

CHAPTER 4

EUROPEAN HUMAN RIGHTS, SUPRANATIONAL JUDICIAL REVIEW AND DEMOCRACY

Thinking outside the judicial box

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1. INTRODUCTION

Circumstances of legal (or constitutional)¹ pluralism in the European Union (EU) have led to an increased focus on values,² on the one hand, and on courts,³ on the other. Values have been identified as constitutive of the common standards that democratic political and institutional structures and legal rules no longer provide in a context of competing legal orders, regimes and sources⁴ – or at least only at the price of very high complexity. Unsurprisingly in those

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¹ Since every legal order can be said to have at least a material constitution, the plurality of overlapping legal orders also implies constitutional pluralism.

² See A Rosas, 'The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue' (2007) 1:2 *European Journal of Legal Studies*, www.ejls.eu/.

³ See Rosas, *supra* n. 2, M Maduro, 'Interpreting European Law – Judicial Adjudication in a Context of Constitutional Pluralism' (2007) 1:2 *European Journal of Legal Studies*, www.ejls.eu/.

⁴ It suffices to read the ECJ's recent case-law whenever difficult issues pertaining to the articulation of legal orders or regimes arise to see that human rights are constantly referred to as common standards in the relationship between legal orders, common standards that can provide the equivalence or identity needed to bridge the lack of coincidence between political communities and between legal orders. See e.g. Case C-127/07 *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895, Case C-213/07 *Michaniki AE v Ethniko Symvoulío Radiotileorasis and Ypourgos Epikrateias* [2008] ECR I-9999. See also, conversely, BVerfGE v. 30.06.2009 *Lissabonsvertrag*, 2 BvE 5/08, para. 340.

conditions, courts have become the privileged forum of decision-making and have used values as guidance in complex normative conflicts.

This conjunction explains why human rights have become so central to the articulation of European legal orders and regimes in recent years. Human rights are used as common standards of adjudication of normative conflicts. But their multi-level guarantees have also given rise to a legal pluralism of their own. And, in conditions of judicial proliferation in the field, this has triggered further jurisdictional conflicts over their interpretation in Europe. All this in turn explains why supranational adjudication in the field of European human rights is perceived as being so problematic. Discussions of the relationship between the European Court of Justice (ECJ), the European Court of Human Rights (ECtHR) and domestic courts, and generally the revival in discussions of human rights adjudication are a testimony to those concerns.

While it is important to understand the role human rights play in circumstances of legal pluralism and what this implies for judicial interpretation and judicial dialogue between the two European courts, on the one hand, and between each or both of them and domestic courts, on the other, the picture would not be complete without understanding how we got here.⁵

On the one hand, focusing exclusively on the relationship between courts in conditions of legal pluralism provides a skewed image of the challenges lying ahead of us in terms of human rights protection in Europe. Based on their visible effectivity and enhanced role in the European construction, but also on their *prima facie* familiarity to national observers (we all know what a court is and how it works, when we see one), supranational courts are too often understood as singletons vested with quasi-political powers.⁶ To broaden our vision and deepen our understanding, we need to place the relationship between courts back into their respective institutional context and especially discuss their relationship to political institutions in their legal order(s).⁷ This is even more important as the

⁵ Discussing the democratic legitimacy of supranational judicial review in the field of human rights in the EU without considering the ECtHR would make no sense given the intricate relationships between the two courts and, as we will see, their complementary nature from a democratic perspective.

⁶ See e.g. AM Slaughter / A Stone Sweet / JHH Weiler (eds), *The European Court and the National Courts: Legal Change in its Social, Political, and Economic Context* (Hart Publishing, Oxford 1998), A Stone Sweet, 'Why Europe Rejected American Judicial Review, and Why it May not Matter' (2003) 101 *Michigan Law Review* 2744–80, AM Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191, K. Alter, *The European Court's Political Power: Selected Essays* (Oxford University Press, Oxford 2009).

⁷ This is something Maduro, *supra* n. 3 realizes, but does not do: 'Courts are ultimately bound to the political community to which their legal order is associated and any such debate would lead us into a very difficult inquiry on what exactly would be the new political community or

different courts involved are neither all situated in the same legal order nor at the same level within each legal order. Furthermore, their interactions with democratic institutions in national legal orders are essential to understand how those courts ought to relate not only to domestic courts, but also among themselves. The relationships between the national legal order and other legal orders in Europe and between the national institutional framework and European courts matter especially in this context, as national law remains the primary legal order in which European law and European human rights are received and integrated.

