

# **Of Tangled and Truthful Hierarchies: EU Accession to the ECHR and its Possible Impact on the UK's Relationship with European Human Rights**

Paul Gragl

## **I. Introduction**

Having been first envisaged and discussed as early as 1979 in a European Commission Memorandum,<sup>1</sup> the European Union's (EU)<sup>2</sup> accession to the European Convention on Human Rights (ECHR) seemed to be a never-ending story. In fact, accession appeared to be legally impossible after major setbacks such as *Opinion 2/94* in which the Court of Justice of the EU (CJEU) held that, as Union law stood back then, the EU had no competence to accede to the Convention.<sup>3</sup> This deficit in competence has only been remedied in 2010, after a long-lasting struggle to put into force both the Lisbon Treaty<sup>4</sup> and Protocol No. 14 to the ECHR,<sup>5</sup> which granted the Union this very competence. This story came to an – albeit provisional – conclusion in April 2013, when a Final Report on accession was submitted to the Council of Europe's Human Rights Steering Committee (CDDH). This report included a Draft Revised Agreement on EU accession to the ECHR and a Draft Explanatory Report to this agreement.<sup>6</sup> After this overwhelming success, December 2014 nonetheless saw another blow to the accession project, when the CJEU held in *Opinion 2/13* that the accession agreement was not compatible with the Union Treaties. For the Court, this incompatibility mainly lies in the agreement's potential adverse effects on the specific characteristics and the autonomy of EU law.<sup>7</sup> And although a re-negotiation of the 'problematic' parts of the accession agreement and further delay in the finalization of the accession procedure seem inevitable, the author shares the optimism that Luxembourg's verdict does not frustrate accession after all: hopefully, it will – in hindsight – remain an albeit irritating, yet mere bump on the road towards a unified system of European human rights protection. Nonetheless *Opinion 2/13* primarily deals with the incompatibilities

---

<sup>1</sup> Commission of the European Communities, 'Memorandum on the Accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms', Bulletin, Supplement 2/79, COM (79) 210 final, 20 May 1979.

<sup>2</sup> For the sake of legibility, only the European Union is being referred to in this text, even if the terms 'European Economic Community' (EEC) or 'European Community' (EC) were legally and historically correct in lieu thereof.

<sup>3</sup> *Opinion 2/94 Accession by the Community to the ECHR* [1996] ECR I-1759, para 36.

<sup>4</sup> Cf. especially Article 6(2) TEU, both enabling and obliging the EU to accede to the Convention.

<sup>5</sup> Cf. especially Article 17 of Protocol No. 14, amending Article 59 ECHR, thus allowing for accession.

<sup>6</sup> Fifth Negotiation Meeting between the CDDH ad hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, Final Report to the CDDH, 10 June 2013, 47+1(2013)008rev2.

<sup>7</sup> *Opinion 2/13 EU Accession to the ECHR* [2014] ECR I-(nyr), para 258.

of accession on the legal order of the EU itself, which is not the focus of this chapter (and which deserves an analysis in its own right). The chapter at hand examines the consequences of accession on the EU Member States in general and the United Kingdom (UK) in particular, and *Opinion 2/13* will therefore only be taken into account where it is relevant to the situation of the Member States.

Given that the European Court of Human Right (ECtHR) currently lacks any jurisdiction *ratione personae* over the European Union,<sup>8</sup> the overall object and purpose of EU accession to the ECHR is to close gaps in the European system of fundamental rights protection. After the EU continued to acquire competences in fields which had previously been the exclusive *domaine réservé* of the Member States, these gaps in human rights protection became most evident in cases where an EU Member State was obliged to implement Union law in violation of the Convention. The legal status quo *before* accession would, in such a case, not lead to a sanction of the actual ‘perpetrator’, namely the Union, but of the Member State implementing the legal act in question. This deficiency will, however, be redressed by the EU’s future accession to the Convention<sup>9</sup> by formally binding the EU to the ECHR.

Furthermore, accession is also intended to bring about a more coherent protection system and confirm the European Union’s standing as a community based on the rule of law,<sup>10</sup> and as a legal order that is fully committed to respecting and promoting human rights. By acceding to the Convention, the EU will become subject to the external supervision of the Strasbourg Court<sup>11</sup> which would then have the last say in human rights and which could hence ensure, in the event of normative conflicts, a coherent and uniform interpretation of these rights throughout Europe. This objective will be achieved by enabling individuals to submit individual complaints under Article 34 ECHR directly against the European Union in the case of an alleged violation of Convention rights<sup>12</sup> – under the reservation, however, that the application of national standards of protection (through Article 53 ECHR) must not be used to compromise the level of protection provided for by the Charter or the supremacy, unity, and effectiveness of EU law.<sup>13</sup>

---

<sup>8</sup> Cf. *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v Ireland*, Appl. no. 45036/98, ECHR 2005-VI, (2006) 42 E.H.R.R. 1, para 155.

<sup>9</sup> Paul Gragl, *The Accession of the European Union to the European Convention of Human Rights* (Oxford: Hart Publishing, 2013) 5.

<sup>10</sup> Hans Christian Krüger, ‘Reflections Concerning Accession of the European Communities to the European Convention on Human Rights’ (2002/2003) 21 *Penn State International Law Review* 89, 93-94 and 97.

<sup>11</sup> 47+1(2013)008rev2 (n 6) Preamble, recital 5.

<sup>12</sup> Jean-Paul Jacqué, ‘The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms’ (2011) 48 *Common Market Law Review* 995, 1007; cf. also Article 1(b) of Protocol 8 to the EU Treaties.

<sup>13</sup> *Opinion 2/13* (n 7) para 188.

But despite these apparent benefits for individuals and the overall development of human rights protection in general, British scepticism towards European human rights law may further be fuelled by this unprecedented step in the history of international law. Today human rights in the UK are protected domestically by the Human Rights Act (HRA)<sup>14</sup> which has attracted enormous criticism for giving an expansive effect to both the Convention rights and the ECtHR jurisprudence within UK law. This incorporation of an international human rights treaty into a domestic legal order has been criticized both because it shifts political power from the executive and legislative branches to the judiciary,<sup>15</sup> and because it, allegedly, undermines Parliamentary sovereignty.<sup>16</sup> ECtHR judgments, such as the now (in)famous *Prisoner Voting Rights* cases,<sup>17</sup> have led to allegations of illegitimate judicial activism on the part of the Strasbourg Court by casting ‘its shadow over the HRA’<sup>18</sup> through section 2(1) HRA, obliging the UK courts to ‘take into account’ any relevant Strasbourg jurisprudence on a particular Convention right. Scepticism vis-à-vis ECtHR case law, coupled with increasing criticism of European Union law (most prominently of the division of competences between the EU and the UK, particularly in the field of the free movement of persons and so-called ‘social tourism’) clearly illustrate why EU accession to the ECHR may not be a very popular step in the UK: From a critical point of view, accession could not only further add delays to litigation by introducing new mechanisms and procedures before the ECtHR,<sup>19</sup> and entangle the UK legal order in a multi-layered labyrinth of European human rights,<sup>20</sup> but also lead to a creeping transformation of both the Convention and Strasbourg’s jurisprudence into domestic law through the backdoor of the supremacy of EU law. In the eyes of the sceptics, EU accession to the ECHR could thus result ‘in a tighter net forming around UK membership to the Convention creating a Gordian knot from which Britain would struggle to be freed.’<sup>21</sup>

In the light of this considerable criticism, this chapter will therefore explore in part II the *negative* aspect of EU accession to the ECHR, or – in other words – what accession is *not* about: it is not about the Member States, but about the European Union itself and its subjection to the

---

<sup>14</sup> Human Rights Act, 1998 c. 42.

<sup>15</sup> Keith D. Ewing, ‘The Human Rights Act and Parliamentary Democracy’ (1999) 62 *Modern Law Review* 79, 79.

<sup>16</sup> Samantha Besson, ‘The Reception Process in Ireland and the United Kingdom’ in Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford: Oxford University Press, 2008) 49-52.

<sup>17</sup> *Hirst v the United Kingdom (No. 2)*, Appl. no. 74025/01, ECHR 2005-IX (2006) 42 E.H.R.R. 41; *Greens and M.T. v the United Kingdom*, Appl. nos 60041/08 and 60054/08, ECHR 2010-VI (2011) 53 E.H.R.R. 21.

<sup>18</sup> Richard Bellamy, ‘Political Constitutionalism and the Human Rights Act’ (2011) 9 *International Journal of Constitutional Law* 86, 97.

<sup>19</sup> *In concreto*, the co-respondent mechanism and the prior involvement procedure, which will be discussed in detail below.

<sup>20</sup> HM Government, ‘Review of the Balance of Competences between the United Kingdom and the European Union – Fundamental Rights’, 22 July 2014, § 5.11.

