 53 ECHR

As for the coordination between Article 53 CFREU and Article 53 ECHR, the CJEU considered that the EU Member States could use Article 53 ECHR to adopt higher standards of fundamental rights in matters covered by harmonised Union law, which is contrary to the primacy of EU law. Therefore, Article 53 ECHR, permitting the Contracting Parties to have higher level of protection of fundamental rights than the ECHR, could be in collision with Article 53 CFREU, as interpreted by the Court in *Melloni*.

First of all, one has to underline that the factual and legal situation in the *Melloni* case was rather particular, since it concerned the interpretation and, if necessary, the validity of Article 4a(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States<sup>96</sup>, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009<sup>97</sup> ('Framework Decision 2002/584') and, if necessary, the examination of the issue of whether a Member State may refuse to execute a European arrest warrant on the basis of Article 53 CFREU on grounds of infringement of the fundamental rights of the person concerned guaranteed by the national constitution.

Apart from the fact that the interpretation of Article 53 CFREU in *Melloni* is far from being peaceful,<sup>98</sup> the truth is that, according to the Court, "[t]his interpretation of Articles 47 and 48(2) of the Charter is in keeping with the scope that has been recognised for the rights guaranteed by Article 6(1) and (3) of the ECHR by the case-law of the European Court of Human Rights (see, inter alia, ECtHR, *Medenica v. Switzerland*, no. 20491/92, § 56 to 59, ECHR 2001-VI; *Sejdovic v. Italy* [GC], no. 56581/00, § 84, 86 and 98, ECHR 2006-II; and *Haralampiev v. Bulgaria*, no. 29648/03, § 32 and 33, 24 April 2012)."<sup>99</sup>

That means one cannot allege that the Court did not take into account the multi-level protection of fundamental rights in Europe. However, in our opinion, the Court adopted a rather rigid position concerning the relationship between fundamental rights and primacy of EU law that can be understandable within the domain of the European arrest warrant and the surrender procedures between Member States, but this should not be spread to other areas. The principle of a higher protection of fundamental rights should be faced as an existential requirement, such as the principle of primacy.

In fact, Article 53 CFREU clearly states that "nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms, as recognised [...], including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions". In our opinion, the Court could have interpreted Article 53 CFREU differently, as long as it

<sup>96</sup> OJ 2002 L 190/1.

<sup>97</sup> OJ 2009 L 81/24.

<sup>98</sup> For a rather critical view see *Nergelius* (Fn 20) 28 et seq.

<sup>99</sup> CJEU Case C-399/11 (*Melloni*) para 50.



was ready to accept higher standards of fundamental rights, coming from ECHR and from Member States' constitutions.<sup>100</sup>

Honestly speaking, this is not the first time the Court sacrifices fundamental rights towards primacy of EU law.<sup>101</sup> In fact, this question focuses on an old and well-known quarrel between Member States' constitutional courts and the Court of Justice that has not been resolved yet. That is to say who is the final arbiter of fundamental rights in Europe?<sup>102</sup> In this study we cannot go further in this issue.

This position of the Court may trigger new adverse reactions from Member States' constitutional courts and may open a "Pandora box", which everyone has reasons to fear, including the Court of Justice.

As someone has already written, "the somewhat inflexible defence of its judicial powers at the expense of an accession of the EU to the ECHR may, unfortunately, lead to an (unexpected) backlash in the relationship between the ECJ and the constitutional courts of the Member States, who may, paradoxically, draw some inspiration from the ECJ's attitude. Constitutional Courts may be willing to defend their judicial powers (with regard to fundamental rights) *vis-à-vis* the ECJ in a fashion parallel to the ECJ *vis-à-vis* the ECtHR".<sup>103</sup>

## 2. Area of Freedom, Security and Justice

Another objection of the Court that, in our opinion, could have been avoided if the Court had used the tools of multilevel constitutionalism, concerns AFSJ. In fact, in a field that is rather conducive to the violation of the fundamental rights, as long as individuals are usually in an extreme situation, either for lack of economic means, either for fear of being repatriated or sent to countries that they do not want to or because they are arrested or detained, these situations require the highest level of protection of fundamental rights.<sup>104</sup>

However, the Court maintains its traditional "exclusivist" constitutional view and shows to be more preoccupied with the autonomy of EU law and with the preservation of its own EU law interpretation than with the protection of fundamental rights.

