

‘European Rights’ and Dialogues in the Context of Constitutional Pluralism

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1 Introduction

France ratified the European Convention on Human Rights (ECHR) on 3 May 1974,¹ and the judgment of the Court of Justice in *Nold* was given 11 days afterwards, on 14 May 1974,² i.e. 15 days before the *Solange I* decision.³ The judgment was transmitted to the Federal Constitutional Court with, arguably, the hope to appease the expected “white hot anger” of the Karlsruhe judges. This little story is symptomatic of the evolution of the “European Rights” in the European Union (EU). In this essay, the “European Rights” should be understood as the fundamental values (principles) of the European Union. These values mirror a multitude of constitutional sources and are now codified in the EU Charter of Fundamental Rights (the Charter or CFR). On top of that, important rulings have been recently decided by the Court of Justice, the national courts and the European Court of Human Rights (ECtHR) concerning the relationship between their respective legal orders. The aim of this contribution is to assess the “European Rights” in light of discursive legal pluralism. It is divided into two main parts. The first part focuses on the EU Charter of Fundamental Rights. This instrument, though not binding yet, codifies the “European Rights” and it appears thus necessary to assess what is the nature of the rights enshrined in it and what is their impact in the context of constitutional pluralism. The second part analyzes, what has been recently called, “*the Law between the legal orders*”⁴ and evaluates the discursive process between the Court of Justice, on the one hand, and the ECtHR and the national courts, on the other. This essay is concluded by a claim on substantive democracy.

2 Rights and the Charter

The French revolution was founded on the values of the famous triplet “*liberté, égalité, fraternité*”, whereas the Charter of Fundamental Rights is articulated around six values (Dignity, Freedoms, Equality, Solidarity, Citizen’s rights and Justice). The Charter embraces a wide conception of fundamental rights based on a multitude of legal sources, e.g. the constitutional traditions and international obligations common to the Member States, the ECHR and its case-law and the Social Charters adopted by the Community and by the Council of Europe.⁵ This broad definition reflects indeed the plurality of sources used by the Court of Justice in the elaboration of general principles. The Charter is far from being a perfect legal instrument and should be seen as a clear reflection of a politico-

1 *Décret* no 74-360 of 3 May 1974 (J.O.R.F, 4th 1974).

2 Case 4/73 *Nold* [1974] ECR 491.

3 Decision of 29 May 1974, *Internationale Handelsgesellschaft v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, BVerfGE 37, 271, [1974] CMLR 540.

4 Editorial, *The Law of the Laws – Overcoming Pluralism*, 4 *EuConst* (2008) 395, 397.

5 Preamble of the Charter of Fundamental Rights, recital 5.

judicial compromise. The text of the Charter carries the marks of a harsh and intensive battle during the nine months of negotiations which has obviously resulted in drafting deficiencies particularly in Title IV (solidarity rights) and the horizontal provisions.

2.1 *Rights v. Principles*

The Charter contains both justiciable rights and programmatic rights. Notably, the provisions of the Charter do not explicitly mention the notion of programmatic rights and prefer to rely instead on the wider concept of “principles”. Indeed, according to the preamble (recital 7), “the Union recognises the rights, freedoms and principles”. This appears rather confusing. One of the main problems is to clearly ascertain the provisions that contain the “principles”. This identification is essential since those programmatic rights or exhortatory principles do not boast direct effect due to their conditional nature. As made clear by Article 51(1) CFR, the Union and the Member States, when they are implementing Union law, shall respect the rights and observe the principles. It may thus be argued that the Charter does not constitute an ideal instrument for stimulating a formal and coherent dialogue between the Court of Justice and the national courts through the preliminary ruling procedure.

With the drafting of the Constitutional Treaty of October 2004 (Rome Treaty), the European Convention added four paragraphs to Article 52 CFR (52 (4) to (7)) in order to clarify the scope and interpretation of rights and principles. In that respect, Article 52(5) CFR (version of 2007) states, “[t]he provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions and bodies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality”. Also, the explanations, drawn up by the praesidia of the Charter and European Convention, as a way of providing guidance in the interpretation of the Charter of Fundamental Rights were included in a Declaration. According to Article 52(7) CFR the explanations shall be given due regard by the courts of the Union and of the Member States. In other words, they have no legal status but may be useful tools for interpretation.

Article 52(5) CFR confirms that the provisions containing principles do not have direct effect. There is clearly no obligation for the Union or the Member States to implement the programmatic rights enshrined in those provisions. Using the language of the explanations, the principles become significant for the Courts only when the legislative or executive acts implementing them are interpreted or reviewed. Problematically, the praesidium’s explanations are in my view rather perplexing by making references to the case-law of the Court of Justice on the precautionary principles and the principles of agricultural law. They cannot be said to constitute here a valuable guidance for interpretation. The emphasis, to make it clearer, should have been on the approach of the Member States’ constitutional systems to “principles” particularly in the field of social law. It would have been helpful since, at first blush, the title IV of the Charter on solidarity rights contains an important amount of “principles”.

At the outset, it should be noted that other Titles may enshrine “principles”. For instance, Title III on equality contains Article 23(2) concerning positive

actions for the under represented sex, Article 25 protecting the rights of the elderly and Article 26 on the integration of persons with disabilities. Sometimes a provision may enshrine both rights and principles. This is clearly illustrated by Article 23 that enshrines both a justiciable right against gender discrimination and a “principle” by making reference to positive discrimination. This assertion is equally true in relation to Articles 33 (family and professional life) and 34 (social security benefits) in Title IV. It is more problematic where a provision mixes the languages of rights and principles in the very same paragraph, e.g. Articles 14(3) (education), 34 (social security benefits) and 35 (health care). This is rather confusing and makes it difficult to establish a clear-cut distinction between “rights” and “principles”.

Arguably, many provisions of Title IV appear to be fully judicial rights since they are sufficiently clear and precise e.g. the Articles 27, 28, 32, 33(2) and 34(2).⁶ To put it differently, in a near future, the Court of Justice might grant direct effect to several provisions of the solidarity Title.⁷ However, Article 1(2) of the British and Polish Protocol on the CFR, made it very clear that “nothing in Title IV of the Charter creates justiciable rights applicable to Poland and the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in their national law”. Consequently, this Protocol could dangerously lead to a disintegrated application of fundamental social rights within the Union and thus would represent the end of a unified and coherent approach to human rights.⁸ Such a situation could be avoided by considering the Protocol as a mere interpretative reservation or by having recourse to the general principles of Union law.

A similar inference results also from Article 1(1) of the Protocol. According to this provision, “[t]he Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms”. Either, one may restrictively interpret this paragraph 1 as a mere declaration that the Charter does not extend the power of the Union in the context of fundamental rights;⁹ or - more perilously for the integrity of the Union legal order - one may consider that this paragraph impedes individuals to invoke the Charter’s provisions before the British and Polish courts. As to the latter situation, the Court of Justice could

6 *See a contrario*, Article 37 (high level of environmental protection) and Article 38 (high level of consumer protection).

7 J. Baquero Cruz, *What's Left of the Charter? Reflections on Law and Political Mythology*, 15 MJ (2008), 65, 70. As put by this author, the application of social rights may still be limited due to the scope of application of Union law and the limited competences of the Union in this field.

8 Problematically, in this situation, the distinction between “rights” and “principles” will not be realized by the Court of Justice.

9 M. Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts*, 45 CMLRev (2008), 617, 669.

have recourse once again to the general principles in order to neutralize the negative effects of the Protocol.¹⁰

The inescapable conclusion is that the general principles would even so appear very much alive after the entry into force of the Lisbon Treaty. This assertion is all the more true in light of the new Article 6(3) TEU which still preserves the importance of the general principles as to the protection of fundamental rights in the Union. In other words, the European Convention of Human Rights and the constitutional traditions would still remain important sources of inspiration for the Court of Justice. It is also clear from the wording of Article 6(1) TEU that the Charter has the same legal value as the treaties and would certainly display a special significance in the case-law of the Luxembourg's court. It appears thus essential to extrapolate on the various models of relationship between the Charter's rights and the general principles that can be chosen by the Court of Justice.

In that sense, Dougan has recently proposed three scenarios.¹¹ In the first situation, the general principles remain the touchstone to protect fundamental rights and the Charter is used as a valid source of inspiration. In the second situation, the Court would manage two separate but parallel fundamental rights regime based on the twisted wording of Article 51(1) CFR. In the third situation, the Court would treat the Charter as the authoritative source of fundamental rights protection within the Union. This last situation is seen as perhaps the best solution where the general principles could perform a more modest role, lying dormant in most situations.¹² In any case, it is safe to say that the Charter as a binding instrument will not freeze the future development of general principles of Union law by the Court of Justice. It also seems that time has not yet come to chant: "*Les principes généraux sont morts. Vive les principes généraux du droit!*"

A constant overlapping marks the relationship between the Charter and the general principles. Indeed, a good half of the Charter's rights may be appraised as already *de facto* binding in light of the (codified) general principles.¹³ It may be thus stated that the general principles have stimulated the legal character of the Charter. In turn, the Charter (would) reciprocally stimulate(s) the scope of the fundamental rights protection by helping the Court to construe the next generation of general principles. It seems difficult to consider the Charter as an element of judicial pusillanimity for the Luxembourg judges. On the contrary, it should be perceived as a precious tool in the hands of the judges to extract the common values needed in order to elaborate the principles common to the Member States on the basis of Article 6(3) TEU.¹⁴ Finally, the Charter is assessed here as *the pluralist instrument par excellence*. It is also an instrument which may bring internal coherence in the context of constitutional pluralism

10 J. Baquero Cruz, cited *supra* note 7, 71.

11 M. Dougan, cited *supra* note 9, 664.

12 Ibid.

13 X. Groussot, *General Principles of Community Law* (Europa Law Publishing, 2006), 110.

14 K. Lenaerts and E. de Smijter, *A Bill of Rights for the European Union?*, 38 CMLRev. (2001), 273, 289.

since the rights enshrined in it are closely related to the theoretical notion of principle.