<sup>21</sup> *Ibid.*, § 5.17.

external scrutiny of the ECtHR. Moreover it is crucial to note that the UK's membership in both the EU and the ECHR has already changed the concept of Parliamentary sovereignty, and that accession will not further negatively impact on the UK constitutional system. Accordingly, the argument that the European human rights system now encompasses too many layers of protection, would be further complicated by EU accession to the ECHR, will be rebutted.

Subsequently, part III will examine the *positive* aspects of accession and demonstrate that its advantages outweigh the British fears by far. It will be analysed, especially, how the Member States might benefit from a – more or less – unified European human rights system in which only disputes between EU Member States might be exempt from Strasbourg's jurisdiction.<sup>22</sup> After accession, sceptics cannot only expect a 'tamer' version of the EU, which will be subject to the external supervision of the ECtHR, but also a 'truthful' hierarchy through the 'unification' of the Member States' international obligations under EU and ECHR law: in contrast to cases such as *Bosphorus*,<sup>23</sup> EU accession to the ECHR will prevent any future normative conflicts between EU law and the ECHR for the Member States, as the last say will in any case rest with the European Court of Human Rights.

## II. Tangled Hierarchies? Risk Assessment in the Light of the Status Quo

Before analysing what (negative) impact EU accession to the ECHR may have on the UK, it is necessary to illustrate the legal reasons for the existing British scepticism towards accession, i.e. the doctrine of Parliamentary sovereignty and the dualist approach of the UK towards international treaty law. This illustration of the legal *status quo* will help explain how the doctrine of Parliamentary sovereignty has already been modified by the UK's integration into both EU and ECHR law and by the European Communities Act 1972 (ECA)<sup>24</sup> and the HRA. This chapter will then assess what risks accession might entail for the British constitution: whether accession will in fact add another layer of human rights protection, and thus further complicate the already intricate three-dimensional web of fundamental rights regimes,<sup>25</sup> tangle the hierarchies of domestic and international law, and (allegedly) further erode the sovereignty of Parliament (for example by 'smuggling' the ECHR into domestic law as a Trojan horse of

---

<sup>22</sup> Opinion 2/13 (n 7) paras 201-214; seeing that, upon accession, the ECHR will become an integral part of EU law, the CJEU claims to have exclusive jurisdiction in any dispute between EU Member States and between the Member States and the EU regarding compliance with the ECHR on the basis of Article 344 TFEU.

<sup>23</sup> *Bosphorus v Ireland* (n 8).

<sup>24</sup> European Communities Act, 1972 c. 68.

<sup>25</sup> Monica Claes and Šejla Imamović, 'National Courts in the New European Fundamental Rights Architecture' in Vasiliki Kosta, Nikos Skoutaris, and Vassilis Tzevelekos (eds), *The EU Accession to the ECHR* (Oxford: Hart Publishing, 2014) 160.

EU law, by complicating the works of domestic courts, and by empowering the EU at the expense of the Member States); or whether the focus and impact of accession is not on the Member States at all, but on the European Union itself and that thus there is no imminent risk for the UK legal order.

### **A. British Exceptionalism: Parliamentary Sovereignty and Legal Dualism**

One reason for the UK's protective approach of certain constitutional fundamentals vis-à-vis international law lies in Dicey's 'orthodox' constitutional theory, according to which Parliament is supreme and sovereign and which subsequently entails that it has the exclusive right to make or unmake any law, or to override its legislation.<sup>26</sup> Furthermore, the United Kingdom is – at least when it comes to treaties<sup>27</sup> – the living proof of a dualist system. This means that the rights and obligations created by international treaties have no automatic effect in domestic law and that the supreme power of Parliament remains intact<sup>28</sup> – a defensive attitude that is also directed against other international bodies of law, such as Union and Convention law.

If, however, as emphasised in the *Thoburn* case, the Common Law accepted, *inter alia*, the Human Rights Act 1998 and the European Communities Act 1972 as 'constitutional' statutes, which would be immune from implied (but not express) repeal by Parliament,<sup>29</sup> a framework would already exist within which such superior constitutional norms could limit the authority of Parliament.<sup>30</sup> This approach could provide a firm and clear basis for construing statutes in a way which does not impinge upon constitutional rights protected by the Common law. The courts may certainly not challenge the validity of legislation itself, but they could construe legislation in such a way to effectively minimize any interference with fundamental rights.<sup>31</sup> Judicial review of primary legislation, however, remains – with two notable exceptions which will be discussed below – beyond the reach of the courts.

Conflicts between international and constitutional law could then be resolved by consistent interpretation in the concrete case, and not on the basis of a normative hierarchy.<sup>32</sup>

---

<sup>26</sup> Albert V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: MacMillan, 1902) 37-38.

<sup>27</sup> Customary international law is usually considered to form part of the Common law; cf. e.g., *Ex Parte Pinochet (No. 1)* [2000] 1 AC 61, 98; *Ex Parte Pinochet (No. 3)* [2000] 1 AC 147, 276; *R v Jones* [2006] UKHL 16.

<sup>28</sup> Anthony Aust, 'United Kingdom' in David Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge: Cambridge University Press, 2009) 476-477.

<sup>29</sup> *Thoburn v Sunderland City Council* [2003] QB 151 [62] and [68]-[69].

<sup>30</sup> Mark Elliott, 'Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention' (2002) 22 *Legal Studies* 340, 369.

<sup>31</sup> Kenneth A. Armstrong, 'United Kingdom – Divided on Sovereignty?' in Neil Walker (ed), *Sovereignty in Transition* (Oxford: Hart Publishing, 2003) 337-338.

<sup>32</sup> Anne Peters and Ulrich K. Preuss, 'International Relations and International Law' in Mark Tushnet, Thomas Fleiner, and Cheryl Saunders (eds), *Routledge Handbook of Constitutional Law* (London: Routledge, 2013) 42.

*Prima facie*, the same is also true for the ECHR and the EU Treaties, on the basis of which Parliament enacted both the ECA and the HRA and thus gave effect to the law of the EU and the ECHR – nonetheless with certain problems for the doctrine of Parliamentary sovereignty.

## **B. UK Membership in the European Union**

The ECA which gave effect to EU law within the United Kingdom is of unique interest to constitutional lawyers, as it raises the question whether the principle of supremacy of Union law brought about the end of Parliamentary sovereignty<sup>33</sup> and thus that of the very ‘Grundnorm’ of British legislative power.<sup>34</sup> The view that the ECA was conceived as an ordinary statute which was not intended to limit Parliamentary sovereignty<sup>35</sup> cannot be seriously upheld anymore. Proponents of the orthodox view may argue that section 2(1) ECA is the necessary constitutional turn of the tap which permits the flow of EU law into the UK legal order,<sup>36</sup> as it states that legal acts under the Treaties shall be given legal effect in the UK. However, Parliament cannot simply pass another statute and thereby constrain the domestic effects of EU law by impliedly repealing the ECA,<sup>37</sup> because this would not only conflict with the relevant CJEU case law on supremacy,<sup>38</sup> but also with the UK courts’ acceptance of that very supremacy<sup>39</sup> and the alleged ‘constitutional’ nature of the ECA.<sup>40</sup> Moreover, section 3(1) ECA expressly states that the meaning and effect of EU law is to be determined by the CJEU (which therefore has the last say on supremacy), while section 2(4) ECA practically obliges domestic courts to disapply primary legislation<sup>41</sup> which is inconsistent with Union law.<sup>42</sup> This means, in conclusion, that a partial change of the Hartian rule of recognition<sup>43</sup> or the Kelsenian ‘Grundnorm’ of the British constitutional system<sup>44</sup> has already taken place and that in the

---

<sup>33</sup> FA Trindade, ‘Parliamentary Sovereignty and the Primacy of European Community Law’ (1972) 35 *Modern Law Review* 375, 375.

<sup>34</sup> Magdalena Martinez, *National Sovereignty and International Organizations* (The Hague: Kluwer Law, 1996) 152.

<sup>35</sup> *Felixstowe Dock v British Transport Docks Board* [1976] CMLR 655.

<sup>36</sup> Armstrong (n 31) 330.

<sup>37</sup> Giuseppe Martinico and Oreste Pollicino, *The Interaction between Europe’s Legal Systems* (Cheltenham: Edward Elgar, 2012) 118.

<sup>38</sup> First clarified in Case 6/64 *Costa v ENEL* [1964] ECR 585.

<sup>39</sup> *R v Secretary of State for Transport, ex parte Factortame (No 2)* [1991] 1 AC 603.

<sup>40</sup> *Thoburn v Sunderland City Council* (n 299) [69].

<sup>41</sup> Joseph Jaconelli, ‘Constitutional Review and Section 2(4) of the European Communities Act 1972’ (1979) 28 *International and Comparative Law Quarterly* 65, 67-69.

<sup>42</sup> *R v Secretary of State for Transport, ex parte Factortame (No 1)* [1990] 2 AC 85; *R v Secretary of State for Employment, ex parte Equal Opportunities Commission* [1995] 1 AC 1.