The Courts' emphasis on the principle of "mutual trust" between EU Member States in the AFSJ, founded on the Dublin rules on asylum responsibility, led the Court to reaffirm its own jurisprudence and fear to interacting with a more protective system of the asylum seekers fundamental rights than the Dublin system, such as the recent case law of the ECtHR.<sup>105</sup>

<sup>100</sup> In the same vein *Popov* (Fn 91) 5.

<sup>101</sup> At the very beginning of the European integration, the Court of Justice refused to accept that fundamental rights were part of EC law (see Case 1/58 [Stork]), but this was going soon to change (see Case 26/69 [Stauder], Case 11/70 [Internationale Handelsgesellschaft]).

<sup>102</sup> For further developments *Kumm Mattias*, The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty, *European Law Journal* 11 (2005) 262 et seq; *Kumm Mattias*, Who is the Final Arbiter of Constitutionality in Europe?, *Common Market Law Review* 36 (1999) 351 et seq.

<sup>103</sup> Editorial Comments (Fn 12) 15. In a similar vein: *Łazowski/Wessel* (Fn 10) 212; *Nergelius* (Fn 20) 48.

<sup>104</sup> In the same vein *Spaventa* (Fn 61) 19.

<sup>105</sup> See 04.11.2014, 29217/12 (Tarakhel/Switzerland).

If the Court would have taken the principle of a higher protection of fundamental rights into account, instead of being once again stuck to its own jurisprudence and to the principle of autonomy of EU law, the fact that a Member State could check that another Member State has observed fundamental rights, would not constitute any insurmountable problem.<sup>106</sup>

In our mind, the scope of the principle of “mutual trust” (or mutual recognition) is not so narrow that it applies only between EU Member States. As we will see below, it should apply in all directions and between every single constitutional player.

### 3. *Jurisdiction over Common Foreign and Security Policy*

Finally, although the lack of jurisdiction over the CFSP was perhaps the most difficult question that the Court had to envisage, it could also have benefited from the input of multilevel constitutionalism and the principle of a higher protection of fundamental rights.<sup>107</sup> To a certain extent, this was the position of the Advocate-General *Kokott*.<sup>108</sup>

The Court is right when it said, that in order to preserve the specific characteristics of the EU, a non EU court cannot be given the power of judicial review over EU acts, even though the CJEU has no jurisdiction itself regarding most CFSP issues.

However, in our perspective, this is a partial view of the problem. In fact, the monopoly of the CJEU jurisdiction over EU acts is not the unique feature of EU law. On the contrary, the respect for human dignity and the respect of fundamental rights in general are also comprised in the specific characteristics of the EU. The Court could have anchored its reasoning in these two points, and it could have accepted this part of the draft agreement. Theoretically, the CFSP could have been the field where the individuals actually could have gained more protection of their fundamental rights with EU accession to the ECHR, because this is a field where the EU has no real jurisdiction. In practical terms, the direct violation of individual rights by a Union’s act that is excluded of the Court’s jurisdiction is somewhat rare.

Due to the jeopardising of the specific characteristics of the EU, the CJEU refused the conformity of the draft agreement on this matter.

#### C. Principle of Common Values between EU Member States, EU, Council of Europe and its Member States

Another significant element of multilevel constitutionalism that the Court apparently did not consider relates to the existence of common values within the Member States, the EU, the Council of Europe and its Member States. In fact, the Court of Justice solely referred to the common values between the Member States and the EU (Article 2 TEU).<sup>109</sup> This reference is fully understandable, as long as the common values are so relevant that their respect constitutes a condition to accede to the Union

<sup>106</sup> Cf *Dubout* (Fn 20) 95 et seq.

<sup>107</sup> In the same vein *Popov* (Fn 91) 7.

<sup>108</sup> See View of the Advocate-General *Kokott* relating to Opinion 2/13, para 82–103.

<sup>109</sup> Opinion 2/13, para 168.

(Article 49 TEU) and its serious and persistent breach by a Member State might conduct to the suspension of that Member State (Article 7 TEU).<sup>110</sup>

However, as mentioned above, the EU and its Member States share also some values (and principles) with the Council of Europe and its Member States.