2.2 *Rights as Principles*

Legal norms are either rules or principles.¹⁵ Rules apply in an “all or nothing” fashion; either they apply or do not. A principle, by contrast, gives a reason for deciding the case in one way, but not a conclusive reason. If a rule applies, and it is a valid rule, the case must be decided in accordance with it. Since principles do not apply in an “all or nothing” way, they have a weight, that is to say that conflicting principles can be balanced, which means that each has a particular “weight”, some taking precedence over others. Rules do not have this dimension, since when two rules conflict one of them cannot be a valid one.¹⁶

In this essay, the rights contained in the Charter are seen as neutral, rational and constitutional principles. This is not surprising since it is settled in case-law that the fundamental rights constitute an integral part of the general principles of Community law. This approach has certainly an impact on the reasoning of the courts and, arguably, fosters *discursive constitutionalism*. For instance, as Kumm puts it, courts engaged in principled reasoning may have positive spill-over effect. Judicial opinions using principled analysis are absorbed by the media and permeate public debate, thereby encouraging meaningful public deliberation.¹⁷ Also, it may be said that a principled reasoning fosters the rationality of a judgement, particularly when the court has recourse to balancing (proportionality). This balancing (weighing) is characteristic of the use of principles. Notably in EU law, it is sometimes for the national courts to realize the balancing or, in other words, to assess the proportionality of the national measure falling within the scope of Community law. This is evident in *Viking Line* and *Promusicae*.¹⁸

Before looking more thoroughly to the “rational principles”, it is worth analyzing the rights enshrined in the Charter in light of neutrality which reflects another important characteristic of the principles.¹⁹ According to Wechsler, a neutral principle has two facets: content generality and equal applicability. For Wechsler, the main constituent of the judicial process is precisely that it must be genuinely principled. In that sense, he defined a principled decision as “one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved”.²⁰ The Charter’s rights are clearly formulated in general terms. The classical example here is the principle of equality which can be bluntly defined as “similar cases should be treated similarly”. The issue of neutrality may also be

15 See R. Alexis, *A Theory of Constitutional Rights* (OUP, 2002, trans.), 44.

16 R. Dworkin, *Taking Rights Seriously*, (Duckworth, 1996, 8th edition), 26.

17 M. Kumm, *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice*, I.CON, Volume 2, Number 3, (2004), 574, 595.

18 *Infra*.

19 H. Wechsler, *Towards Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. (1959), 1.

20 *Ibid.*, at p.19.

illustrated by the recent debate on the existence of abuse of law as a general principle.²¹ It is argued that the degree of generality/neutrality or “open-endedness” of the principles not only fosters the internal coherence of the judicial process²² but also stimulates an external dialogue by forming a bridge between the different legal systems.²³

The neutral principles contained in the Charter are also constitutional principles. In the recent cases of *Kadi and Al Barakaat*, for the very first time, the Court of Justice relied to the concept of “constitutional principles”.²⁴ The Court made it clear in its paragraph 285 that “the obligations imposed by an international agreement cannot have the effect of prejudicing the *constitutional principles* of the EC Treaty, which include the principle that *all Community acts must respect fundamental rights*, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty”. This observation, which results in the constitutionalization of the principle of legality, is indeed based on four premises. Firstly, the Community is based on the rule of law, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions. Secondly, an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system ensures by the Court by virtue of Article 220 EC. Thirdly, fundamental rights form an integral part of the general principles of law. Fourthly, the respect for human rights is a condition of the lawfulness of Community acts.²⁵

What is the material scope of the “constitutional principles”? Their range is, arguably, very broad. It would thus not be surprising to see that the Court of Justice relies on this concept in relation to, for instance, the principle of direct effect, supremacy, loyalty and the fundamental rights. The Charter’s rights could clearly also be labeled “constitutional principles”. Although the notion of “constitutional principles” was not clearly apparent within the Court of Justice case-law before *Kadi*, the doctrine had suggested such a classification long ago. In that regard, Bengoetxea and Wiklund dealing with what they called the “*theoretical notion of principles*”, established three categories of principles (constitutional principles):²⁶

21 See R. de la Feria, *Prohibition of Abuse of (Community) Law: The Creation of a New General Principles through Tax*, 45 CMLRev. (2008), 395.

22 A principle can be supported by another more general one. Indeed, general principles are often used to justify more specific ones. For instance, the Court of Justice has developed general principles like legal certainty (justifying non-retroactivity and legitimate expectations) or the *audi alteram partem* principle (justifying for instance the principle of right to access to files).

23 J. Jans et al. (eds.), *Europeanisation of Public Law*, (Europa Law Publishing, 2007), 115.

24 Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* [2008] n.y.r.

25 Ibid., paras. 280-284.

26 J. Bengoetxea and O. Wiklund, *General Constitutional Principles of Community Law*, in U. Bernitz and J. Nergelius, (Kluwer, 2000), 119, 133.

- The constitutional principles which define the legal structure of the Community.
- The special standing of certain provisions (such as basic freedoms, open market economy).
- The fundamental principles which assure the protection of the citizens.

This last category is, in my view, similar to what Tridimas has called the principles which derive from the rule of law.²⁷ They are operative principles that allow the judicial review of both the acts of the Community institutions and acts of the Member States falling within the scope of Community law. The Charter's rights fall clearly within this kind.

In addition, the rights enshrined in the Charter have clearly a weight dimension in light of Article 51(2) CFR. Indeed, the rights are not absolute such that restrictions may be put on the exercise of these rights. These restrictions must, however, be proportionate. It is for the courts to assess the proportionality of restrictive measures and thus to balance the interests at stake in a particular case. As rightly put by De Schutter and Tulkens, “[se]ducing as it may seem, balancing may be closer to a slogan than to a methodology”.²⁸ The “Law of Balancing” is properly defined and elaborated by Robert Alexy.²⁹ It is worth having a closer look at his theory. Balancing is one aspect of one more comprehensive principle: the principle of proportionality, which is subdivided into suitability, necessity and the proportionality in the narrow sense (the “Law of Balancing”).³⁰ Accordingly, the “Law of Balancing” concerns optimization relative to the legal possibilities - those legal possibilities being essentially defined by competing principles. In other words, it can be explained as: the greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other. Going further, this “structured balancing” should be separated into three phases: first, establishing the degree of non-satisfaction, or of detriment to a first principle (intensity of the infringement); second, establishing the importance of satisfying the competing principle, third establishing whether the importance of satisfying the latter principle justifies the detriment to or non-satisfaction of the former (evaluation).³¹

In practice, “balancing” has a key function in the jurisprudence of many constitutional courts. In Germany, the Federal Constitutional Court has recourse to the so-called method of *praktische Konkordanz* (practical concordance) in order to solve conflicts of fundamental rights. Here, a solution has to be found

27 T. Tridimas, *General Principles of EU Law*, (OUP, 2007), 4.

28 O. De Schutter and F. Tulkens, *Rights in Conflict: The European Court of Human Rights as a Pragmatic Institution*, Working paper series: REFGOV-FR-14, (2008), 1, 22.

29 See R. Alexy, *A Theory of Constitutional Rights*, cited *supra* note 15, and of the same author, “Balancing, Constitutional Review, and Representation”, I-CON, Volume 3, Number 4, (2005), 572.

30 For some developments as to the use of this three-pronged test by the Court of Justice, see X. Groussot, *Annotation in Case C-310/04 Spain v. Council*, 44 CMLRev. (2007), 761.

31 R. Alexy, cited *supra* note 29, 572.

which allows for one principle to be applied as far as possible without infringing the other. An adequate balance is needed between two equally protected fundamental rights. In the end, this reconciliation of fundamental rights should lead to rational balancing of contradictory values, always respecting the principle of proportionality. Notably, the rhetoric of reconciliation is also used in the Court of Justice case law in the situation of conflicting (fundamental) rights. This assertion appears clear from cases like *Schmidberger* (para.77), *Omega* (para.36), *Laval* (para.94), *Varec* (para.52) but also *Promusicae* (para.65).³² As put by the Court in *Promusicae*, “[t]he present reference for a preliminary ruling thus raises the question of the need to reconcile the requirements of the protection of different fundamental rights, namely the right to respect for private life on the one hand and the rights to protection of property and to an effective remedy on the other”. Those interests should evidently be reconciled. Yet it is not always possible to reconcile them completely. In some instances, it will be required to restrict one party’s right in order to ensure that the very substance or essence of the other party’s right, is not impaired.³³ Importantly, any restriction must not go beyond what is necessary for that purpose, and a fair balance must be struck between the conflicting rights. Thus reconciliation is closely linked to balancing/proportionality, particularly in situations of total conflicts, i.e. where the conflicting rights cannot be fully reconciled.³⁴

Some objections may be formulated against the “Law of Balancing”. In that sense, it may be said that there is no sensible standard for balancing conflicting fundamental rights. The judge has, in fact, a considerable degree of discretion in the balancing process which, therefore, leads to unconstrained subjectivity or intuitionism. Besides, there is a value judgement of the court which is no longer related to the alternatives of a right or wrong decision. Weighing of values is said to be able to yield a judgement as to a result but is not able to justify that result.³⁵ Additionally, it should be remarked that the judges are not in the best position to deal with a clash of fundamental rights since those rights do not come before him/her in an equal manner. Arguably, there is more attention to the rights submitted by the applicant and that very state of affairs may create a presumption of priority.³⁶ However, it is evident that the “Law of Balancing”

32 Case C-112/00 *Schmidberger* [2003] ECR I-5659; Case C-36/02 *Omega Spielhallen* [2004] ECR I-2609; Case C-341/05 *Laval un Partneri* [2007] ECR I-11567; and Case C-450/06 *Varec* [2008] ECR I-581. For arguments to consider fundamental freedoms as fundamental rights, see V. Skouris, *Fundamental Rights and Fundamental Freedoms: the Challenge of Striking Delicate Balance*, 17 EBLR (2006), 225.

33 Ibid., A.G. Sharpston in Case C-450/06 *Varec*, paras. 47-48.

34 A distinction may be realized between partial and total conflicts. See L. Zucca, *Conflicts of Fundamental Rights as Constitutional Dilemmas*, in E. Brems (ed.), *Conflicts Between Fundamental Rights* (Intersentia, 2008), 19. A partial conflict is susceptible of case-by-case regulation (time, space, manner of exercise) and will normally not amount to a negation of the core of the right, e.g. regulating freedom of expression in the situation of a demonstration. The reconciliation between the rights is feasible. By contrast, total conflicts reflect the situation where the rights at stake cannot be put aside without simultaneously being alienated.