<sup>43</sup> Sir William Wade, ‘Sovereignty – Revolution or Evolution?’ (1996) 112 *Law Quarterly Review* 568, 574.

<sup>44</sup> George Winterton, ‘The British Grundnorm: Parliamentary Sovereignty Revisited’ (1976) 92 *Law Quarterly Review* 591, 614-615.

context of Union law Parliament's will may no longer be entirely sovereign.<sup>45</sup> In other words, on the basis of the ECA, EU law, in all its manifestations, may 'freely flow' into the UK legal order and prevail over the latter, as confirmed by section 18 of the European Union Act 2011.<sup>46</sup> Yet all of this has been done under Parliamentary authority and continues to be correctly done under valid law, at least as long as Parliament chooses to refrain from express repeal of the ECA 1972<sup>47</sup> and to withdraw from the EU under Article 50 TEU.

### **C. UK Membership in the European Convention on Human Rights**

In contrast to the ECA, the HRA does not *per se* incorporate the international treaty in question – the Convention – into domestic law, but rather gives effect to certain ECHR provisions by giving a defined status to 'Convention rights' in the UK legal system.<sup>48</sup> By domesticating the ECHR through substantive incorporation of only particular Convention provisions, the HRA remains a domestic statute placing European human rights norms in a constitutional context<sup>49</sup> without binding the domestic courts directly to the ECtHR. Under section 2(1) HRA domestic courts are merely required to 'take into account' Strasbourg case law. Accordingly it has been argued that the HRA does not conflict with Parliamentary sovereignty.<sup>50</sup>

Nonetheless there is considerable scepticism vis-à-vis the HRA and Strasbourg's jurisprudence which lies in section 3(1), providing that 'so far as it is possible to do so' legislation 'must be read and given effect in a way which is compatible with Convention rights.' The main difference between the ECA and the HRA is that Parliamentary Acts in contravention of the HRA are merely subject to a 'declaration of incompatibility' (section 4 HRA) which does not affect the validity, application, or enforcement of the law and accordingly respects Parliamentary sovereignty. As a result, the ultimate decision as to whether to amend the law rests with Parliament, and not the courts.<sup>51</sup> However, the HRA's real power rests more in interpretative techniques of conflict avoidance under section 3(1) than in declarations of incompatibility.<sup>52</sup> Section 3(1) decrees a far-reaching interpretative obligation and thus may require the UK courts to depart from the textual meaning of legislation. In other words, it

---

<sup>45</sup> Sir William Wade, 'What Has Happened to the Sovereignty of Parliament?' (1991) 107 *Law Quarterly Review* 1, 2.

<sup>46</sup> European Union Act, 2011 c. 12.

<sup>47</sup> Neil MacCormick, 'Beyond the Sovereign State' (1993) 56 *Modern Law Review* 1, 3.

<sup>48</sup> Keith D. Ewing, 'The Human Rights Act and Parliamentary Sovereignty' (1999) 62 *Modern Law Review* 79, 84.

<sup>49</sup> Armstrong (n 31) 332-333.

<sup>50</sup> *R v Secretary of State for the Home Department, ex parte Simms* [1999] QB 349.

<sup>51</sup> Alice Donald, Jane Gordon, and Philip Leach, 'The UK and the European Court of Human Rights', *Equality and Human Rights Commission*, Research Report 83 (London Metropolitan University, 2012) 23.

<sup>52</sup> Armstrong (n 31) 334.

requires the courts to depart from Parliament's legislative intention<sup>53</sup> – a feature which does not sit easily with orthodox constitutional theory.<sup>54</sup> One could certainly argue that when a court approaches the outermost boundary of its interpretative leeway, a declaration of incompatibility must be issued, since the use of section 3(1) HRA in such a case would inevitably cross the constitutional divide between interpreting and legislating.<sup>55</sup> And although the introduction of the HRA certainly is an indication that a profound constitutional change has taken place,<sup>56</sup> the broad terms of the HRA necessarily require elaboration by the courts in order to be applied to the circumstances of new cases.<sup>57</sup> Lastly, this also means that if a court is issuing such a declaration, it is simply doing what Parliament has instructed it to do under section 4 HRA.<sup>58</sup>

#### **D. EU Accession to the ECHR: Adding Layers and Tangling Hierarchies?**

Seeing that both the ECA and the HRA have already considerably altered the UK's constitutional landscape, we must now raise the question what this means for accession. Does it really add new legal layers of human rights protection to the existing system of the domestic plane (informed by both the ECA and the HRA), the EU level (consisting of the 'general principles of law' developed by the CJEU and the EU Charter of Fundamental Rights (EUCFR)), and the 'Strasbourg regime' (comprising the Convention and the ECtHR)? Does accession in fact tangle the hierarchies of domestic, European Union, and ECHR law, and thus further encroach upon Parliamentary sovereignty? The following sections will answer these questions by not only presenting and analysing the most persuasive arguments against accession, but also by showing that they can easily be rebutted. They will show that in fact, not much will actually change on the domestic level, as accession is about binding and constraining the EU, and not its Member States, and that any concerns for further intrusions into the doctrine of Parliamentary sovereignty are unfounded.

##### *i. 'Timeo Danaos et dona ferentes': The ECHR as a Trojan Horse in EU Law*

---

<sup>53</sup> *Ghaidan v Mendoza* [2004] UKHL 30, [2004] 3 WLR 113 [30].

<sup>54</sup> Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2009) 96.

<sup>55</sup> Liora Lazarus et al., 'Reconciling Domestic Superior Courts with the ECHR and the ECtHR: A Comparative Perspective', *Submission to the Commission on a Bill of Rights* (University of Oxford, 2011) 70.

<sup>56</sup> Armstrong (n 31) 343.

<sup>57</sup> Aileen Kavanagh, 'The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998' (2004) 24 *Oxford Journal of Legal Studies* 259, 267.

<sup>58</sup> *Regina v Secretary of State for the Home Department, ex parte Anderson* [2002] UKHL 46 [63].



There is considerable anxiety that the UK constitutional order will gradually lose full control of the ‘domesticated’ ECHR,<sup>59</sup> i.e. the HRA and its domestic effects. It is feared that after EU accession the ECHR might assume similar features as EU law, namely direct effect and supremacy.<sup>60</sup> The ‘gift’ of effective human rights protection under the ECHR is therefore – as in Virgil’s words in the title of this section<sup>61</sup> – often seen as a Trojan horse, rampant to prevail over the UK constitution in the disguise of EU law. It is true that, upon accession, the EU will be bound under international law by the Convention. Pursuant to the settled case of the CJEU, the Convention will, as an international agreement entered into by the Union, also form an integral part of the EU legal order.<sup>62</sup> Given its clear and precise provisions which are largely not subject to subsequent implementation measures<sup>63</sup> the Convention will thus – in its manifestation as EU law – also have direct effect in and supremacy over domestic law.<sup>64</sup> Within the scope of application of European Union law, all national courts would become ‘human rights courts’ under the EU obligation to review domestic law in the light of the ECHR and therefore be obliged to enforce the ECHR within the interpretative boundaries of EU law by, for instance, disapplying contravening national law.<sup>65</sup> The Convention rights would then not flow into the UK legal order through the interpretative filter-mechanism of the HRA, but through the fully opened tap of the ECA. This also implies that under section 3(1) ECA, the last say on this issue would rest with the CJEU which remains the ultimate guardian of Union law, including ‘unionized international law’.<sup>66</sup> In the UK, this would extend the powers and responsibilities of the courts, which must, in the case of conflict with domestic law, set contravening law aside under the ECA, and not leave the review of compliance of primary legislation to Parliament.<sup>67</sup>

However, things are not as intrusive as they seem at first glance, as the ECHR is already indirectly binding via EU law. Whenever Member States are implementing EU law (Article 51(1) EUCFR) or are acting ‘within the scope of EU law’, i.e. in all situations governed

---

<sup>59</sup> Giuseppe Martinico, ‘Is the European Convention Going to be “Supreme”? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts’ (2012) 23 *European Journal of International Law* 401, 424.

<sup>60</sup> Helen Keller and Alec Stone Sweet, ‘Assessing the Impact of the ECHR on National Legal Systems’ in Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford: Oxford University Press, 2008) 681.

<sup>61</sup> *Virgil*, Aeneid, Book II, 49.

<sup>62</sup> Case 181/73 *Haegeman v Belgian State* [1974] ECR 449, para 5; confirmed in Opinion 2/13 (n 7) para 180.

<sup>63</sup> Case 12/86 *Demirel* [1987] ECR 3719, para 14.

<sup>64</sup> Gragl (n 9) 98-99.

<sup>65</sup> Claes and Imamović (n 25) 167.

<sup>66</sup> E.g., Case C-280/93 *Germany v Council (Bananas – Common Organization of the Markets)* [1994] ECR I-4973, para 144; and Case C-149/96 *Portugal v Council (Market Access in Textile Products)* [1999] ECR I-8395, paras 47 et seq.