Similarly, on the other hand, (international) human rights are complex moral standards whose relationship to democracy is one of the most difficult issues in contemporary political and legal theory. Clearly, as a result, that relationship needs to be unpacked before a judgement can be made about the interpretation of human rights in a legal pluralist context where human rights are guaranteed by different overlapping legal orders and protected by many overlapping national and supranational courts. In fact, the circumstance that European human rights (at least European Convention on Human Rights (ECHR) rights) were from the beginning intrinsically connected to the strengthening of national democracy, but also to supranational adjudication mechanisms⁸ makes the relationship between supranational judicial review and democracy in the context of European human rights a particularly sensitive one.⁹

In short, the key to assessing the role and the legitimacy of European human rights adjudication in circumstances of legal pluralism lies precisely in what has made both human rights and courts the obvious means and place to arbitrate those normative conflicts: the complexity of democratic legitimation in a pluralist European legal order where democratic polities overlap just like the legal norms stemming from them.

True, the relationship between human rights and democracy, on the one hand, and between judicial review and democracy, on the other, are old questions that have kept generations of constitutional theorists and legal philosophers busy. Surprisingly, however, very little has been written theoretically about the legitimacy of *supranational* judicial review of the kind we know in Europe,

whether we could abandon such link between courts and the particular legal order whose integrity they are supposed to protect.'

⁸ See A Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe' (2000) 54:2 *International Organization* 217–52, 217–8.

⁹ See G Letsas, *A Theory of Interpretation of the European Convention of Human Rights* (Oxford University Press, Oxford 2008), 18–21.

whether at the ECJ or at the ECtHR.¹⁰ And even less about its democratic legitimacy and about the compared democratic legitimacy of the two courts. Of course, a lot has been written about adjudication, judicial reasoning and judicial discretion/restraint in both courts from a legal or from a political science perspective,¹¹ but legal and political philosophers have not yet had a chance to address those issues.¹² This is even more important as classical arguments in favour or against judicial review in the domestic context cannot simply be transposed *mutatis mutandis* to the supranational level.¹³

¹⁰ This is surprising because supranational judicial review pertaining to human rights is unlike international adjudication between States and over matters that pertain to interstate relations and that cannot be part of domestic law. Supranational human rights review resembles a lot national human rights adjudication in terms of subjects and subject matter.

¹¹ There have actually been more publications about judicial review by the ECJ in this respect than about the ECtHR. See on judicial review by the ECJ: M Volcansek, *Judicial Politics in Europe*, American University Studies –Series X, vol. 7 (Peter Lang, New York 1986), JHH Weiler, 'Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration' (1993) 31 *Journal of Common Market Studies* 417, AM Burley / W Mattli, 'Europe before the Court: A Political Theory of Legal Integration' (1993) 47:1 *International Organization* 41–76, JHH Weiler, 'A Quiet Revolution, The European Court and its Interlocutors' (1994) 26 *Comparative Political Studies* 510–34, JHH Weiler, 'Fundamental rights and fundamental boundaries: on the conflict of standards and values in the protection of human rights in the European legal space' in *The Constitution of Europe* (Cambridge University Press, Cambridge 1999), 102–29, Slaughter/Stone Sweet/Weiler, *supra* n. 6, M Shapiro, 'The European Court of Justice' in P Craig / G de Burca (eds), *The Evolution of EU Law* (Oxford University Press: Oxford 1999), 321–45, G de Burca / JHH Weiler (eds), *The European Court of Justice* (Oxford University Press, Oxford 2001), Rosas, *supra* n. 2, Maduro, *supra* n. 3, Alter *supra* n. 6, A Stone Sweet, 'The European Court of Justice and the Judicialization of EU Governance', *Living Reviews in EU Governance* (2010), <http://europeangovernance.livingreviews.org/Articles/lreg-2010-2/>. See on judicial review by the ECtHR, P Mahoney, 'Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin' (1990) 11 *Human Rights Law Journal* 57–88, R Bernhardt, 'Human Rights and Judicial Review: The European Court of Human Rights' in DM Beatty (ed.), *Human Rights and Judicial Review: A Comparative Perspective* (Martinus Nijhoff, Dordrecht 1994), 297–319, Letsas, *supra* n. 9, A Follesdal, 'The Legitimacy of International Human Rights Review: The Case of the European Court of Human Rights' (2009) 40:4 *Journal of Social Philosophy* 595–607. See on supranational judicial review in general, L Helfer / AM Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1998) 107 *Yale Law Journal* 273–391, Slaughter, *supra* n. 6, K Anderson, 'Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks – Review of Slaughter 2004' (2005) *Harvard Law Review* 1255–312, E Benvenisti, 'Margin of Appreciation, Consensus and Universal Standards' (1998) 31 *NYU Journal of International Law and Politics* 843–54, A Follesdal, 'Why International Human Rights Judicial Review Might Be Democratically Legitimate' (2007) 52 *Scandinavian Studies in Law* 52, 103–122, A Follesdal, 'International Judicial Human Rights Review – Effective, Legitimate or Both?' in J Sihvola / P Korkman / V Mäkinen (eds), *Universalism in International Law and Political Philosophy*, Helsinki: COLLeGIUM, 2008, www.helsinki.fi/collegium/e-series/volumes/volume_4/10_follesdal_2008_4.pdf, L Garlicki, 'Cooperation of Courts: The Role of Supranational Jurisdictions in Europe' (2008) 6:3 *International Journal of Constitutional Law* 509–30.