35 R. Alexy, cited *supra* note 29, 573.

36 E. Brems (ed.), *Conflicts Between Fundamental Rights* (Intersentia, 2008), 3.

should not be discarded. Balancing is essential for improving the rationality of a judgment. It has also the irrefutable advantage to acknowledge the veracity of the clash of rights, and demonstrates with strength that there is no ready-made answer to such types of clashes.

2.3 *Rights and Conflicts*

The horizontal provisions of the EU Charter of Fundamental Rights are particularly interesting when it comes to offering a framework for preventing conflicts between the Court of Justice, the national courts and the European Court of Human Rights. In that sense, Articles 52(3), 52(4) and 53 of the Charter are of special significance since they essentially seek to guarantee a harmonious relationship between the Charter, the national constitutions and the Strasbourg regime. These provisions acknowledge the intricate application of European rights in a pluralist context. However, they also have the ambition to prevent a conflict of interpretation between the various jurisdictions due to the plurality of the legal sources. Overall, the rhetoric of the high standard of human rights' protection in the Union transpires from Articles 52 and 53 of the Charter. Article 52 CFR aims at ensuring equivalent protection of rights between the Strasbourg and Luxembourg regimes (Article 52(3)). Also, its purpose is to ensure harmony between the Charter's rights and the national constitutions (Article 52(4)). Article 53 CFR establishes the so-called non-regression clause of the rights enshrined in the Charter, ECHR and the national constitutions. These provisions reflect the plurality of the constitutional sites in Europe and deal with their (harmonious) relationship.

2.3.1 *Ensuring Equivalent Protection*

According to Article 52(3) CFR, “[i]nsofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection”. Two key aims can be identified in this provision. First of all, this paragraph has the purpose to ensure the crucial consistency between the Charter and the ECHR by establishing the rule that, insofar as the rights in the present Charter also correspond to rights guaranteed by the ECHR, the meaning and scope of those rights, including authorized limitations, are the same as those laid down by the ECHR. As made clear by the explanations, the meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the European Court of Human Rights and by the Court of Justice of the European Union. This paragraph is essential to make sure that the Charter's rights incorporate as a minimum the standards of the Convention. The level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR.

Secondly, the last sentence of the paragraph is intended to allow the Union to guarantee more extensive protection. It is true that under Article 53 ECHR, the Strasbourg Convention constitutes a minimum standard of protection. It is also true that the Court of Justice in its pre-binding Charter case-law has sometimes

taken a 'maximalist' approach of the ECHR rights.³⁷ This approach must be praised since it has established a high standard of protection in Europe and has led to the cross-fertilization of the legal orders. Interestingly, the Court of Justice is now empowered very clearly to do so. Article 52(3) may thus be said to enhance the plurality of the European constitutional protection and, at the same time, safeguard the autonomy of Union law by allowing a higher level of protection.

Arguably, Article 52(3) codifies the principle of equivalent protection developed in the Strasbourg regime. It is the *M&Co* decision of the European Commission of Human Rights (ECoHR) that has established the principle of equivalent protection.³⁸ The ECoHR recalled the decision in *CFDT* to the effect that it was not competent to examine proceedings before, or decision of, the organs of the European Communities, since those institutions are not parties to the ECHR. Before this, the ECoHR stated that 'the transfer of powers to an international organisation is not incompatible with the Convention *provided* that within that organisation fundamental rights will receive an *equivalent protection*'.³⁹ In that respect, the ECoHR noted that the legal system of the European Communities not only secures fundamental rights but also provides for control of their observance. It is emphasized that the Court of Justice has developed a case-law according to which it is called upon to control Community acts on the basis of fundamental rights, including those enshrined in the European Convention on Human Rights. The ECoHR concluded that the application is incompatible with the provisions of the Convention *ratione materiae*.

The ECoHR has, in this way, launched the "principle of equivalent protection", under which it will declare inadmissible the applications against one or more Member States for acts of the Community, if the applicant has been granted protection of his or her fundamental rights at the Community level which is equivalent to the protection afforded under the Convention. It can be added that the principle of equivalent protection is also a matter of jurisdiction. Indeed, if the Strasbourg Court considers that the fundamental rights protection offered by the Court of Justice is sufficient, it will decline jurisdiction by considering that the complaint is unfounded and thus inadmissible. In other

37 See, e.g., Case C-13/94 *P v. S and Cornwall County Council* [1996] ECR I-2143.

38 ECoHR, Decision of 9 February 1990 on Application No 13258/87, *M. & Co. v. Federal Republic of Germany*. M&Co was fined by the European Commission for violating the EC competition rules. The company challenged the Commission's decision before the Court of Justice by claiming that the procedure followed did not provide for a fair hearing. The Court of Justice rejected the action and the German Federal Minister of Justice issued a writ of execution for the fine. The company started proceedings against Germany before the ECoHR, claiming that the judgment of the ECJ infringed Article 6 ECHR and that therefore, the writ of execution was wrongfully issued. The ECoHR declared the application inadmissible ruling that only the ECJ could review the legality of Community act and subsequently ensure that the fundamental rights were protected.

39 ECoHR Decision of 10 July 1978 on Application No 8030/77, *Confédération française démocratique du travail v. European Communities*.

words, using the “*Solange* formulation”,⁴⁰ as long as the Court of Justice will afford an equivalent standard of protection, the [EcoHR or] ECtHR will not review the national act implementing the Community measure.⁴¹

The Court of Justice and its Advocates General have increasingly stressed the equivalence of protection between the ECHR rights (including the corollary jurisprudence) and the Luxembourg case-law. A.G. Mischo in *Roquette*, declared that “the application of the principle of the inviolability of the home to business premises, are such as to call in question the principles resulting from the judgement in *Hoechst v. Commission*. Those principles accord undertakings protection equivalent to that which the European Court of Human Rights infers from Article 8 of the Convention”.⁴² The Opinion refers to the ECtHR jurisprudence (*Niemietz*⁴³ and *Funke*⁴⁴) and accomplishes a full-fledged analysis of the Strasbourg case-law.⁴⁵ Similarly, the Court of First Instance (CFI) in *Mannesmannröhren*⁴⁶ emphasized the equivalence between the rights of defence and the right to fair legal process in competition law and Article 6 ECHR.⁴⁷ Unsurprisingly, it was an A.G. who started to use the principle of equivalence in relation to the Charter. In *Booker Aquaculture*, A.G. Mischo referred to Article 17 of the Charter and underlined that the scope and structure of that provision is similar to the equivalent Article in the ECHR.⁴⁸ In the end, it may be said that Article 52(3) constitutes a pluralist provision since it codifies a principle developed not by the Court of Justice but by another regional jurisdiction.

2.3.2 Ensuring Harmony with the National Constitutions

Article 52(4) CFR states that “[i]nsofar as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in *harmony* with those traditions”. According to the explanations, this paragraph constitutes a rule of interpretation based on the wording of Article 6(2) TEU and takes due account of the approach to common constitutional traditions followed by the Court of Justice. Under that rule, rather than following a rigid approach of “a lowest common denominator”, the Charter rights concerned should be interpreted in a way offering a high

40 F. Zampini, *La Cour de justice des Communautés européennes gardienne des droits fondamentaux dans le cadre du droit communautaire*, 35 RTDE (1999), 659, 692.

41 See, *infra* *Bosphorus*, which introduces a presumption of equivalence.

42 A.G. Mischo in Case C-94/00 *Roquette Frères* [2002] ECR I-9011, para. 48.

43 *Ibid.*, para. 37.

44 *Ibid.*, para. 44.

45 The Court (para. 47) also mentioned the *Colas Est* case of the EctHR (Judgment of 16 July 2002 *Colas Est v. France*). The ECtHR considered that Article 8 ECHR may be applicable to business premises under certain circumstances. It ruled that France had violated Article 8 ECHR by requiring the search of business premises without a prior authorization (which should have been furnished by a judge).

46 Case T-112/98 *Mannesmannröhren-Werke AG v. Commission* [2001] ECR II-729.

47 *Ibid.*, para. 77.

48 A.G. Mischo in Joined Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood* [2003] ECR I-7411, para. 127.

standard of protection which is adequate for the law of the Union and in harmony with the common constitutional traditions.⁴⁹

This interpretation makes a clear reference to the so-called “evaluative approach” used by the Court of Justice in elaborating the general principles. This approach is marked by the necessity to find a solution appropriate to the needs and specific features of the Community legal system. The “evaluative approach” is generally chosen instead of the approach of “a lowest common denominator”. The “minimalist methodology” was recently criticized by A.G. Maduro in *FIAMM and FIAMM* since it is amenable to a low standard of protection.⁵⁰ In his words, “[s]uch a mathematical logic of the lowest common denominator would lead to the establishment of a regime for Community liability in which the victims of damage attributable to the institutions would have only a very slim chance of obtaining compensation”.⁵¹ Though the evaluative approach may lead to a high standard of protection, it is important to stress that it is not the highest constitutional standard (maximalist approach) which should be chosen. Weiler has profoundly analyzed what he calls “*the conundrum of high and low standard*”.⁵² Taking the right to property (*Hauer* case) and the right to life (*Grogan* case) as practical examples, he advocates for a powerful rejection of the maximalist standard.⁵³

It is argued that the “maximalist approach” entails the risk of establishing the dominance of one particular Member State. Indeed, such a choice amounts to the imposition of the highest standard embodied in the constitution of one Member State on the rest of the Member States. In a similar vein, De Witte has considered that is not the proper role of the Court of Justice to rely on the maximalist standard of protection, but to be inspired by the common features of the constitutions of the Member States. Therefore, the Court of Justice, must act with self-restraint in shaping fundamental rights and, also, be extremely aware that the constitutional norms represent the aggregate of the societal values espoused by a specific Member State. The choice of a maximalist approach appears to favour a specific country and the author does not see why this should be the case.⁵⁴ Furthermore, the Court of Justice has categorically rejected in

49 E.g., judgment of 13 December 1979, Case 44/79 *Hauer* [1979] ECR 3727; and judgment of 18 May 1982, Case 155/79, *AM&S*, [1982] ECR 1575.