<sup>67</sup> Claes and Imamović (n 255) 167.

by EU law,<sup>68</sup> they are bound by the directly effective and supreme EU Charter of Fundamental Rights. And most importantly, under Article 52(3) EUCFR, the meaning and scope of those Charter rights which correspond to Convention rights shall be, at the minimum, the same as those laid down by the Convention (subject to a more extensive protection of fundamental rights by the EU). Furthermore, this same obligation to comply with EU fundamental rights which correspond to ECHR rights in the domestic application of Union law even existed before the Charter entered into force, namely through the general principles of EU law, which are informed by the ECHR,<sup>69</sup> and are binding on both the Union and its Member States via Article 6(3) TEU.<sup>70</sup> This means that even before accession, the UK courts are, within the scope of EU law, already bound by the ECHR<sup>71</sup> and Strasbourg jurisprudence<sup>72</sup> through the EUCFR under the duty of consistent interpretation in Article 52(3) EUCFR.<sup>73</sup>

However, the crucial *caveat* is that, even though the ECHR may have the same effects as EU law, it can only have these effects *qua* EU law. In accordance with the CJEU's judgment in *Melloni*,<sup>74</sup> the CJEU held in *Opinion 2/13* that Article 53 ECHR must not be interpreted as granting the Member States the power to guarantee a standard of protection that does not correspond to the Charter and a uniform interpretation and application of Union law.<sup>75</sup> Furthermore Article 6(3) TEU 'does not require the national court, in case of conflict between a provision of national law and the ECHR, to apply the provisions of that Convention directly, disapplying the provision of national law incompatible with the Convention.'<sup>76</sup> Even if the CJEU changed its position and granted the ECHR supremacy and direct effect after accession,<sup>77</sup> this would still occur *qua* EU law and would not change the Member States' situation in comparison with the *status quo* under Article 6(3) TEU.<sup>78</sup>

The elephant in the room remains, nonetheless, a potential spill-over effect from EU competence into non-competence areas. In other words, the CJEU, may – as it has occasionally

---

<sup>68</sup> Case C-617/10 *Åklagaren v Åkerberg Fransson* [2014] ECR I-(nyr), para 19.

<sup>69</sup> Cf. e.g., Case C-260/89 *ERT* [1991] ECR I-2925, paras 41-45.

<sup>70</sup> Claes and Imamović (n 25) 167.

<sup>71</sup> Case C-400/10 PPU *McB* [2010] ECR I-8965, para 53; Joined Cases C-92/09 and C-93/09 *Schecke and Eifert* [2010] ECR I-11063, paras 51-52.

<sup>72</sup> Case C-279/09 *DEB* [2010] ECR I-13849, para 35.

<sup>73</sup> This finding is all the more important after the CJEU's judgment in Joined Cases C-411/10 and C-493/10 *N.S. and M.E.* [2011] ECR I-13905, paras 116-122 where the Court held that Protocol No. 30 to the Treaties does not exempt the UK from the obligation to comply with the Charter; cf. also Steve Peers, 'The "Opt-Out" that Fell to Earth: The British and Polish Protocol Concerning the EU Charter of Fundamental Rights' (2012) 12 *Human Rights Law Review* 375, 384.

<sup>74</sup> Case C-399/11 *Melloni* [2013] ECR I-(nyr), paras 55-64.

<sup>75</sup> *Opinion 2/13* (n 7) para 189.

<sup>76</sup> Case C-571/10 *Kamberaj v IPES* [2012] ECR I-(nyr), para 63.

<sup>77</sup> Giuseppe Bianco and Giuseppe Martinico, 'Dialogue or Disobedience? On the Domestic Effects of the ECHR in the Light of the *Kamberaj* Decision' (2014) 20 *European Public Law* 435, 449.

<sup>78</sup> *Opinion 2/13* (n 7) para 180.

done, e.g. in *Åkerberg Fransson* – more fully impose a fundamental rights review over Member State action and move beyond the application of fundamental rights within the scope of EU law. Such a competence creep is more likely in the area of fundamental rights than in other areas, because it is difficult to separate the different interlocking layers of European fundamental rights protection. On the other hand, the CJEU may be careful not to stretch its competence given the obvious opposition of the Member States. In fact, concerns regarding the creeping incorporation of the rights laid down in additional protocols to the ECHR which have not been ratified by the UK<sup>79</sup> turn out to be unfounded. Admittedly, the Explanations to the Charter expressly state that their ‘reference to the ECHR covers both the Convention and the Protocols to it,’<sup>80</sup> which enable the CJEU to take them into account as interpretative tools. However, although the CJEU referred to the relevant Strasbourg case law regarding the *ne bis in idem* principle and Protocol No. 4 to the ECHR in cases such as *Åkerberg Fransson*<sup>81</sup> and *Bonda*,<sup>82</sup> the Court only used both these Convention rights and the ECtHR case law in order to resolve difficult interpretative issues in the context of Article 50 EUCFR,<sup>83</sup> which is binding on the Member States anyway. Accession will not change this *status quo*, as the EU will only accede to Protocols No. 1 and 6 to the ECHR under Article 1 of the Accession Agreement, simply because only these two Protocols have already been ratified by all EU Member States. In the end, there is no need for concerns at all in this regard, as most of the rights set forth in the additional protocols are also protected under the Charter (cf. e.g. Protocol No. 12 on non-discrimination and Article 21 EUCFR, or Protocol No. 13 on the abolition of the death penalty in all times and Article 2 EUCFR).<sup>84</sup> Thus in the context of additional protocols, no real legal issues arise for the UK.

The European Commission correctly emphasized in its application for *Opinion 2/13* that the pre-accession situation of the Member States in relation to the Convention must be preserved, as indicated in Article 2 of Protocol No. 8 to the Treaties, because some Member States have made reservations under Article 57 ECHR in respect of some provisions of the Convention or of one or more of the Protocols. Consequently, Article 1(3) of the Accession Agreement limits the scope of the Union’s commitments *ratione personae* to the EU alone, and accordingly, accession does not create any new obligations under Union law which

---

<sup>79</sup> The UK has not ratified Protocol No. 4 (CETS No. 46), Protocol No. 7 (CETS No. 117), and Protocol No. 12 (CETS No. 177) to the Convention.

<sup>80</sup> Explanations relating to the Charter of Fundamental Rights, OJ C 303/17, 14 December 2007, Article 52, 33.

<sup>81</sup> Case C-617/10 *Åklagaren v Åkerberg Fransson* (n **Error! Bookmark not defined.**) paras 14-15.

<sup>82</sup> Case C-489/10 *Criminal Proceedings against Łukasz Marcin Bonda* [2012] ECR I-(nyr), paras 23 and 36.

<sup>83</sup> Steve Peers and Sacha Prechal, ‘Article 52’ in Steve Peers, Tamara Harvey, Jeff Kenner, and Angela Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Oxford: Hart Publishing, 2014) para 52.114.

<sup>84</sup> Jacqu  (n 122) 1003.

'[go] beyond the scope of the pre-existing individual legal situations of the Member States in relation to the Convention and its protocols.'<sup>85</sup>

In conclusion, the revolutionary change dreaded by UK sceptics will not happen upon accession, but has already occurred a long time ago, when the UK became a Member State of the ECHR and the EU. For the Member States, accession therefore rather seems like old wine in new bottles.<sup>86</sup>

### *ii. Complicating the Work of National Courts*

Even before accession, national courts are often confronted with ambiguity of and the departure from previous jurisprudence by the Luxembourg and Strasbourg courts, which may be difficult to absorb into the domestic system. This is the case in particular if the CJEU or the ECtHR misunderstood the domestic law position.<sup>87</sup> As the lynchpins in enforcing both the law of the EU and the Convention, the Member State courts are, to an increasing extent, confronted with two extremely intricate bodies of law which must be implemented on the national level.<sup>88</sup> Besides this already-existing complexity, accession is feared to bring about new procedural relationships and issues, and hitherto unknown dynamics, which could prove detrimental to the effective work of the UK courts and thus the overall protection of human rights.<sup>89</sup> This tangling of hierarchies through such new procedural routes (e.g. by the prior involvement procedure, discussed below) may force individual litigants to incur enormous financial costs and procedural delays, which, at the end of the day, could prove more detrimental than beneficial to the cause of human rights protection. Moreover, whatever one might speculate as to what exact impact accession will have on national courts, it is noteworthy that the Accession Agreement fails to address this issue at all in order to not interfere with the division of competences between the EU and the Member States and thus the autonomy of the Union legal order. This means that domestic judges will have to work out these problems for themselves.<sup>90</sup>

The main problem the Member States will face after accession is a scenario in which individuals allege that their fundamental rights have been violated, and where the courts must – if such a case is within the scope of EU law – decide whether or not to request a preliminary ruling from the CJEU. Member State courts of last resort are obliged under Article 267(3)

---

<sup>85</sup> European Commission, 'Request for an Opinion', SJ.F(2012) 2701339, 4 July 2013, paras 81-84.