The Court could have looked at those common values and could have highlighted the influence that one has had into the other in the past, which has progressively led to convergence in fundamental rights' matters instead of seeking for eventual divergences in the future.

This approach could have produced more fruits to EU law than the "exclusivist" view of the Court. For example, in the field of CFSP, EU accession to the ECHR could have filled the gap of human rights protection in this area and the same can be said in the field of AFSJ. Furthermore, the objections of the Court related to Article 53 ECHR in connection with Article 53 CFREU did not take into due account the fact that the common values justify the input of many provisions from the ECHR to the CFREU.

#### D. Principle of Cooperative Judicial Dialogue

Turning to the principle of cooperative judicial dialogue, in our point of view, the CJEU in *Opinion 2/13* did not take it into due account. On contrary, it seems to be too influenced by a principle of distrust.

As *Eleanor Spaventa* underlines *Opinion 2/13* "is also disappointing because it shows a Court's profound distrust of both national courts (and their compliance with the principle of loyal cooperation) and of the European Court of Human Rights".<sup>111</sup>

Many objections of the Court could have been prevented if the Court would have considered a proper cooperative judicial dialogue.

Above all, the tension between Article 53 ECHR and Article 53 CFREU, as interpreted by the Court of Justice, presupposes that the ECtHR will force an EU Member State to apply a national standard of human rights protection which is higher than the Convention standard. Or, the ECtHR does not enforce higher national standard of protection, but the convention itself.<sup>112</sup> The CJEU seems to be feared that the ECtHR exceeds its jurisdiction and starts to control the national standard of protection and indirectly the uniform standard imposed by the Charter. However, nothing in the former jurisprudence of the ECtHR indicates such a direction.

<sup>110</sup> On the common values between the Member States and the EU see *Guerra Martins Ana Maria*, Os valores da União na Constituição Europeia, in Acosta Sánchez José ea (eds), Colóquio ibérico: Constituição Europeia (2005) 497 et seq; *Constantinesco Vlad*, Valeurs et contenu de la Constitution européenne, in Uma Constituição para a Europa (2004) 161 et seq; *Sorrentino Federico*, Brevi riflessione sui valori e sui fini dell'Unione Europea nel progetto di costituzione europea, Diritto Pubblico 3/2003, 810 and 811; *Bieber Roland*, Ingérence ou manifestation d'une responsabilité commune? La protection des valeurs de l'Union européenne à l'égard des Etats-membres, in Institut Suisse de Droit Comparé (ed), L'intégration européenne: historique et perspectives (2002) 95 et seq; *Guerra Martins Ana Maria*, Les valeurs communes et la place de la Charte en Europe, European Review of Public Law 14 (2002) 130 et seqs; *Schorkopf Franz*, Homogenität in der Europäischen Union – Ausgestaltung und Gewährleistung durch Art. 6 Abs. 1 und Art. 7 EUV (2000) 36 et seq.

<sup>111</sup> *Spaventa* (Fn 61)12.

<sup>112</sup> For developing this topic, see *Eeckhout* (Fn 15) 10–14.

Another position of the CJEU that reveals an enormous distrust of all other courts concerns Protocol No 16, which will enable the highest courts and tribunals of the Member States to request advisory opinions.<sup>113</sup> As we have already mentioned, the EU will not become part of this protocol because of the accession to the ECHR and the protocol has not entered into force yet. Otherwise, such a problem may emerge with or without EU accession, whenever all or some EU Member States ratify the protocol.<sup>114</sup>

Notwithstanding, if by chance a highest court of a Member State uses the protocol in a way that violates EU law, this is a problem that would have to be solved by the EU law and its remedies' machinery.

The position of the Court in this case seems to presuppose that "Member State highest courts cannot be trusted to respect EU law. That is not a position that is conducive to genuine judicial dialogue".<sup>115</sup> The same Court that reads the principle of mutual trust between the EU Member States, which does not clearly result from the Treaties, in a rather rigid manner, does not take into due account the principle of sincere cooperation between the Member States and the Union provided in Article 4(3) of TEU.<sup>116</sup>

The objection of the Court relating to the Article 33 ECHR,<sup>117</sup> which permits inter-states disputes, presupposes a climate of suspicion between the CJEU and the ECtHR that is hardly understandable in a multilevel constitutional system. For the CJEU "only the express exclusion of the ECtHR's jurisdiction under Article 33 of the ECHR over disputes between Member States or between Member States and the EU in relation to the application of the ECHR within the scope *ratione materiae* of EU law would be compatible with Article 344 TFEU."<sup>118</sup>

Actually, this is a step back in the judicial dialogue of these two Courts. Even prior to accession, EU primary law has been reviewed in the context of individual applications. In the *Matthews* case,<sup>119</sup> the ECtHR decided that the citizens of Gibraltar should be able to vote in European Parliament elections.