50 A.G. Maduro in Case C-120/06 P *FIAMM and FIAMM* [2008] n.y.r.

51 *Ibid.*, para. 55.

52 J. Weiler, *The Jurisprudence of Human Rights in the European Union: Integration and Disintegration, Values and Processes*, “www.jeanmonnetprogram.org/papers/96/960205”.

53 This approach is described by Besselink as the pluralist approach. See L. Besselink, *Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union*, 35 *CMLRev.* (1998), 629. The author described three types of situation, i.e. the pluralist standard, the local maximum standard and the universalized standard. The pluralist approach considers that the Community standard of protection is adequate. There is no question of maximum or minimum standard since the Community legal order is autonomous (*Ibid.*, at p. 667).

54 B. de Witte, *The Past and Future Role of the ECJ in the Protection of Human Rights*, in Alston (ed.), *The EU and Human Rights*, OUP (1999), 881.

Hauer the maximum standard of protection.⁵⁵ The *Hauer* case is explicitly mentioned in the legal explanations of Article 52(4) CFR.

An alternative interpretation of Article 52(4) is to consider it as the “little brother” of the defunct Article I-5 of the Constitutional Treaty and 4(2) of the TEU as amended by the Treaty of Lisbon.⁵⁶ According to Article I-5(1), “[t]he union shall respect the equality of Member States before the constitution as well as their *national identities*, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government”. This provision recognized with strength the principle of national constitutional autonomy and reflected, in my view, European constitutional pluralism.⁵⁷ If this interpretation is chosen by the Court of Justice, Article 52(4) CFR could be used to reconcile national constitutional law with a conflicting Charter’s right. That could probably be the case in an *Omega*-like situation, where a strong domestic constitutional principle, e.g. principle of secularity [*laïcité*] in France, clashes with a Charter’s right. In that sense, Article 52(4) CFR might be perceived as an instrument to defuse constitutional conflicts and ensure a peaceful coexistence between the national and European legal orders.

2.3.3 Ensuring a Minimum Standard of Protection

According to Article 53 CFR, “[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions”. This provision constitutes a non-regression clause and is intended to maintain the level of protection currently afforded within their respective scope by Union law, national constitutions and international law (particularly the ECHR). Its purpose, in the end, is to avoid conflicts of interpretation and conflicts of jurisdiction between on the one hand, the Court of Justice, and, on the other hand, the ECtHR and national courts.

Regarding the ECHR, one of the major problems that a binding Charter could raise is that of diverging interpretations with the ECHR. It may be argued that the Charter could increase the risk of divergence, since the text of the Charter does not correspond exactly to the ECHR. Lenaerts and de Smijter contended

55 Such an assertion is based on the paragraph 14 of the *Hauer* judgment, where the ECJ decided that: “. . . [t]he introduction of special criteria for assessment from the legislation or constitutional law of a particular Member State would, by damaging the substantive unity and efficacy of Community law, lead inevitably to the destruction of the unity of the Common Market and the jeopardizing of the cohesion of the Community”.

56 Paragraph 4 was added to Article 52 by the European Convention in 2004.

57 See *Conseil constitutionnel* in Decision n 2004-505 DC of 19 November 2004, paras. 12-13. The CC made reference to Article I-5 CT and stressed that it results from all the provisions of the Constitutional Treaty and notably from Articles I-5 and I-6, that the Treaty does not modify the nature of the European Union and the scope of the principle of supremacy. Consequently, the inclusion of Article I-6 of the Constitutional Treaty shall not lead to an amendment of the French Constitution.

that “[w]here the text of the Charter departs from that of the ECHR, it can never be at the expense of the level of protection offered by the ECHR”.⁵⁸ The risk of diverging interpretation is in reality rather weak due to the “subsidiary” character of the ECtHR jurisdiction.⁵⁹ It will become even weaker with the entry into force of the Lisbon Treaty since the new Article 6(2) TEU imposes an obligation on the Union institutions to accede to European Convention on Human Rights. Finally, it is worth noting that the “non-regression” clause might be difficult to put into practise in the situation of clash between fundamental rights like in the *Promusicae* case.⁶⁰

Regarding the Member States’ constitutions,⁶¹ Article 53 of the Charter of Fundamental Rights may also have repercussions on the principle of supremacy. In that sense, the Charter could pose a threat to the supremacy of EU law. More precisely, there might be a risk of multiplication of conflicts between domestic constitutional norms and Union law that would, consequently, increase the proclivity of the national courts to review the acts of the Union. This “terror thesis” was rightly set aside by Liisberg who has undertaken a wide analysis of the drafting history of Article 53 CFR as well as a detailed comparison of similar provisions in international and US federal instruments (Article 53 ECHR entitled “safeguard for existing human rights”, Article 27 of the declaration of Fundamental Rights and Freedoms entitled “degree of protection”, and the Ninth Amendment of the US Constitution). The conclusion pointed out towards a limited legal significance for Article 53 CFR.⁶² The aim of Article 53 is to clarify that the EU Charter of Fundamental Rights does not replace national constitutions and does not jeopardize the existence of higher standards of protection at the domestic level. Besides, Article 53 may arguably be used by the European Court of Justice in order to elaborate fundamental rights (as general principles) not enshrined in the Charter.⁶³ However, in light of the Lisbon Treaty, this function would probably be assumed by the new Article 6(3) TEU.

In the end, both the substantive and horizontal provisions of the Charter of Fundamental Rights transpire constitutional pluralism. It is also worth stressing that the CFR, though non-binding, is nowadays extensively referred by the national courts,⁶⁴ the ECtHR⁶⁵ and the Court of Justice.⁶⁶ The references to the

58 K. Lenaerts and E. de Smijter, cited *supra* note 14, 273, 297.

59 A.G. Jacobs in *Konstantinidis*, para. 50.

60 Cited *supra* n. 32.

61 J.B. Liisberg, *Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?*, 38 CMLRev. (2001), 1171, 1193. The mere reference to the constitutions and not to the common constitutional traditions is explained as being a compromise between Member States who wanted a reference to the national law and the others who desired a reference to the common constitutional traditions). The explanations make reference to “national law”.

62 *Ibid.*, at p.1198.

63 *Ibid.*, in the words of Black, writing on the Ninth Amendment, it could be used as a “fountain of law” (quoted in Liisberg).

64 The CFR has been welcomed by the highest national judicial authorities, e.g Belgium (TC), France (CE) Spain (TC) and United Kingdom (HC). See e.g. in the UK, the High Court referred to Article 8 CFR (right of protection of personal data) in *R v. City of Wakefield*

CFR by the national courts and the ECtHR is not merely another illustration of constitutional pluralism but also demonstrates the legitimacy exuding from this document.

3 Rights and the Courts

This second part analyzes what has been recently called “*the Law between the legal orders*”⁶⁷ and evaluate the discursive process between the Court of Justice, on the one hand; and the ECtHR and the national courts, on the other.

3.1 *Rights and the Strasbourg Court*

The very aim of the Strasbourg Court is to protect human rights in Europe. Although there is no formal bridge established with the Luxembourg Court at the time, the jurisdiction and jurisprudence of the two Courts are closely interlinked when it comes to the protection of human rights. The *Tillack* and *Attila Vajnai* cases perfectly reflect this interdependence and the core importance of the Strasbourg Court when the Court of Justice declares inadmissible a request based on fundamental rights.⁶⁸ Arguably, there is an important two-way dialogue between the European Court of Human Rights and the Court of Justice. Furthermore, it is contended that the EU Charter of Fundamental Rights has drastically accelerated this discursive process.

Since the Strasbourg Convention constitutes a minimum standard of protection under Article 53 ECHR, it is logical that the Court of Justice may adopt a “maximalist interpretation” of the rights enshrined in the ECHR. In turn, the Strasbourg may rely on progressive EU rulings in order to improve its own case law interpreting the ECHR rights. This situation illustrates the cross-fertilization of these two legal orders and also stalwartly demonstrates the existence of a “rights dialogue”. The classical and well-known example here is the *P v. S* case of the Court of Justice which has influenced the ECHR case law on transsexuality. More recently, in *Vilho Eskelinen*, the Strasbourg Court referred extensively to EU law and the right to effective judicial protection in particular.⁶⁹ The ECtHR considered that the Luxembourg Court applies a wider

Metropolitan Council and the Home Secretary, ex parte Robertson [2001] EWHC (admin) 915, and to Article 24 CFR (rights of the child) in *R v. Secretary of the State for the Home Department, ex parte Howard League for Penal Reform* [2002] EWHC (admin) 2497.

65 See *infra* notes 71, 72 and 73.

66 See e.g., Case C-540/03 *Parliament v. Council* [2006] ECR I-5769; Case C-432/05 *Unibet* [2007] ECR I-2271; Case C-341/05 *Laval* [2007] ECR I-11767; and Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat*, cited *supra* note 24.

67 Cited *supra* note 4.

68 See Case T-193/04 *Hans-Martin Tillack* [2006] ECR II-3995; and Case C-328/04 *Attila Vajnai* [2005] ECR I-8577. See also, Application 20477/05 in Case of *Hans-Martin Tillack v. Belgium*, 27 November 2007; and Application no. 33629/06 in Case of *Attila Vajnai v. Hungary*, 8 July 2008.

69 Application no. 63235/00, Case of *Vilho Eskelinen and Others v. Finland*, 19 April 2007 (Grand Chamber).

approach in favour of judicial control, as shown by its landmark judgment in *Johnston*. Referring to the operative part of this latter judgment, it noted that if an individual can rely on a material right guaranteed by Community law, his or her status as a holder of public power does not render the requirements of judicial control inapplicable.⁷⁰

Also, the references to the EU Charter of Fundamental Rights by the ECtHR clearly exemplify the dialogue on rights established between the two legal orders. Interestingly, the ECtHR mentioned the EUCFR for the first time in *Hatton I* (2001), that is to say the same year as the CFI in *Max-Mobil*.⁷¹ In *Hatton II* (Grand Chamber), the judges of the dissenting opinion considered that Article 37 CFR on the right to the protection of the environment constitutes an “interesting illustration” and that it “shows clearly that the member States of the European Union want a high level of protection and better protection, and expect the Union to develop policies aimed at those objectives”. Additionally, it is worth noting that the references have been rather scarce until 2006 – the year of the first reference to the CFR by the Court of Justice in *Parliament v. Council*. Indeed, between 2006 and 2009, the references to the CFR have importantly increased.⁷² It may thus be concluded that the ruling of the Court of Justice in *Parliament v. Council* has had a clear impact on the Strasbourg Court.