<sup>86</sup> Claes and Imamović (n 25) 168.

<sup>87</sup> Rt Hon Lady Justice Arden DBE, 'Peaceful or Problematic? The Relationship between National Supreme Courts and Supranational Courts in Europe' (2010) 29 *Yearbook of European Law* 3, 8-9.

<sup>88</sup> Noreen O'Meara, "'A More Secure Europe of Rights?'" The European Court of Human Rights, the Court of Justice of the European Union and EU Accession to the ECHR' (2011) 12 *German Law Journal* 1813, 1829.

<sup>89</sup> Claes and Imamović (n 255) 169.

<sup>90</sup> O'Meara (n 888) 1831.

TFEU to request a preliminary ruling from Luxembourg when the interpretation of EU law in general or the validity of Union legislation are at issue,<sup>91</sup> but these rules are not watertight: a domestic court may, for instance, assume that EU legislation in question was compatible with fundamental rights and consequently valid,<sup>92</sup> and thus not request a preliminary ruling. Because individual applicants do not have a right to request a preliminary reference, they might submit their case directly to the ECtHR. Strasbourg would then be required to adjudicate upon the conformity of an EU act with human rights, without the CJEU having the opportunity to decide on the validity of a provision of secondary law or the interpretation of a provision of primary law first.<sup>93</sup> However, the Accession Agreement foresees and addresses this scenario. In this event, the so-called ‘prior involvement procedure’ under Article 3(6) of the Accession Agreement would be triggered, under which Strasbourg has to afford the CJEU sufficient time to assess the compatibility of EU law with the Convention rights at issue, if it has not already done so before the ECtHR considers the case. This procedure will not only provide Luxembourg with the opportunity to interpret EU law before Strasbourg does so, but it will thus also comply with the requirement that local remedies be exhausted before the ECtHR accepts a case (Article 35(1) ECHR). Following *Opinion 2/13*, the prior involvement procedure must also ensure that it will not be the ECtHR deciding whether the CJEU has already given a ruling on the question at issue in that case, but the competent EU institution, and that the scope of the procedure will not solely be limited to questions of validity of secondary law, but to its interpretation as well.<sup>94</sup>

A major concern of the domestic courts is lengthy litigation which would be caused by involving three court systems, and the cost of justice being delayed. The UK courts will of course have an interest in having such cases off their dockets as fast as possible, and passing them on to either the ECtHR or the CJEU (although the case will return from the latter court), and not to further increase their workload. Lastly, domestic courts will also struggle with the question of overlapping fundamental rights catalogues and the question when to apply which body of law and the consequences which this will entail.<sup>95</sup>

However, none of these concerns is caused or further worsened by accession: firstly, the UK courts already are under the obligation to request a preliminary ruling in cases where Article 267(3) TFEU is applicable, which will prevent the triggering of the prior involvement

---

<sup>91</sup> Case 314/85 *Firma Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199, para 15.

<sup>92</sup> Tobias Lock, ‘End of an Epic? The Draft Agreement on the EU’s Accession to the ECHR’ (2012) 31 *Yearbook of European Law* 162, 181.

<sup>93</sup> 47+1(2013)008rev2 (n 6) 27, para 65.

<sup>94</sup> *Opinion 2/13* (n 7) paras 236-241 and 242-247.

<sup>95</sup> Claes and Imamović (n 255) 169-170.

procedure and hence not differ from the *status quo*. If, however, the prior involvement mechanism is initiated, the Explanatory Report to the Accession Agreement provides that the CJEU shall ensure that its rulings are delivered quickly in order not to unduly delay the proceedings in Strasbourg. Such accelerated procedures before the CJEU already exist, e.g. the expedited preliminary ruling procedure under Article 23(a) of the CJEU Statute and Article 105 of the CJEU Rules of Procedure, which allow the Luxembourg Court to give rulings within six to eight months.<sup>96</sup> In comparison with the overall length of proceedings, this rather short period of time appears to be a minimal price to pay for a more effective protection of human rights. Finally, sceptics must also accept that the combined application of overlapping fundamental rights catalogues is not a new phenomenon brought about by accession: even today, the Member State courts are already confronted with minimally three spheres of human rights protection and must accordingly deal with an intricate system of multilevel human rights protection. So far, the UK courts have fared well in this respect, particularly by interpreting the relevant domestic piece of legislation (the ECA and the HRA) in consistency with the EU Treaties and the Convention. Hence there is no reason why this should change for the worse after accession and the introduction of the prior involvement procedure.

### *iii. EU Competence Creep, in Particular through Positive Obligations*

One of the major reasons for British scepticism towards EU accession to the ECHR lies in the minefield that is the division of competences between the Union and the Member States. The first concern is the EU's potential gain of competences at the expense of the Member States in the course of accession. The second concern is that, subsequently, Parliamentary sovereignty could be further undermined by EU law imposing positive obligations on the UK and thus to enact relevant legislation. Such an effect on Member State competences is above all seen in the thorny field of social rights<sup>97</sup> – especially because of the ECtHR's continuing reading of such obligations into the Convention.<sup>98</sup> Seeing that the Union in any event has only little competence<sup>99</sup> in the area of fundamental rights protection,<sup>100</sup> the possible imposition of positive obligations on the EU (which would then be subsequently 'passed on' to the Member States)

---

<sup>96</sup> 47+1(2013)008rev2 (n 6) 27, para 69.

<sup>97</sup> Theodor Schilling, 'On Equal Footing: The Participation Rights Envisaged for the European Union after its Accession to the European Convention on Human Rights' (2014) 14 *Human Rights Law Review* 197, 217.

<sup>98</sup> David Harris, Michael O'Boyle, Ed Bates, and Carla Buckley, *Law of the European Convention on Human Rights* (3<sup>rd</sup> edn; Oxford: Oxford University Press, 2014) 22-24.

<sup>99</sup> Cf. e.g., Article 19 TFEU giving the Union the competence to take appropriate action in order to combat any form of discrimination.

<sup>100</sup> Edouard Dubout, 'The Protection of Fundamental Rights and the Allocation of Competences in the EU: A Clash of Constitutional Logics' in Loïc Azoulai (ed), *The Question of Competence in the European Union* (Oxford: Oxford University Press, 2014) 193.

upon accession sits uncomfortably with the sceptics who consider this an excessive intrusion upon national sovereignty.<sup>101</sup> And even though the CJEU declared that respect for fundamental rights cannot ‘have the effect of extending the scope of the Treaty provisions beyond the competences of the [Union]’,<sup>102</sup> these anxieties persisted. As the EU will assume the same duties as its Member States under Article 1 ECHR to secure the Convention rights to everyone within its jurisdiction, the ECtHR can only be expected to apply consistent reasoning and thus claim that merely refraining from violations may be insufficient.<sup>103</sup>

In order to alleviate these anxieties, Article 6(2) TEU not only sets forth the competence and obligation of the EU to accede to the Convention, but also provides that accession ‘shall not affect the Union’s competences as defined in the Treaties.’ This assurance is almost verbatim reiterated in Article 2 of Protocol No. 8 to the Treaties, according to which the Accession Agreement ‘shall ensure that accession [...] shall not affect the competences of the Union or the powers of its institutions.’ This requirement was duly taken into account by the drafters of the Accession Agreement and is now reflected in its Article 1(3) which reads that ‘[n]othing in the Convention or the protocols thereto shall require the European Union to perform an act or adopt a measure for which it has no competence under European Union law.’

Nonetheless, sceptics might interject that all human rights, even those outside the Union’s competences, could hypothetically be relevant for the EU and the Member States, as the example of Regulation 1236/2005/EC<sup>104</sup> demonstrates in the area of the free movement of goods, as it prohibits the transfer of instruments which could be used for torturing.<sup>105</sup> Subsequently, the ECtHR could, after accession, determine that the Union has violated the Convention by *not* enacting a particular piece of legislation. And if this very piece of legislation were not to fall into EU competence, the competence in this field of law might implicitly shift to the Union at the expense of the Member States<sup>106</sup> – which may subsequently lead to an obligation under EU law for the UK to implement the relevant Union rules or adopt relevant legislation under the EU’s aegis.

However, this is incorrect for a number of reasons. First of all, the Union is, in the exercise of its competences, very restricted due to the principle of conferral in Article 5(2) TEU which

---

<sup>101</sup> Catherine Stubberfield, ‘Lifting the Organisational Veil: Positive Obligations of the European Union Following Accession to the European Convention on Human Rights’ (2012) 19 *Australian International Law Journal* 117, 141.

<sup>102</sup> Case C-249/96 *Grant v South-West Trains Ltd.* [1998] ECR I-621, para 45.

<sup>103</sup> Stubberfield (n 101) 133.