Furthermore, "the purpose of the accession is to enable individuals to complain to the ECtHR about the Convention violations by the EU".<sup>120</sup>

Even in topics, such as the co-respondent mechanism and the prior involvement mechanism, where the Court and the Advocate-General took a similar position, and,

<sup>113</sup> For developing this topic, see *Eeckhout* (Fn 15) 17–18.

<sup>114</sup> In the same vein *Korenica* (Fn 18) 416–418.

<sup>115</sup> See *Eeckhout* (Fn 15) 18.

<sup>116</sup> Article 4 (3) TEU reads: "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

<sup>117</sup> Specially on this issue see *Johansen Stian Øby*, The reinterpretation of TFEU Article 344 in Opinion 2/13 and its Potential Consequences, *German Law Journal* 16 (2015) 169 et seq.

<sup>118</sup> Opinion 2/13, para 213.

<sup>119</sup> 18.02.1999, 24833/94 (*Matthews/United Kingdom*).

<sup>120</sup> See *Eeckhout* (Fn 15) 24.

in our opinion, they were right, there is no sign, in the Opinion of the Court, that these obstacles could be better overcome with a deep, permanent and mutual dialogue between the two Courts. Bearing in mind that the ECtHR has mostly respected the competence of the CJEU,<sup>121</sup> the Court could have made a reference to that fact. Notwithstanding, it seemed to fear too much the interference in its competence, and it rather prevented such a situation.

Finally, several statements of the CJEU concerning the exclusion of jurisdiction of the ECtHR over the EU in certain cases, such as in CFSP and in AFSJ, are hardly compatible with a proper judicial dialogue.

The CJEU could have used the existence of the ECtHR jurisdiction regarding CFSP matters as an argument to extend its own jurisdiction on this field or to interpret the provisions of the EU Treaties in a large sense. On contrary, it rather argued the exclusivity of its jurisdiction, which is somewhat disputable in this context.

### E. Principle of Sincere Cooperation and Mutual Trust

As we have just pointed out, multilevel constitutionalism presupposes a sincere cooperation between all players, and not only between the EU and its Member States. This sincere cooperation is based on the trust of every player in each other.

Taking this into consideration, at least, two fears of the CJEU do not make full sense.

The first one relates to Protocol No 16. Apart from the fact that this protocol is not included in the draft agreement, it has not entered into force yet and no one can predict what will be its future. Furthermore, it does not compete with the preliminary ruling based on Article 267 TFEU. “The Protocol no. 16 advisory opinion is different in nature, as it will be limited to the highest national court, it is never obligatory and the opinion itself is not binding”.<sup>122</sup>

Anyway, if the Court would have taken the principle of sincere cooperation into account and would have trusted the EU Member States, it could have omitted the reference to Protocol No 16. Providing that the Member States will use in the future the procedure foreseen in that protocol, violating their duties under the preliminary reference procedure, EU law has at its disposal some mechanisms, in order to punish the Member State, including the judicial ones.<sup>123</sup>

The same can be said as regards Article 33 ECHR, which allows for inter-state disputes between ECHR Contracting Parties regarding alleged breaches of the Convention. If the EU Member States decide to submit a dispute concerning the interpreta-

<sup>121</sup> See, for instance, the *Bosphorus* case (30.06.2005, 45036/98), which is an example where “the ECtHR and the ECJ are singing in harmony” (*Klabbers Jan*, Treaty Conflict and European Union [2009] 172). On the future of the *Bosphorus* case see *De Schutter Olivier*, Bosphorus Post-Accession: Redefining the Relationships between European Court of Human Rights and the Parties of the Convention, in Kosta Vasiliki/Skoutaris Nikos/Tzevelekos Vassilis (eds), *The EU Accession to the ECHR* (2014) 177 et seq; *Gragl* (Fn 5) 69–75.