The Charter of Fundamental Rights is a more progressive and innovative instrument than the ECHR for protecting fundamental rights in Europe. Many provisions of the Charter do not find an explicit counterpart in the ECHR. Therefore, the Charter may constitute a source of inspiration for the ECtHR wishing to extend the level of human rights protection in the Strasbourg regime. In that sense, it is worth noting that the recent references to the Charter are often made in relation to “progressive rights”. In *Hatton I and 2*, Article 37 CFR (right to the protection of the environment) was quoted by the ECtHR judges. In *Goodwin v. United Kingdom*, the Strasbourg Court noted that Article 9 CFR departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women.⁷³ In the dissenting opinion of the *Fretté case*, the judges relied on Article 21 CFR to argue that a European consensus is now emerging in the area of sexual orientation.⁷⁴ Similarly, in the

70 Ibid., para. 60.

71 Application no. 36022/97, Case of *Hatton and others v. UK*, 2 October 2001, and Application no. 36022/97, Case of *Hatton and others v. UK*, 8 July 2003 (Grand Chamber).

72 See Application no. 34503/97 in Case of *Demir and Baykara v. Turkey*, 21 November 2006, dissenting opinion, article 28 CFR, (right to negotiate and conclude collective agreements); Applications nos. 52562/99 and 52620/99 in Case of *Sørensen and Rasmussen v. Denmark*, 11 January 2006, para. 37, Article 12 CFR (freedom of assembly and association) and 53 CFR (Level of protection); Application no. 73049/01 in Case of *Anheuser-Busch Inc. v. Portugal*, 11 January 2007 (Grand Chamber) para. 38. Article 17 CFR; Application no. 13229/03 in Case of *Saadi v. United Kingdom*, 29 January 2008 (Grand Chamber) para. 39, Article 18 CFR; and Application no. 14939/03 in Case of *Sergey Zolotukhin v. Russia*, 10 February 2009 (Grand Chamber), para. 79, Article 50 CFR.

73 Application no. 28957/95 in Case of *Goodwin v. UK*, 11 July 2002 (Grand Chamber), para. 100.

74 Application no. 36515/97 in Case *Fretté v. France*, 26 May 2002, see joint dissenting opinion. Accordingly, “..in Chapter III (on equality) of the EU's Charter of Fundamental

joined dissenting opinion in *Künstler v. Austria*, the judges made reference to the right to dignity, enshrined in Article 1 CFR and to the *Omega* case.⁷⁵ A provision directly related to dignity is inexistent in the ECHR. Finally, the Strasbourg Court in *Vilho Eskelinen*, mentioned the provisions of the CFR on effective judicial protection in order to show that the scope of applicability of judicial control in EU law is wide.

Many critics of the Charter have underlined the weakness of its content. The numerous references to the Charter's provisions by the ECtHR provide, in my view, iron-cast arguments against this denigration and enhance the Charter's legitimacy. The CFR is undeniably a progressive instrument for the protection of human rights — probably, the most progressive in the world. It is now clearly used as a source of inspiration by the ECtHR judges in search of progressive and innovative rulings. The two-way dialogue is here quite informal.

By contrast, some rulings of the ECtHR have tried to formalize the discursive process with international organizations, particularly the European Union due to its clear overlap with the Strasbourg regime. In that respect, *Bosphorus* is a seminal case as to the relationship between the Court of Justice and the ECtHR.⁷⁶ The Strasbourg Court, building on the *M&CO* decision, used a *Solange* type of reasoning and introduced the concept of presumption of relevance. According to the Court,

“State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides...[i]f such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the Convention's role as a “constitutional instrument of European public order” in the field of human rights”.

In the concurring opinion, Judges Botoucharova, Garlicki, Rozakis, Traja, Tulkens and Zagrebelsky considered that the duplicity of standards in the protection of human rights might constitute a risk. Such a duplicity could arise from the common postulation that the EU offers an equivalent protection to that of the ECHR. Indeed, to leave the EUs judicial system the task of ensuring “equivalent protection”, without preserving a means of assessing on a case-by-case basis that the protection is “equivalent”, would be corresponding to consent

Rights of 7 December 2000, Article 21 expressly prohibits “any discrimination based on any ground such as sex ... or sexual orientation. It may therefore be reasonably argued that a European consensus is now emerging in this area”.

75 Application no. 68354/01 in Case of *Vereinigung Bildender Künstler v. Austria* (25 April, 2007), *see* joined dissenting opinion, fn 5.

76 Application no. 45036/98 in Case of *Bosphorus v. Ireland*, 30 June 2005 (Grand Chamber).

tacitly to substitution, in the field of Community law, of ECHR standards by a Community standard.⁷⁷ In a rather similar vein, Judge Ress, in his separate concurring opinion, advised against the emergence of double standards through the doctrine of “equivalent protection” and drew attention to the deficiencies in the EU system of judicial protection, particularly in relation to the limited *locus standi* for private parties before the Court of Justice. Notably, Ress raised the question whether this amounted to an infringement of Article 6(1) of the ECHR.⁷⁸

The reasoning of the majority opinion is evidently different. First of all, the ECtHR made an extensive description of the system of legal remedies. It is pointed out that the effectiveness of substantive guarantees of fundamental rights depends on the mechanisms of control in place to ensure their observance. In that sense, the *UPA* case (paras. 39-42) and the preliminary ruling procedure are analyzed in a very detailed manner.⁷⁹ The ECtHR found that the protection of fundamental rights by EC law can be considered to be, and to have been at the relevant time, “equivalent” to that of the ECHR system.⁸⁰ This conclusion is drawn after a thorough examination of the protection of fundamental rights in the EU. The ECtHR made references to the Charter of Fundamental Rights and to the possibility of accession to the ECHR in light of the Constitutional Treaty.⁸¹ The role of the national courts in providing effective judicial protection was particularly emphasized.⁸²

The rationale of the *Bosphorus* ruling came under discussion in *Behrami* and *Saramati*.⁸³ The main question at stake was whether the ECtHR is competent *ratione personae* to review the acts of the respondent States carried out on behalf of the UN and, more generally, as to the relationship between the Convention and the United Nations (UN) acting under Chapter VII of its Charter. The applicants in *Behrami* argued that the substantive and procedural protection of fundamental rights provided by KFOR was in any event not “equivalent” to that under the Convention within the meaning of the Court's *Bosphorus* judgment, with the consequence that the presumption of Convention compliance on the part

77 Ibid., concurring opinion, para. 3.

78 Ibid., concurring opinion of Judge Ress, para. 2.

79 Ibid., paras. 85 and 96 to 99.

80 Ibid., paras. 165.

81 Ibid., para 160.

82 Ibid., para 164.

83 Application no. 71412/01 in Case of *Behrami and Behrami v. France*, 2007, and Application no. 78166/01 in Case of *Saramati v. France, Germany and Norway*, 2 May 2007. In *Behrami*, the applicants complained that France had not respected the provisions of Resolution 1244 concerning de-mining. It was alleged that Gadaf Behrami's death and Bekir Behrami's injuries were caused by the failure of the French KFOR troops to mark and/or defuse the un-detonated cluster bombs which KFOR had known to be present on the site in question. They relied on Article 2 (right to life) of the European Convention on Human Rights. In *Saramati*, the applicant complained about his detention by KFOR. He further complained that he did not have access to court and that France, Germany and Norway had failed to guarantee the Convention rights of individuals living in Kosovo.

of the respondent States was rebutted.⁸⁴ However, the Strasbourg Court made it clear that the circumstances of the present cases were clearly distinguishable from those with which the Court was concerned in the *Bosphorus* case.⁸⁵ The ECtHR underlined that the alleged acts and omissions of KFOR and UNMIK cannot be attributed to the respondent States and, moreover, did not take place on the territory of those States or by virtue of a decision of their authorities. In addition, there was distinction between the nature of the international organization and of the international cooperation with which the Court was concerned in *Bosphorus* and those in the present cases. The actions of UNMIK and KFOR were directly attributable to the UN (under Chapter VII), an organization of universal jurisdiction fulfilling its imperative collective security objective.⁸⁶ The Court concluded that the applicants' complaints must be declared incompatible *ratione personae* with the provisions of the ECHR.

The issue of the relationship between the UN regime and the European regimes reappeared, this time before the Court of Justice, in *Kadi and Al Barakaat*. The Council, the Commission and the United Kingdom alleged that the Strasbourg Court has relinquished its powers of review when a contested measure is necessary in order to implement a Security Council resolution. They essentially contended that the Court of Justice should follow and transfer the line of reasoning established in *Behrami* to the *Kadi* circumstances. The Court of Justice, following the A.G., rejected such an argumentation. Similarly to the ECtHR, the Court drew a sharp distinction between the *Bosphorus* line and the *Behrami* line; and heavily relied on the operative part of the judgment in *Behrami* (para.151).⁸⁷ Moreover, the Court of Justice pointed out the fundamentally different circumstances between *Kadi* and *Behrami*. It appears clear that in *Kadi* the contested regulation cannot be considered to be an act directly attributable to the United Nations as an action of one of its subsidiary organs created under Chapter VII of the Charter of the United Nations or an action falling within the exercise of powers lawfully delegated by the Security Council pursuant to that chapter.⁸⁸ Thus, the Court of Justice came to the conclusion that the judicial review of the Community measure in light of EU fundamental rights is not to be prejudiced by an international agreement. The reasoning of the Luxembourg Court was strongly influenced by the ECtHR. The informal dialogue is here at its peak.

Finally, if the Treaty of Lisbon enters into force, the Union shall accede to the European Convention of Human Rights according to Article 6(2) TEU. The Strasbourg Court would thus be competent to review the legality of the acts of the Union institutions in light of the ECHR. The accession would clearly formalize the relationship between the two courts.⁸⁹ However, the necessity to

84 Ibid., para. 150.

85 Ibid., para. 151.

86 Ibid.

87 *Kadi*, cited *supra* note 24, paras. 311-313.