<sup>104</sup> Council Regulation (EC) 1236/05 concerning trade in certain goods which could be used for capital punishment, torture, or other cruel, inhuman or degrading treatment or punishment [2005] OJ L 200/1.

<sup>105</sup> Giorgio Gaja, ‘Accession to the ECHR’ in Andrea Biondi, Piet Eeckhout, and Stefanie Ripley (eds), *EU Law after Lisbon* (Oxford: Oxford University Press, 2012) 183-184.

<sup>106</sup> Gragl (n 9) 195.

permits the EU only to act within the competences conferred upon it by the Member States in the Treaties. Any competences not conferred upon the EU in the Treaties remain with the Member States. This corresponds to Article 1(1) TEU, underscoring the position of the Member States as ‘Masters of the Treaties’ which have voluntarily conferred competences upon the EU. Thus, given the EU’s lack of legislative *Kompetenz-Kompetenz* (i.e. the competence to extend its own legislative powers without Member State consent), it is unlikely that an international court such as the ECtHR could interfere with the division of competences between Member States and the EU and unilaterally change this balance of powers. This would evoke severe criticism on part of the Member States, in the light of the *Lissabon*<sup>107</sup> and *Honeywell*<sup>108</sup> decisions of the German *Bundesverfassungsgericht*, and the UK would definitely not stand alone in such an event. Moreover, the CJEU itself held in its *Opinion 1/91* that it will neither accept any external interference with the Union-internal division of competences,<sup>109</sup> nor any hidden amendments to the Treaties in international agreements.<sup>110</sup>

Lastly, even if a question regarding any positive obligations of the Union outside its competences arose in Strasbourg, the Member State in question may subsequently join the EU as co-respondent under Article 3(3) of the Accession Agreement.<sup>111</sup> In this case, the ECtHR would then hold the Member State and the EU jointly responsible, pursuant to Article 3(7) of the Accession Agreement, without the further need of adjudicating on the allocation of powers. The respondents may then decide how to remedy the violation of the Convention on the basis of EU law and Strasbourg would not ‘clandestinely’ afford the EU additional competences at the expense of the Member States.<sup>112</sup> In *Opinion 2/13*, the CJEU voiced concerns that Article 3(7) would not preclude a Member State from being held responsible for the violation of a provision of the ECHR to which that Member State may have made a reservation under Article 57 ECHR.<sup>113</sup> This, however, is logically impossible, given that the EU can only join proceedings as co-respondent where there is a Member State as respondent. This presupposes that the Member States is under an obligation under the Convention, and has – in other words – not made a reservation in the first place. This problem therefore seems to be pre-empted on

---

<sup>107</sup> 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09 *Lissabon – Entscheidungen des Bundesverfassungsgerichts* (BVerfGE) 123, 267.

<sup>108</sup> 2 BvR 2661/06 *Honeywell* – BVerfGE 126, 286.

<sup>109</sup> *Opinion 1/91 EEA I* [1991] ECR I-6079, paras 34-35.

<sup>110</sup> *Ibid.*, paras 58 and 61.

<sup>111</sup> The ‘co-respondent mechanism’ will be considered in detail in section III.B. below.

<sup>112</sup> Gragl (n 9) 195.

<sup>113</sup> *Opinion 2/13* (n 7) paras 226-228.



the basis of the ECHR anyway.<sup>114</sup> This means, in conclusion, that accession will not have any effect of imposing obligations on the EU which are beyond the scope of its competences,<sup>115</sup> and that any anxieties regarding the further undermining of Parliamentary sovereignty in the UK are unfounded.

### **III. Truthful Hierarchies: The Benefits of Accession**

After having applied some relieving balm on the sceptics' doubts regarding accession, the present section will now analyse its positive aspects and show that the advantages of accession will outweigh any fears of the Member States by far. Given the absence of a codified UK Constitution, it may be more difficult for the British than for representatives of Continental legal orders to accept that a constitutional debate can result in a single document<sup>116</sup> which unifies and hierarchizes a multitude of legal bodies, such as the ECHR, the EU, and the Member States. The *status quo* of these three bodies of law is shaped by a heterarchical plurality of legal systems, where there is no ultimate authority to decide which system would prevail in the case of conflicts, and each system will ultimately resolve such clashes by confirming its own autonomy and supremacy.<sup>117</sup> The advantage of accession is, however, that it will unify the European human rights system and give Strasbourg the last say in matters of human rights, make the EU and its Member States equal partners in proceedings before the ECtHR (which would also prevent future normative conflicts between EU law and the ECHR), and establish clear legal hierarchies, which may ideally simplify the current pluralist *status quo* of European human rights law. The following subsections will demonstrate how the Member States, including the UK, will benefit from this unified and hierarchized system.

#### **A. External Scrutiny and the Taming of the Shrew**

It is evident that the EUCFR cannot compensate for the added value of an impartial, objective, and external scrutiny by an international court<sup>118</sup> such as the ECtHR. Moreover, accession would also remove the increasing contradiction between the human rights commitments required from future EU Member States and the Union's lack of accountability vis-à-vis the

---

<sup>114</sup> Tobias Lock, 'Oops! We Did It Again – The CJEU's Opinion on EU Accession to the ECHR', *Verfassungsblog*, 18 December 2014, <http://www.verfassungsblog.de/en/oops-das-gutachten-des-eugh-zum-emrk-beitritt-der-eu/#.VJf3-AIAKY>.

<sup>115</sup> European Commission, 'Request for an Opinion' (n 85) para 76.

<sup>116</sup> Ingolf Pernice, 'Multilevel Constitutionalism in the European Union' (2002) 27 *European Law Review* 511, 514.

<sup>117</sup> Piet Eeckhout, 'Human Rights and the Autonomy of EU Law: Pluralism or Integration?' (2013) 66 *Current Legal Problems* 169, 173.

<sup>118</sup> R. Alonso García, 'The General Provisions of the Charter of Fundamental Rights of the European Union' (2002) 8 *European Law Journal* 492, 500-501.

ECtHR.<sup>119</sup> Otherwise, it would remain highly hypocritical to make ratification of the Convention a condition for EU membership, when the Union itself is exempt from Strasbourg's scrutiny.<sup>120</sup> This is all the more important in situations where there is no Member State involvement, but only action by the EU. This presents considerable gaps in the protection by the ECtHR.<sup>121</sup> In the *Connolly* case, for example, Strasbourg found that the alleged violation was not attributable to any Member State, nor was the EU bound (yet) by the ECHR.<sup>122</sup> A similar gap can be seen in the *Biret* case in which an importer attempted to claim damages from the Union for an embargo against the importation of US beef, and failed before the CJEU.<sup>123</sup> When the company subsequently claimed an infringement of its procedural rights under Articles 6 and 13 ECHR, because it did not have a chance to directly challenge the relevant EU directives before the CJEU, the ECtHR concluded that these violations related solely to deficits in the judicial protection offered by the European Union and were thus not attributable to the Member States. Due to this lack of jurisdiction *ratione personae* over the EU, the case was declared inadmissible.<sup>124</sup> Accession will eventually close this gap in the external scrutiny of the ECtHR, as the EU will subsequently be directly responsible in such cases.<sup>125</sup>

In this respect, sceptics might dread that the Member States will be subject to new constraints under EU law in relation to the Convention, and that due to the increasingly interwoven European human rights system after accession, it will solely be the CJEU that will take the role of the national courts in the international human rights discourse. Yet it remains nonetheless incorrect to assume that the Luxembourg and Strasbourg courts are the only two European courts, to the exclusion of national courts, as both will continue to depend on the support of the Member State courts.<sup>126</sup> After navigating at the fringes of the scope of application of Union law in *Åkerberg Fransson*,<sup>127</sup> the CJEU aptly proved in a couple of recent decisions that certain fundamental rights matters are better left with the relevant Member State

---

<sup>119</sup> Krüger (n 100) 94.

<sup>120</sup> Philip Alston and J.H.H. Weiler, 'The European Union and Human Rights: Final Project Report on an Agenda for the Year 2000' in Antonio Cassese (ed), *Leading by Example: A Human Rights Agenda for the European Union for the Year 2000* (Florence, European University Institute, 1998) 55.

<sup>121</sup> Lock (n 922) 164.

<sup>122</sup> *Connolly v 15 Member States of the European Union*, Appl. no 73274/01, ECHR 2008-V (ECtHR, 9 December 2008).

<sup>123</sup> Case C-93/02 P *Biret International v Council* [2003] ECR I-10497.

<sup>124</sup> *Biret v 15 Member States of the European Union*, Appl. no 13762/04, ECHR 2008-V (ECtHR, 9 December 2008).

<sup>125</sup> Lock (n 922) 164.

<sup>126</sup> Christina Eckes, 'EU Accession to the ECHR: Between Autonomy and Adaptation' (2013) 76 *Modern Law Review* 254, 284.