<sup>122</sup> *Mohay Ágoston*, Back to the Drawing Board? Opinion 2/13 of the Court of Justice on the Accession of the EU to the ECHR - Case note, *Pécs Journal of International and European Law* 2015/1, 35.

<sup>123</sup> Apart from the political mechanism foreseen in Article 7 TEU, the EU law has judicial remedies against the Member States, such as the infringement procedure (Article 258–260 TEU).

tion or application of the EU Treaties to the ECtHR, it could constitute a violation of EU law, including a violation of Article 344 TFEU itself and the EU Member States are fully aware of this.

## V. Concluding Remarks

At the end of this study, we can extract some conclusions.

Although the Treaty of Lisbon had imposed to the Union an obligation to accede to the ECHR (Article 6(2) TEU), the Court of Justice, for the second time in the history of its case law, rejected, in *Opinion 2/13*, the EU accession to the ECHR. In the view of the Court, some matters contained in the draft agreement are not compatible with Article 6(2) TUE or with Protocol No 8 relating to Article 6(2) of the Treaty on European Union.

Those matters concerned the coordination between Article 53 ECHR and Article 53 CFREU, as it is interpreted by the Court; the principle of mutual trust in the field of AFSJ, which obliges the Member States to presume that all other Member States are in compliance with EU law and particularly with the fundamental rights recognised by EU law, except for exceptional circumstances as interpreted by the CJEU; the Protocol No 16, which provides for national highest courts of High Contracting Parties the possibility to send questions to the ECtHR on interpretation of the ECHR; Article 33 ECHR relating to interstate disputes; the co-respondent mechanism that creates a new procedure where the EU and a Member State could be parties to an ECtHR case, the procedure for prior involvement of the CJEU and the judicial review in CFSP matters.

According to the Court, the principle of autonomy and the specific characteristics of EU law, including the jurisdiction's monopoly of the Court for interpreting EU law, were violated by the draft agreement.

Taking into account that the thematic of the EU accession to the ECHR has been included in the agenda of the EU for decades, *Opinion 2/13* had a huge legal and political impact. In a so sensitive matter, one had expected from the Court a more cooperative attitude with the Member States, with the EU institutions that had conducted particularly hard negotiations and, last but not least, with other Courts that also compose the European multilevel system of fundamental rights, such as the highest national courts, including the constitutional courts, and the ECtHR.

In spite of drawing attention to the constitutional structure of the EU, the Court seems to reject the multilevel constitutionalism theory, anchoring its position in an "exclusivist" constitutionalism, once the EU as a constitutional entity must preserve its own legal autonomy and specific characteristics at any price.

In our point of view, the Court could have decided otherwise, if it had assessed the draft agreement in the context of the multilevel constitutionalism, in which the different components – EU law, national laws and ECHR law – need to work together, in order to contribute to a major objective that is a higher level of protection of fundamental rights. This would have permitted an interpretation of the draft agreement in conformity with the EU law at least in three cases – the coordination between Article 53 ECHR and Article 53 CFREU; the principle of mutual trust between EU Member States in the AFSJ and the jurisdiction over CFSP.



Another constitutive element of multilevel constitutionalism that the Court apparently overlooked was the existence of common values within the Member States, the EU, the Council of Europe and its High Contracting Parties, which could contribute to the convergence of fundamental rights. The Court only referred to the common values between the Member States and the EU.

Furthermore, in *Opinion 2/13*, the Court seems to be stuck to a view of the EU constitutional system that is much more linked to a hierarchical judicial order than to a cooperative judicial dialogue. In our opinion, the objections concerning Article 53 ECHR, Protocol No 16 and Article 33 ECHR are based on a distrust of both national courts and ECtHR. Or, without the acceptance of the principle of cooperative judicial dialogue and the principle of sincere cooperation and mutual trust between every single player, this is impossible to avoid jurisdictional conflicts, which will not contribute to reinforce the European protection and enforcement of fundamental rights.

In *Opinion 2/13*, it is evident that the Court does not trust anyone, except itself. For the Court, EU Member States, national courts, and ECtHR can endanger the autonomy of EU law, the specific characteristics of EU and the monopoly of its jurisdiction.

This position of the Court may be rather problematic, once it may open a “*Pandora box*” of adverse reactions of all other players, which everyone has reasons to fear, including the Court of Justice.

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