88 Ibid., paras. 314-315.

89 See A.G. Maduro in *Kadi*, para. 36. The ECtHR is intended to operate above all as an interstate agreement creating obligations at the international level, whereas the duty of the

accede to the ECHR is not convincing. The plurality of human rights' sites, the healthy competition resulting from it and the ongoing cross-fertilization of the legal orders has established a high standard of human rights protection in Europe. The accession would probably bring more coherence but, perhaps, less pluralism to the European human rights culture.

3.2 *Rights and National Courts*

The national courts are the preferred interlocutors of the Court of Justice, considering the special and crucial role given to the preliminary ruling procedure in the European legal order.⁹⁰ In a similar vein, the national courts are the “powerhouse” of EU law.⁹¹ Indeed, the local courts enforce Community law rights by applying the principle of construction (indirect effect) and Member State’s liability and – more generally – are entrusted with guaranteeing the legal protection that citizens derive from the Community law, *e.g.* in the context of national procedural autonomy (effectiveness/equivalence) and human rights.⁹² This transfer of power is vital in order to ensure the efficacy of the system since the European Court of Justice, obviously, cannot bear all the ‘enforcement’ burden. This delegation also entails an increased discretion being given to the national courts in, for instance, the assessment of the proportionality of national measures in free movement or/and fundamental rights cases.⁹³

The importance of this accommodating dialogue has been recognized by both the national courts and the European Court of Justice. Already in the *Maastricht* decision, the German Federal Constitutional Court has pointed out the need of a “*relationship of cooperation*” in the context of fundamental rights.⁹⁴ As an aside, this case also shows that an indirect dialogue is established between the Court of Justice and the national constitutional courts even when no preliminary rulings procedure is made available.⁹⁵ The same remark applies to, for instance, France⁹⁶ and Spain.⁹⁷ It is worth noting that the French *Conseil constitutionnel* justified the absence of direct dialogue by the nature of the *ex-ante* system of

Court of Justice is to act as the constitutional court of the municipal legal order that is the Community.

90 See, A.G. Ruiz-Jarabo Colomer in Case C-14/08 *Roda Golf & Beach Resort SL*, Opinion of the 5th March 2009.

91 D. Edward, *National Courts – the Powerhouse of Community Law*, 5 CYELS (2002) 1.

92 Case C-432/05 *Unibet* [2007] ECR I-2271, paras. 38-39. The *Unibet* case, affirms once again the importance of the national courts in the context of national procedural rights. This new trend appears to reinforce the dialogue between the national courts and the Court of Justice.

93 M.P. Maduro, *Contrapunctal Law: Europe’s Constitutional Pluralism in Action*, in N. Walker (ed.), *Sovereignty in Transition* (Hart, 2003), 501, 528.

94 F. C. Mayer, *The European Constitution and the Courts*, in A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law*” (Hart, 2006), 281, 312.

95 The FCC has never made a preliminary ruling to the Court of Justice. Cf. FCC, 5 August 1998, BvR 264/98.

96 Case № 2006-540 DC, 27 July 2006, *Loi transposant la directive sur les droit d’auteurs*.

97 Case № 28/1991, 14 February 1991.

constitutional review which requires a ruling before the promulgation of the Act within the time frame of Article 61 of the French Constitution. Interestingly, the *Conseil constitutionnel* has also stressed that it depends on the ordinary national courts to refer, by way of preliminary ruling, to the Court of Justice, as the occasion arises. It is of utmost significance that the national constitutional courts take their European role seriously. The formal preliminary ruling procedure should be used in order to stimulate a direct constitutional dialogue. Such a discursive constitutionalism already exists between the Court of Justice and the constitutional courts in Austria and Belgium.⁹⁸ In some countries such as Sweden, that might be difficult since there is no constitutional court.⁹⁹ Notably, in April 2008, the Italian constitutional court made its first preliminary reference to the Court of Justice.¹⁰⁰

The position of the Supreme Administrative Court in France is also interesting to analyze in the context of constitutional pluralism. In February 2007, the *Conseil d'Etat* in *Arcelor* decided a significant case which provides a new approach departing from the theory of veil-constitution and reconciling the principle of supremacy of EC law with the supremacy of the French Constitution.¹⁰¹ In this case, Arcelor and other plaintiffs challenged the decree 2004-832 implementing Directive 2003/87 after that the President, the Prime Minister and other competent Ministers refused to repeal it. The applicants argued that the national measure (decree) infringed different principles (the right to property and to trade freely and the principle of equality) guaranteed by the French Constitution. In an exciting opinion, the *commissaire du gouvernement* (Mattias Guyomar) advised the *Conseil d'Etat* to follow the decisions of the *Conseil constitutionnel* concerning national measures implementing secondary Community legislation and thus to adopt a restrictive interpretation of the so-called *réserve de constitutionnalité*. Notably, the *commissaire du gouvernement* (CG) emphasized that the solution adopted by the *Conseil constitutionnel* is in harmony with the jurisprudence established by various national courts in other Member States of the European Union such as in Spain (Declaration given on 13 December 2004 by the Constitutional Tribunal), Germany (the *Solange II* and *III* cases of the Federal Constitutional Court) and Italy (*Fragd* decision of the Constitutional Court). Furthermore, Guyomar stressed the danger of a “*cavalier*

98 See in Austria (Case C-144/99 *Adria-Wien Pipeline* [2001] ECR I-8365) and Belgium (*Cour d'arbitrage Belge*, case № 6/97, 19 February 1997).

99 The issue to create a constitutional court was recently discussed and rejected. See, SOU 2008:125, at p.373 and SOU 2007:85. It is worth mentioning that a significant constitutional control is accomplished by this specific authority, the *Lagrådet* (Law Council). This Council is comprised of Judges from the Supreme Court and the Supreme Administrative Court. The task of the Law Council is to examine the draft legislation submitted by the government to the parliament. The main task of the Law Council is to determine whether a draft is compatible with fundamental laws. Notably, the views are of an advisory nature, and are not binding on the government or Parliament. Nevertheless, it ought to be mentioned that its advisory opinions are generally followed. However, the Law Council has never made a preliminary ruling to the Court of Justice.

100 Case № 536/95, 29 December 1995.

101 CE Ass, 8 February 2007, *Société Arcelor Atlantique et Lorraine*, Req. № 287110.

seul" (lonely ride) when a general movement of judicial cooperation is clearly discernable between the supreme national courts of the Member States and the European Court of Justice.

Also, the *commissaire du gouvernement* considered that the recent ruling of the European Court of Human Rights (ECtHR) in *Bosphorus*, establishing a presumption of equivalence in the context of fundamental rights, is symptomatic of this broad and new wave of judicial cooperation. In the end, the CG underlined that the "*dialogue des juges*" should be preferred to the "*guerre des juges*".¹⁰² The *Conseil d'Etat* followed the *commissaire du gouvernement*. In its operative part (*considérant de principe*), the national court referred first to Articles 55 and 88-1 of the French Constitution. According to the *Conseil d'Etat*, a constitutional obligation to implement Directives results from Article 88-1. Then, the *Conseil d'Etat* established very clear and detailed guidelines on how to assess the validity of a national measure implementing Community law when the parties argue a breach of fundamental rights enshrined in the Constitution. In that regard, the highest administrative court emphasized that the control of constitutionality of the national measure implementing the Directive must be exercised by having recourse to a specific method in the situation where the national measures implement unconditional and precise provisions, i.e. provisions having direct effect.¹⁰³

At the outset, the administrative judge must seek whether the alleged constitutional principle is also protected, both in nature and scope, by the general principles of Community law as interpreted by the (most recent) case law of the European Court of Justice. Indeed, the general principles of Community law should guarantee, by their application, the effective respect of the constitutional disposition or principle. If there is such a protection, the administrative judge must scrutinize the national measure in the light of the general principles of Community law. In the absence of doubts as to the validity of the act, the national judge should discard the argument; in the contrary situation, the national judge should refer a question on validity to the European Court of Justice. If there is no such a protection (absence of a general principle of Community law), the national judge must directly examine the constitutionality of the implementing measures. Notably, the *Conseil d'Etat*, in the circumstances of the case, considered that the alleged rights to property and trade and the principle of equality constitutes also general principles of Community law which are protected in the same way in the French Constitution.

One may venture to say that the operative part of the ruling appears very well articulated and thus contrasts with the laconic formulation generally used by French courts in drafting judgments. In that sense, it may be said that the *Arcelor* case boasts also an informative and pedagogical purpose for the lower administrative judges when they (will) examine the validity of the national measures implementing Community law. Therefore, this case arguably

102 As noted by the CG, the expression "*dialogue des juges*" had been used 20 years ago by Bruno Genevois.

103 See C. Charpy, *The Status of (Secondary) Community Law in the French Internal Order: The Recent Case-Law of the Conseil Constitutionnel and the Conseil d'Etat*, 3 *EuConst.* (2007), 436, 462.

established a (horizontal) judicial dialogue at the national level. In addition, it is worth noting that the *Conseil d'Etat* considered that there might be a problem of validity of the Directive in relation to the principle of equality and decided in March 2007 to refer a question to the Court of Justice.¹⁰⁴ Another (vertical) dialogue is here established, this time with European Court of Justice through the use of the preliminary ruling procedure. Broadly speaking, this case reflects that the Court of Justice can only perform its function successfully if national courts, using the words of Baquero Cruz, “play by the rules of the game and make use of the preliminary ruling procedure”.¹⁰⁵

For instance in Sweden, the national courts and more particularly the Supreme Court (*Högsta Domstolen*) have been reluctant in some instances to apply correctly Community law.¹⁰⁶ In 2004, the Commission started an action against Sweden and sent a Reasoned Opinion to the Swedish government for the lack of preliminary references made by the Supreme Court (only 2 preliminary rulings between 1995 and 2004) allegedly due to the leave of appeal system (*prövningstillstånd*).¹⁰⁷ This Reasoned Opinion has led Sweden to amend its legislation in 2006 on the leave to appeal which includes now an obligation of motivation in (only!) Community law matters.¹⁰⁸ In its Reasoned Opinion, the Commission considered that there was a breach of Article 234(3), which appears as the result of judicial practise of the Supreme Courts regarding leave to appeal and its absence of motivation. As observed by the Commission, this practise has led the Swedish Supreme Courts referring too rarely to the Court of Justice. Therefore, it may be said that the system of leave to appeal creates a situation where there is no effective right to appeal. The Commission has insisted that the Supreme Court must provide reasons as to the decision not to provide leave to appeal so it would be possible for the Commission to examine the decision to protect the EU interests. In examining the reasons given by the Supreme Courts, it would thus be possible to determine whether there is a breach or not of the obligation to refer under Article 234(3) EC, for example whether the Supreme Courts have applied the doctrine of *acte clair* in good faith. In the case of a negative answer, it would be possible to apply the *Köbler* line of case-law and engage the Member State liability for breach of Community law by one of its supreme courts.