<sup>127</sup> Daniel Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, National Courts, and the New Framework of Fundamental Rights Protection in Europe' (2013) 50 *Common Market Law Review* 1267, 1277.

authorities, provided they conform to the principle of proportionality,<sup>128</sup> respect EU fundamental rights as yardsticks when acting within the limits of their national procedural autonomy,<sup>129</sup> and where they act outside the scope of Union law.<sup>130</sup> These cases reveal that Luxembourg is not as intrusive as often presented and that it does not unnecessarily intervene in questions of national law.<sup>131</sup> Accordingly, there is no reason to assume that this approach would change after accession.

In fact, accession could prove very beneficial for the UK in terms of a feared EU competence creep. Accession is expected to bring forth a ‘tamer’ version of the EU, because it is subjected to the external jurisdiction of the Strasbourg Court. Given this new scrutiny of EU legal acts by the ECtHR, it is doubtful whether the CJEU or any other Union institution would attempt to claim any new competences at the expense of the Member States. Even though new competences would primarily mean additional powers in legislating and adjudicating, they would also include new responsibilities. These might, eventually, lead to an increased number of judgments against the European Union in Strasbourg. As a matter of fact, the *Bosphorus* case in itself should be a reason for the UK to support accession: if the EU did not accede to the Convention and the Member States were to implement future EU legislation in violation of the ECHR, there is a risk of Member States being held accountable by the ECtHR for human rights violations of the EU. Currently this possibility is mitigated by the presumption that the Union protects fundamental rights in a manner equivalent to that for which the Convention provides as a result of which the ECtHR restricts its review of Member States’ responsibility for EU acts.<sup>132</sup> But there is no guarantee that the ECtHR will not depart from this presumption in the future, even in a non-accession scenario. In such an event, the UK, or any other Member State, would stand alone in Strasbourg, and would be required to take the entire blame for the implementation of EU law in contravention to the ECHR. After accession, however, both the Member State in question and the Union will have the right to defend their actions as equal partners before the ECtHR.

## **B. The Co-Respondent Mechanism: Equal Partners in Strasbourg**

To the chagrin of many law students, the EU’s specific legal status as a non-State entity of quasi-federal character is highly complicated, as the ‘federation’ (EU) legislates and the ‘states’

---

<sup>128</sup> Case C-234/12 *Sky Italia* [2013] ECR I-(nyr), para 26.

<sup>129</sup> Case C-418/11 *Texdata Software GmbH* [2013] ECR I-(nyr), para 85.

<sup>130</sup> Case C-206/13 *Siragusa v Regione Sicilia* [2014] paras 26-36.

<sup>131</sup> *Eeckhout* (n 1177) 186.

<sup>132</sup> *Bosphorus v Ireland* (n 8) paras 155-158.

(Member States) implement such legislation,<sup>133</sup> and, conversely, the ‘states’ enact the ‘federation’s’ constitution (the Treaties) and the latter implements it. After accession, when questions regarding the compatibility of national measures with the Convention arise, individual applicants will have to face the question of responsibility: is the Member State which enacted the measure responsible for the alleged human rights violation, or can the EU be held responsible for the underlying EU legal act which the Member State authorities had to apply?<sup>134</sup> In order to ensure that individual applications will be correctly addressed to the Member States and/or the Union as appropriate (Article 1(b) of Protocol No. 8 to the Treaties), Article 3 of the Accession Agreement introduces the so-called co-respondent mechanism. Under this new mechanism, the Member States may join the EU as co-respondents in proceedings before the ECtHR, if a primary EU law provision is allegedly in violation of the Convention (Article 3(3)); or the EU may join one or more Member States as co-respondent, if a provision of primary or secondary EU law is allegedly infringing the ECHR, and this alleged infringement could have only been avoided by a Member State by disregarding an obligation under Union law (e.g., when an EU law provision leaves no discretion to a Member State as to its implementation at the national level) (Article 3(2)).<sup>135</sup>

It is particularly this latter scenario which is of specific interest to the Member States. In *Opinion 2/13*, the CJEU criticized in an overly strict manner that the ECtHR’s power to decide on a request from the EU to intervene as co-respondent under Article 3(5) of the Accession Agreement is incompatible with EU law.<sup>136</sup> Luxembourg sees this incompatibility in the ECtHR’s right to ask for reasons for the intervention from which it can subsequently deduce that the conditions for the EU’s participation in the procedure are met. In carrying out such a review, the ECtHR would be prompted to interfere with the EU’s legal autonomy when determining which entity is the correct respondent and how responsibility should be allocated between the EU and the Member States on the basis of their division of powers.<sup>137</sup> This, however, is not true. Article 3(5) constrains Strasbourg to merely assess such a request to the extent whether it is *plausible* in the light of Articles 3(2) and (3). ‘*Plausible*’ is not a very persuasive or powerful word and would consequently not require the ECtHR to immerse itself

---

<sup>133</sup> Xavier Groussot, Tobias Lock and Laurent Pech, ‘EU Accession to the European Convention on Human Rights: A Legal Assessment of the Draft Accession Agreement of 14<sup>th</sup> October 2011’ [2011] *Fondation Robert Schuman—European Issues* No 218, 1, 13.

<sup>134</sup> Bruno de Witte, ‘Beyond the Accession Agreement: Five Items for the European Union’s Human Rights Agenda’ in Vasiliki Kosta, Nikos Skoutaris, and Vassilis Tzevelekos (eds), *The EU Accession to the ECHR* (Oxford: Hart Publishing, 2014) 351.

<sup>135</sup> 47+1(2013)008rev2 (n 6) 24, paras 48-49.

<sup>136</sup> Article 3(5) provides that any High Contracting Party may only become a co-respondent ‘either by accepting an invitation from the Court or by decision of the Court upon the request of that High Contracting Party.’

<sup>137</sup> *Opinion 2/13* (n 7) paras 222-224.

into the internal division of competences between the EU and the Member States. This also means that no competence creep at the expense of the Member States may occur after accession, e.g. by the ECtHR deciding on the Union-internal division of competences.<sup>138</sup> More importantly, cases such as *Matthews*,<sup>139</sup> *Bosphorus*,<sup>140</sup> and *Nederlandse Kokkelvisserij*<sup>141</sup> illustrate that this mechanism will be applied only in a limited number of cases.<sup>142</sup> Consequently, in the light of potential normative conflicts where the Member States can only implement EU law by simultaneously violating the ECHR, it is in their own interest that this mechanism will enable the EU as the legislator of secondary law, and thus as the actual ‘perpetrator,’ to join the proceedings and to share the responsibility for the infringement of Convention rights.

Lastly, the sceptics might interject that the UK would not benefit from the co-respondent mechanism because the EU would be able to refuse to join the proceedings because of its voluntary nature under Article 3(5) of the Accession Agreement. This must be criticized because of its sub-optimal results regarding the efficiency of individual human rights protection.<sup>143</sup> Yet, even though the co-respondent mechanism will be voluntary as a matter of international law,<sup>144</sup> this issue may look differently from the perspective of EU law: the principle of sincere cooperation (Article 4(3) TEU) obliges both the Union and the Member States to assist each other in carrying out the tasks which flow from the Treaties. This was also confirmed by the CJEU when it held that the Union has an interest in compliance by both the Union itself and its Member States with the commitments entered into under international agreements.<sup>145</sup> Hence it can be easily argued that the EU would also have an obligation under Union law to join the proceedings as co-respondent<sup>146</sup> in order to assist the Member State in question.

---

<sup>138</sup> Gragl (n 9) 156-157, and 160.

<sup>139</sup> *Matthews v the United Kingdom*, Appl. no 24833/94, ECHR 1999-I (1999) 28 E.H.R.R. 361.

<sup>140</sup> *Bosphorus v Ireland* (n 8) para 147.

<sup>141</sup> *Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij v the Netherlands*, Appl. no 13645/05, ECHR 2009-I (2009) 48 E.H.R.R. SE18.

<sup>142</sup> Eighth Working Meeting of the CDDH Informal Working Group on the Accession of the European Union to the European Convention on Human Rights (CDDH-UE) with the European Commission, Draft Legal Instruments on the Accession of the European Union to the European Convention on Human Rights, 19 July 2011, CDDH-UE(2011)16, 17, para 44, and fn 18.

<sup>143</sup> Lock (n 922)

<sup>144</sup> Providing the co-respondent mechanism with a compulsory nature might have been considered by the EU to encroach upon the EU’s legal autonomy; cf. Opinion 1/91 *EEA I* (n 10909).

<sup>145</sup> Case C-239/03 *Commission v France (Étang de Berre)* [2004] ECR I-9325, para 29.

<sup>146</sup> Andrés Delgado Casteleiro, ‘United We Stand: The EU and its Member States in the Strasbourg Court’ in Vasiliki Kosta, Nikos Skoutaris, and Vassilis Tzevelekos (eds), *The EU Accession to the ECHR* (Oxford: Hart Publishing, 2014) 118.