¹² There are exceptions, of course, such as Letsas, *supra* n. 9, Follesdal 2009, 2008 and 2007, *supra* n. 11.

¹³ Follesdal 2009, *supra* n. 11, 596 seems to think some form of transposition is plausible but does not explain why.

What I would like to do in this chapter, therefore, is assess the types of supranational human rights review exercised by the ECJ and the ECtHR from a democratic point of view,¹⁴ and not only as it is often the case from their respective judicial perspectives or that of domestic courts, or, even more broadly, from that of Member States in general.¹⁵ Normative answers as to what judges ought to do in circumstances of legal and judicial pluralism cannot be found in descriptions of the circumstances of legal pluralism. Nor can they be found within existing sets of judicial duties in monist or dualist and hierarchical legal orders. Thinking outside the judicial box is what is needed, in other words. It will provide us with a clearer view of those supranational courts' respective institutional roles in European democracies, of how to articulate the norms stemming from their respective legal orders and then accordingly of how the respective courts ought to be adjudicating normative conflicts between those orders. Eventually, this will not only help clarify the notion of legal pluralism and ways of addressing a feature of the European legal order that is here to stay, but also the role of human rights in the regional context.¹⁶

Of course, this approach should not be taken to deny the crucial function of supranational adjudication and the importance of judicial coherence and integrity in circumstances of legal pluralism.¹⁷ The point is merely to place the question in an institutional perspective that goes beyond an interjudicial one and

¹⁴ Other justifications of the authority of supranational judicial review may be provided than democracy. As a matter of fact, democracy is rarely considered as a major justification of international law and even more rarely of international human rights law (see the discussion in S Besson, 'The Democratic Authority of International Human Rights' in A Follesdal (ed.), *The Legitimacy of Human Rights* (2011) forthcoming). When international law and adjudication become supranational, however, and affect individuals' rights and duties directly, democracy becomes a central concern. This is even more so in circumstances of legal pluralism where international law and especially international human rights can no longer be dissociated from national law and national human rights.

¹⁵ Of course, it is easier to focus on courts and judicial relationships: actors are similar across the board and the information readily available. 'Political institutions' or 'actors' are more diverse and numerous, and usually referred to as an indeterminate entity without further efforts: see e.g. Maduro, *supra* n. 3, Weiler, *supra* n. 11. See, however, the more detailed approach to the reception of the ECHR by political actors in Contracting Parties used in the different chapters of H Keller / A Stone Sweet (eds), *A Europe of Rights. The Reception of the European Convention on Human Rights* (Oxford University Press, Oxford 2008).

¹⁶ See L Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19: 1 *European Journal of International Law* 125–159, J Cavallaro / S Brewer, 'Reevaluating Regional Human Rights Litigation in the Twenty-First Century: the Case of the Inter-American Court' (2008) 102 *American Journal of International Law* 768 on the current dangers facing supranational judicial review in regional human rights systems such as the European one.