Between 1995 and September 2009, the Swedish courts made around 80 preliminary rulings to the Court of Justice. It is an average of around 6 cases a year. Though one may consider this statistic as quite insufficient, they are some

104 Case C-127/07 *Société Arcelor Atlantique et Lorraine*, lodged on 5 March 2007.

105 J. Baquero Cruz, *The Legacy of the Maastricht-Urteil and the Pluralist Movement*, 14 *ELJ* (2008), 289, 319. The author discussed the issue of the institutional choice and considered rightly that national courts may not be in the best position to decide complex cases.

106 *Data Delecta* Case, NJA 1996, 668 and *Volvo Service* Case, NJA 1998, 474. See also the attitude of the Supreme Administrative Court in the *Barsebäk* case, RÅ 1999, ref. 76.

107 Commission docket № 2003/2161,C(2004) 3899.

108 See U. Bernitz, *The Duty of Supreme Courts to Refer Cases to the ECJ: The Commission's Action Against Sweden*, in N. Wahl and P. Cramer, *Swedish Studies in European Law*, vol.2 (Hart, 2006), 37.

recent rays of hopes emanating from the Swedish national courts. Indeed, the Supreme Court has demonstrated more willingness to cooperate and to respect Community law in the aftermath of the Reasoned Opinion by increasing substantially the number of preliminary ruling sent to the Court of Justice.¹⁰⁹ Additionally, the Supreme Court in the *Pastor Green* case has shown some signs of constitutional pluralism by interpreting the constitutional provisions of freedom of expression and religion in light of the European human rights regime and thus has departed from the traditional methodology based on preparatory works.¹¹⁰ Also, the increasing acceptance of the general principles of Community law by the Swedish national courts clearly shows that legal pluralism is making its way.¹¹¹ Yet, it appears clear that the constitutional dialogue can still be and should be improved. It is important to keep in mind that Sweden does not boast a constitutional court. Though the creation of this constitutional court was under discussion, it is now clear that that this new judicial institution will not be elaborated. Therefore, it is argued that the Supreme Court and the Supreme Administrative Court have an extra burden on establishing a formal constitutional dialogue with the Court of Justice through the preliminary ruling procedure. As seen before, a comparative analysis of the situation in Europe demonstrates that there is general trend of cooperation between the supreme courts/constitutional courts in the Member States of the Community and the Court of Justice. Any national judges should be vigilant not to take a “lonely ride” that may lead to isolation and undue judicial micro-resistance.

3.3 *Rights and the Luxembourg Court*

3.3.1 **Discursive jurisprudence in Luxembourg**

A judicial discourse is also established or encrypted within the ECJ case-law relating to the (effective) judicial protection of individuals. In that respect, it is worth recalling the *UPA* case where the Court of Justice stated that,

“in accordance with the principle of sincere cooperation laid down in Article 5 of the Treaty [new 10 EC], national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act”.¹¹²

Notably, in the *Segi* case, the Court of Justice has delivered in 2007 the same type of (subliminal?) message in relation to the judicial protection of individuals

109 See, e.g. *Unibet*, cited *supra* note 92.

110 NJA 2005, 805. See J. Nergelius, 2005 – *The Year when European Law and its Supremacy was finally Acknowledged by Swedish Courts*, in P. Cramer and T. Bull, *Swedish Studies in European Law*, vol.1 (Hart 2007), 145.

111 J. Hettne, *Rättsprinciper som Styrmedel* (Norstedts Juridik, 2008), 313.

112 Case C-50/00 P *UPA v. Council* [2002] ECR I-6677, para. 42.

under the Third Pillar.¹¹³ The judgment emphasized the role of the national courts in providing effective judicial protection in the field of EU law.¹¹⁴ Looking at the Opinion of A.G. Mengozzi, it should be noted that he put even greater weight on the national courts' tasks. Indeed, the A.G. considered that while the EU was subject to the principle of effective control of EU measures, such control effectively remained within the national courts, due to the lack of jurisdiction of the Court of Justice over damages actions and its limited jurisdiction over preliminary rulings. The Advocate General acknowledged that bringing proceedings through the national courts hoisted thorny issues connected with the choice of defendant (the Union or the Member States), the choice of jurisdiction, the choice and content of the applicable law and the likely immunity of the Union. In the end, the ruling and the Opinion reached comparable conclusions. However, the Court laid much greater emphasis on the preliminary ruling's procedure to ensure the legality of third pillar measures, whereas the Opinion put greater stress on the national courts.

This judgment echoes the *UPA* case.¹¹⁵ To recall *UPA*, the Court of Justice stated that, "the European Community is a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights".¹¹⁶ The Court of Justice also made it clear that it was for the Member States – and impliedly it was not the task of the Court – to reform the judicial system of remedies in the Community legal order. Going further, in paragraphs 41 and 42, the Court of Justice, ruled that it is for the Member States to establish a system of legal remedies and procedure which ensures the respect of the right to effective judicial protection. Relying on Article 10 EC, the Court of Justice ruled that there is a duty of the national courts to use a preliminary ruling procedure whenever there is a presumption of invalidity.

In *Segi* case, the Court of Justice similarly pointed out that the judicial system of remedies necessitates a legislative reform. Furthermore, it ruled in its paragraph 56 that, "...it is for the Member States and, in particular, their courts and tribunals, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the lawfulness of any decision or other national measure relating to the drawing up of an act of the European Union or to its application to them and to seek compensation for any loss suffered". In contrast to *UPA*, there is evidently not explicit reference to Article 10 EC. It may also be noted that its scope appears to be wider since it does not only include the lawfulness of any decision but also embraces the actions in damages. Finally, as put by Peers, the *Segi* case offers the first unequivocal statement by the Court of Justice that the Union is governed by the principle of the rule of law, including

113 Case C-355/04 P *Segi v. Council* [2007] ECR I-1657, para. 38.

114 M. Claes, *The National Courts' Mandate in the European Constitution* (Hart Publishing, 2006), 586.

115 See S. Peers, *Salvation Outside the Church : Judicial Protection in the Third Pillar after the Pupino and Segi Judgments*, 44 CMLRev. (2007), 883, 894.

116 Ibid., *UPA*. para. 38.

the corollary principle of judicial review.¹¹⁷ In that regard, the Court of Justice provides us with a very detailed discussion on the rule of law within the Union.¹¹⁸

The decision in *Segi* reflects the difficult choice between the respect of the wording of the Treaties and the aspiration of ensuring effective judicial protection. To tackle this problem, the *Segi* judgment does not take the *Chernobyl* direction of expanding the category of applicants since the Court has expressly ruled out any jurisdiction over damages liability within the framework of the third pillar, and it seems also to have ruled out jurisdiction over direct actions for annulment brought by individuals. By contrast, the Court has chosen to take the *ERTA* route of expanding the categories of acts which can be challenged within the existing judicial framework, coupled with the penchant, seen in *UPA*, of decentralizing the legality of third pillar acts to the national courts.¹¹⁹

The spirit of conciliation resorts also from the jurisprudence of the ECJ in the field of fundamental rights. The Court of Justice appears ready to respect the specific constitutional identity of the Member States. At least, this flows from the reading of the *Omega case*, in which the Court balanced the right to dignity (Article 1 of the German Basic Law) against the freedom to provide services.¹²⁰ It is interesting to note that the ECJ in *Laval* (2007) made an explicit reference to the importance of the right to collective action enshrined in the Swedish Constitution.¹²¹ It is not really the style of the Court to make such an observation in relation to the general principles of Community law. Moreover, it appears that the ECJ has given discretion to the national courts for applying the proportionality test.¹²² As put clearly in *Viking Line*, “it is ultimately for the national court, which has sole jurisdiction to assess the facts and interpret the national legislation, to determine whether and to what extent such collective action meets those requirements”.¹²³ The domestic court is seen explicitly as the ultimate arbiter of the validity of national law in the context of EU fundamental rights and a two-way dialogue is established. Besides, in *Advocaten voor de Wereld*, a preliminary ruling on the validity of the EAW Framework Decision, the Court has confirmed the need of dialogue and concession under the Third Pillar.¹²⁴ Indeed, it appears clear that the ECJ has given a wide margin of appreciation to the Member States under the Third Pillar and, in the same way, confirmed the importance of fundamental rights for limiting the Member State’s action in this area. Put in the context of the *EAW* saga – which can be perceived

117 S. Peers, cited *supra* note 115, 395.

118 Compare with paragraph 38 of *UPA*. *SEGI* addressed a more detailed discussion of the possibilities open to the applicants.

119 S. Peers, cited *supra* note 115, 897-898.

120 Case C-36/02 *Omega* [2004] ECR I-9609.

121 Case C-341/05 *Laval*, cited *supra* note 32, para. 92.

122 See e.g. Case C-438/05 *Viking Line* [2007] ECR I-10779, paras. 80-85.

123 *Ibid.*, para.85.

124 Case C-303/05 *Advocaten voor de Wereld* [2007] ECR I-3633.

in itself as a horizontal discourse between highest courts – this ruling of the ECJ may be seen as fitting perfectly the *discursive legal pluralism* model. Indeed, as outlined by Sarmiento, the decision of the ECJ confirmed the Czech approach and gave some support to the German and Cypriot cases by confirming the Member State's wide discretion in Third Pillar matters.¹²⁵ The upshot of all this is that a spirit of dialogue and compromise emerges from this multi-level system of European constitutionalism.