The main benefit of accession for the UK would therefore lie in its ‘unifying’ effect of the Member States’ international obligations under both EU and ECHR law: in contrast to cases such as *Bosphorus*, where the Member States were left no discretion, EU accession to the ECHR will prevent any future normative conflicts for the Member States, as the last say will in any case rest with the ECtHR – which might also lead to a judgment against the European Union, the polity actually responsible for an alleged human rights violation.

### C. Truthful Hierarchies Instead of Pluralist Enmeshments

The final argument in favour of accession presented here relates to establishing a genuine and truthful hierarchical system of European human rights protection. The current heterarchically informed pluralist structure of domestic, EU, and international law is practically unable to account for fundamentally hierarchical concepts in non-domestic law,<sup>147</sup> such as the direct effect and supremacy of EU law,<sup>148</sup> the obligation to disapply domestic law in contravention to Union law,<sup>149</sup> and Luxembourg’s monopoly on declaring EU acts invalid;<sup>150</sup> the ECHR’s existence beyond the jurisdiction of the High Contracting Parties,<sup>151</sup> Strasbourg’s – albeit limited – competence to exercise and supervise functions traditionally reserved to States,<sup>152</sup> and the ECtHR’s power to adopt binding judgments, to award compensation, and, if appropriate, to require the respondent party to take general measures in its domestic legal order to put an end to the violation found by the Court and to redress the effects.<sup>153</sup>

The continuing talk about ‘legal’, ‘constitutional’, and ‘multilevel constitutionalism’ to describe the *status quo* may seem very appealing in terms of a non-organized spirit of cooperation, judicial dialogue, and avoidance of normative conflicts. In fact, however, these pluralist enmeshments of three legal orders without any clear-cut hierarchy are unable to solve normative conflicts,<sup>154</sup> continuously erode the rule of law and any legal certainty,<sup>155</sup> and merely provide a disaggregating legal patchwork quilt instead of a rational and intelligible unity of

---

<sup>147</sup> Eeckhout (n 1177) 190-191.

<sup>148</sup> Bruno de Witte, ‘Direct Effect, Primacy, and the Nature of the Legal Order’ in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (2<sup>nd</sup> edn; Oxford: Oxford University Press, 2011) 358-362.

<sup>149</sup> Case C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629, para 21.

<sup>150</sup> Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199, para 11.

<sup>151</sup> Cf. Article 34 ECHR and the individual right to submit applications to Strasbourg; *Mamatkulov and Askarov v Turkey*, Appl. nos 46827/99 and 46951/99, ECHR 2005-I (2005) 41 E.H.R.R. 25, paras 100 and 122.

<sup>152</sup> Cf. the margin of appreciation doctrine; *Handyside v the United Kingdom*, Appl. no 5493/72, Series B no 22 (1979-80) 1 E.H.R.R. 737, paras 48-49.

<sup>153</sup> Cf. Article 46(1) ECHR, and *Verein gegen Tierfabriken (VgT) v Switzerland (No 2)*, Appl. no 32772/02, ECHR 2009-IV (2011) 52 E.H.R.R. 8, paras 85-86.

<sup>154</sup> George Letsas, ‘Harmonic Law: The Case against Pluralism’ in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford: Oxford University Press, 2012) 91.

<sup>155</sup> Gordon R. Woodman, ‘Legal Pluralism and the Search for Justice’ (1996) 40 *Journal of African Law* 152, 160.

law.<sup>156</sup> Furthermore, the desire for legal pluralism on the part of some Member States cannot detract from the fact that national courts are nonetheless already bound by EU fundamental rights and Luxembourg's case law, and, therefore have to give them supremacy in their legal orders. In the case of normative conflicts, they cannot, as a matter of EU law, let their respective constitutional laws prevail without infringing their obligations under international or EU law.<sup>157</sup>

Upon accession, the CJEU will find itself in a position similar to that of any Constitutional or Supreme Court of the Member States vis-à-vis Strasbourg, and the EU – in its entirety – will be subordinate to the international legal system of the Convention.<sup>158</sup> In particular the prior involvement procedure under Article 3(6) of the Accession Agreement contains a quasi-federal element by giving the CJEU the opportunity to step in as the Union's 'supreme court' and to guarantee the uniform interpretation and application of EU law. This court-centric approach is by no means pluralist, but rather undoubtedly constitutionalist,<sup>159</sup> and despite the negative outcome of *Opinion 2/13*, the entire endeavour of accession conveys the overwhelming impression that all judicial and political actors involved are willing to create formal links between the two European institutions rather than perpetuate the current status of informal coordination, non-binding dialogue, and pluralist uncertainty. It is, without doubt, more desirable for the UK to establish an explicitly coherent fundamental rights order than to maintain a system of multiple conflicting orders. With the ECtHR at the apex of the future European human rights edifice, a clear-cut judicial hierarchy will not encroach either upon national or Parliamentary sovereignty, but bring more coherence and legal certainty to fundamental rights protection.<sup>160</sup> Eventually, it seems that accession is a crucial tool in bringing an end to the deficiencies of legal pluralism. Legal pluralists might object that the structure of the post-accession order bears resemblance to Neil MacCormick's pluralism under international law, according to which both the Member States and the European Union both cohere within a common legal universe governed by international law and thus within a monistic framework.<sup>161</sup>

MacCormick admits, however, that this particular strand of pluralism is in fact just an instance of Kelsenian monism, with the notable exception that both the Member State and EU

---

<sup>156</sup> Ken Kress, 'Coherence' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (2<sup>nd</sup> edn; Oxford: Wiley-Blackwell, 2010) 523-524.

<sup>157</sup> Claes and Imamović (n 255) 173.

<sup>158</sup> Olivier de Schutter, 'The Two Europes of Human Rights: The Emerging Division of Tasks between the Council of Europe and the European Union in Promoting Human Rights in Europe' (2008) 14 *Columbia Journal of European Law* 509, 560-561.

<sup>159</sup> Lucas Lixinski, 'Taming the Fragmentation Monster? International Constitutionalism, "Pluralism Lite" and the Common Territory of the Two European Legal Orders' in Vasiliki Kosta, Nikos Skoutaris, and Vassilis Tzevelekos (eds), *The EU Accession to the ECHR* (Oxford: Hart Publishing, 2014) 232.

<sup>160</sup> Lorenzo Zucca, 'Monism and Fundamental Rights' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Law* (Oxford: Oxford University Press, 2012) 349 and 351.

<sup>161</sup> Neil MacCormick, *Questioning Sovereignty* (Oxford: Oxford University Press, 1999) 116-117.

legal orders enjoy equal ranks juxtaposed with one another, only subordinated to international law.<sup>162</sup> EU accession to the ECHR should therefore rather be seen as crucial to realize Kelsen's monism of legal hierarchies, which regards international and domestic law as parts of a single unified legal order.<sup>163</sup>

#### IV. Conclusions

There are two ways of regarding the European Union's accession to the Convention. One view would be to dread this step as a further encroachment upon the Member States' sovereignty in general and the Parliamentary sovereignty of the UK in particular. However, as Lady Justice Arden correctly states, we tend to react to certain controversial cases on the European level on an unreflected *ad hoc* basis instead of thinking in a long-term way about a thriving and beneficial relationship in its entirety<sup>164</sup> One should therefore not jump to any conclusions and not forget another view: namely that the UK became part of the European system of human rights protection at its inception and that EU accession to the ECHR is not about further restricting Member State competences, but about closing the last gap in the already close-meshed web of European human rights law. In fact, if sceptics fear the subversion of the British constitutional order by the EU and the ECHR, then they should accept that this revolution has already happened when the UK became a member of these two supranational systems.

As this chapter has shown, accession does not entail any significant risks for the British constitution: EU accession to the ECHR neither adds another layer of human rights protection, nor does it further complicate the three-dimensional web of fundamental rights regimes. Moreover, it will not tangle the hierarchies of the dualist UK legal order, which can only give effect to the law of the EU and the ECHR via the enactment of domestic legislation (i.e. the HRA and the ECA), and international law. Hence it does not erode further the sovereignty of Parliament. Accession is about 'taming' the EU and subjecting it to Strasbourg's external scrutiny, and not about further limiting Member State sovereignty. Therefore the Member States, including the United Kingdom, should welcome accession as a pivotal move in the right direction. Accession does not take away any powers from the Member States; on the contrary, it will remedy the shortcomings of a currently pluralist system by unifying and hierarchizing the European human rights order, and thus strengthen the rule of law and legal certainty for everybody.

---

<sup>162</sup> Neil MacCormick, 'Risking Constitutional Collision in Europe?' (1998) 18 *Oxford Journal of Legal Studies* 517, 530.

<sup>163</sup> Hans Kelsen, *Pure Theory of Law* (2<sup>nd</sup> edn; Berkeley and Los Angeles: University of California Press, 1967) 328-344.

<sup>164</sup> Arden (n 877) 4.