3.3.2 The Court of Justice as the Guardian of Fundamental Rights in Europe

The European Union is founded on the principle of the rule of law and it respects fundamental rights as general principles of Community law. With the *Kadi* and *Al Barakaat* cases,¹²⁶ the Court of Justice appears as the guardian of fundamental rights in Europe by rejecting the half-solution and the monist conception of international law proposed by the Court of First Instance.

In the ruling of the CFI, the tribunal used a rather curious two-step reasoning which may reflect the complexity of the situation.¹²⁷ It considered that that the resolutions of the Security Council fall, in principle, outside the ambit of the Court's judicial review and that the Court has no authority to call in question, even indirectly, their lawfulness in the light of Community law. However, the CFI immediately emphasized, in the very next paragraph, that the Court is empowered to check, indirectly, the lawfulness of the resolutions of the Security Council in question with regard to *jus cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible.¹²⁸ This approach is profoundly monist as Community law is seen as an integrated part of international law.

By contrast, the Court of Justice adopted a dual (plural) approach by considering that the Community judicature must ensure in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations.¹²⁹ This attitude

125 See D. Sarmiento, *European Union: The European Arrest Warrant and the Quest for Constitutional Coherence*, 6 *International Journal of Constitutional Law* (2008) 171.

126 Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat Foundation v. Council and Commission*, cited *supra* note 24. Three pleas were raised before the Court of Justice (lack of legal basis, lack of direct and individual concern [Article 249 EC] and breach of fundamental rights). On the basis of the third plea, the Court of Justice not only overturns the judgments of the Court of First Instance but also quashes the EC measures since the right to be heard, the right to effective judicial review and the right to property were violated by the Council and the Commission when they implemented the UN Security Council resolutions.

127 See L. Pech, *Trying to Have it Both Ways – On the First Judgments of the Court of First Instance Concerning EC Acts Adopted in the Fight against International Terrorism*, *Irish Human Rights Law Review*, Vol. 1, 2007.

128 *Ibid.*, paras. 225-226.

129 *Ibid.*, para 326.

constitutes a strong message which advances unambiguously the autonomy of the Community legal order and which may even be understood as offering support to assert local constitutional resistance.¹³⁰ Therefore, the Court of Justice appears also as the guardian of the autonomy of the Community legal order.¹³¹

The entire *Kadi* litigation is imbued with pluralism. Already in the claim, Kadi relied on the *Bosphorus* case and the *Solange* formulation: “[s]o long as the law of the United Nations offers no adequate protection for those whose claim that their fundamental rights have been infringed, there must be a review of the measures adopted by the Community in order to give effect to resolutions of the Security Council”.¹³² The pluralist argumentation is also strongly articulated in the Opinion of the Advocate General. According to the A.G, “[i]n an increasingly interdependent world, different legal orders will have to endeavour to accommodate each other’s jurisdictional claims. As a result, the Court *cannot always assert a monopoly* on determining how certain fundamental interests ought to be reconciled. It must, where possible, recognise the authority of institutions, such as the Security Council, that are established under a different legal order than its own and that are sometimes better placed to weigh those fundamental interests. However, the Court cannot, in deference to the views of those institutions, turn its back on the *fundamental values* that lie at the basis of the Community legal order and which it has the duty to protect. Respect for other institutions is meaningful only if it can be built on a shared understanding of these values and on a mutual commitment to protect them”.¹³³

The ruling of the Court is sensibly more obscure but follows the pluralist approach advocated by A.G. Maduro and the *Bosphorus* type of reasoning. The Court stated that,

“ [321] In any event, the existence, within that United Nations system, of the re-examination procedure before the Sanctions Committee, even having regard to the amendments recently made to it, cannot give rise to *generalised immunity* from jurisdiction within the internal legal order of the Community...[322] Indeed, such immunity, constituting a significant derogation from the scheme of judicial protection of fundamental rights laid down by the EC Treaty, appears unjustified, for clearly that re-examination procedure does not offer the guarantees of judicial protection”.¹³⁴

The paragraph 321 reflects the pluralist approach by stressing the absence of an absolute claim of power. In other words, there is no generalized immunity from jurisdiction of the UN system within the internal legal order of the Community.

130 See G. de Búrca, *The EU, the European Court of Justice and the International Legal Order after Kadi*, 51 *Harvard International Law Journal* (2009).

131 T. Tridimas and J.A. Gutierrez-Fons, “EU Law, International Law and Economic Sanctions against Terrorism: The Judiciary in Distress?” *Fordham International Law Journal* (2008), 1, 65. According to the authors, the ruling reflects the “*constitutional hegemony*” of the Court of Justice on EU law.

132 *Kadi*, cited *supra* note 24, paras 255-256.

133 *Ibid.*, Opinion in *Kadi*, para. 44.

134 *Ibid.*, *Kadi*, paras. 321-322.

The paragraph 322 alludes in a rather cryptic manner to the *Bosphorus* reasoning of the ECtHR. Looking at the French version,¹³⁵ it appears that it introduces more clearly a kind of manifest deficiency test transpiring arguably from the *Bosphorus* case. This is interesting since it may be said that the Court of Justice is using a technique of legal reasoning – normally used by the Strasbourg court – which reflects once again the plural dimension of the *Kadi* ruling.¹³⁶

Furthermore, it is worth noting that the Court of Justice in *Kadi* has relied heavily on the Strasbourg case-law.¹³⁷ In a recent article, Harpaz - after pointing out the deferential approach of the European Court of Justice towards the ECHR case-law in *Kadi* - calls for “*collegial respect*” to be demonstrated by the Court of Justice towards the Strasbourg court. According to this author, “the Luxembourg court should rely on the Strasbourg regime and on the jurisprudence of the Strasbourg Court in a more explicit, coherent, systematic, integrative and comprehensive manner”.¹³⁸ It is also important to keep in mind that, in a pluralist world, the two-way dialogue is necessary and the Strasbourg Court should similarly rely when needed to the case-law of the Court of Justice and/or the provisions of the EU Charter of Fundamental Rights. Finally, by restoring the Community judicature as the ultimate guardian of fundamental rights, the Court of Justice has judiciously avoided a perilous situation where national courts may have been tempted to assess the legality of the Community measure in light of domestic fundamental rights.¹³⁹

4 On Plurality and Substantive Democracy

Plurality is inherent to European constitutionalism. The ‘European rights’ – the core values of Europe – constitute plural norms *par excellence*. As seen in this essay, they clearly stimulate the constitutional dialogue, which is also a patent pluralist phenomenon. The principled nature of ‘European rights’ supports the internal dialogue of the Court of Justice. Additionally, the plural nature of these norms facilitates the external dialogue between the different legal orders and their cross-fertilization. A formal dialogue on “European Rights” is established by the preliminary ruling procedure; and an informal one results from a common

135 According to para. 322, “[e]n effet, une telle immunité, qui constituerait une dérogation importante au régime de protection juridictionnelle des droits fondamentaux prévu par le traité CE, n’apparaît pas justifiée, dès lors que cette procédure de réexamen n’offre manifestement pas les garanties d’une protection juridictionnelle”.

136 B. Kunoy and A. Dawes, *Plate Tectonics in Luxembourg: The Ménage à Trois between EC Law, International Law and the European Convention on Human Rights Following the UN Sanctions Cases*, 46 CMLRev. (2009) 73, 81.

137 See e.g. paras. 344, 360 and 363.

138 G. Harpaz, *The European Court of Justice and its Relationship with the European Court of Human Rights: The Question for Enhanced Reliance, Coherence and Legitimacy*, 46 CMLRev.(2009) 105, 115.

139 See B. Kunoy and A. Dawes, cited *supra* note 136, 103.

discursive dialectic used in the jurisprudence by the national courts, the ECtHR and the Court of Justice.

Going further, this essay provides insights as to the nature of the democracy in the European Union and the place of the European judge. This democracy, not surprisingly, is founded on the plurality of powers and the plurality of the rule of law. As to the former, it appears clear that EU governance is marked by an extraordinary pluralism. The EU is not a system of parliamentary sovereignty or deliberative democracy, but one of separation of powers: “[p]ower is divided vertically among the Commission, Council, Parliament and Court, and horizontally among local, national and transnational levels – requiring concurrent majorities for action”.¹⁴⁰ The Court of Justice is *surprisingly* strong.¹⁴¹ This is so since, perhaps, the counter-majoritarian difficulty is practically non-existent and the ECJ does not face much of a significant horizontal separation of powers problem.¹⁴² Yet, the Court of Justice is confronted to a vertical clash of power with the supreme and constitutional courts of the Member States, particularly in the context of supremacy/fundamental rights. Besides, the Community Courts, through judicial review, have systematically enhanced the transparency, accountability and democratic nature of the decision-making process in the EU.¹⁴³ This process has reached its peak with the *Kadi* case. In this seminal case, the Court of Justice made clear that the judge in a democracy must ensure the respect of the rule of law or – to borrow Barak’s words – that the role of the judge is to bring about the realization of the rule of law.¹⁴⁴

This rule of law in the European Union is not only a “jurisprudential concept” but a “substantive concept”. In other words, it must be expanded to the “*right conception*” of the rule of law.¹⁴⁵ As such, the “European rights” as fundamental rules of values should clearly be understood as essential vectors of a substantive European democracy.¹⁴⁶ A democracy based on a strong Court of Justice which appears as the guardian of fundamental rights in Europe – or perhaps, as one of its guardians to be more politically correct in this pluralist world.

140 A. Moravcsik, *In Defense of the Democratic Deficit: Reassessing Legitimacy in the European Union*, 49 *JCMS* 2002, 603, 610.

141 *Ibid.*

142 See M. Rosenfeld, *Comparing Constitutional review by the European Court of Justice and the U.S. Supreme Court*, 4 *Int’l J Con Law* (2006), 630.

143 K. Lenaerts and T. Corthaut, *Judicial Review as a Contribution to the Development of European Constitutionalism*, in T. Tridimas and P. Nebbia (eds.), *European Union Law for the Twenty-First Century*, volume 1 (Hart, 2004), 17, 43.

144 See A. Barak, *The Judge in a Democracy* (Princeton University Press, 2006).

145 *Ibid.*, 54.

146 *Ibid.*, 23.