¹⁷ Especially as circumstances of legal pluralism have led to vesting judges with more responsibility in this context. See e.g. Maduro, *supra* n. 3, S Besson, 'From European Integration to European Integrity. Should European law speak with just one voice?' (2004) 10:3 *European Law Journal* 257–281.

hence to understand it better in a multi-level and multi-layered institutional context. True, it would be wrong to oppose supranational courts to domestic political institutions as a whole in an old-fashioned way, thus negating the denationalisation of some of the functions of those institutions (including the judicial function) and hence denying the importance of interjudicial dialogue between national and supranational courts in Europe. However, ignoring the parallel denationalisation of political and especially of legislative institutions, and hence the importance of reconnecting legislative and judicial functions across levels of governance, has become a blind spot in current discussions.¹⁸ In short, we ought and will be looking at the same legal reality, but from a different perspective, thus hoping to shed some light onto other mechanisms and solutions than those usually identified by studies that focus on interjudicial cooperation.

There will be three steps in the argument. First of all, and after a first section in which the terms ‘supranational’ and ‘judicial review’ are clarified, I will present the nature and scope of the supranational judicial review exercised by the European Court of Human Rights and by the European Court of Justice, focusing on recent developments and drawing comparisons between the two. In a second step, I will turn to the more philosophical questions raised by the democratic legitimacy of that heightened form of scrutiny exercised by supranational judicial bodies in Europe over the respect of human rights in national legal systems. Not only will the traditional questions have to be reframed to fit the supranational context, but the answers will also be very different from those one usually finds in philosophical discussions of judicial review. A critical assessment of the kinds of judicial review exercised by the two European courts will ensue. Finally, on the basis of the institutional differences between the kinds of supranational judicial review exercised by the two courts identified in the first section, I will draw some implications for the relationship between the two European courts and their national counterparts, but also between them in the context of human rights adjudication in Europe.

2. THE NOTION OF SUPRANATIONAL JUDICIAL REVIEW

Defining supranational judicial review requires a definition of both the terms ‘supranational’ and ‘judicial review’.

¹⁸ See AM Slaughter, ‘Global Government Networks, Global Information Agencies and Disaggregated Democracy’ (2003) 24 *Michigan Journal of International Law* 1041 on this disaggregation. The important thing is to connect those disaggregated functions back again at all levels and across levels.

To start with, the term ‘supranational’ is used, by contrast to ‘international’ *stricto sensu*, to identify a type of international organization, institution or law beyond the state that is empowered to exercise directly some of the functions that are in principle reserved to the state, especially in relation to individuals within that state.¹⁹ Supranationality implies, in other words, a greater transfer of or limitation on state sovereignty, either in the establishment of an international organisation, institution or law or in their ability to make decisions which take priority over national law and are directly binding upon states and individuals within those states. Supranationality generally also implies compulsory and binding adjudication within states. This is what one may refer to as ‘supranational adjudication’. Supranational adjudication, when it is granted, differs from the non-compulsory kind of adjudication that prevails in international relations and whose decisions are not usually binding within states.

There is no necessary connection, however, between supranational law (e.g. human rights) and supranational adjudication. Human rights law of supranational origin ought to be interpreted, specified and applied by domestic institutions and in particular by domestic courts in priority, without necessarily benefiting from the aid of a supranational court reviewing national law.²⁰ True, supranational organisations usually have courts such as the ECJ in the EU. However, certain supranational rights courts exist independently from a supranational organisation and the ECtHR provides a good illustration thereof.

Supranational adjudication may imply the exercise of judicial review –but may not necessarily do so. There is supranational judicial review when supranational courts’ decisions that review the compatibility between national law and supranational law are (i) binding within national law and (ii) are directly invocable by individuals (direct effect) (iii) *vis-à-vis* all Contracting States’ institutions, whether of a legislative, executive or judicial nature. As in the national context, one ought to distinguish between weak and strong judicial review, depending on whether a judicial decision results in a mere declaration of incompatibility, on the one hand, or in the prohibition of application or even in the striking down of the national act or decision, on the other.²¹

Supranational judicial review may imply some amount of judicial discretion. However, the two questions are distinct. One may regard supranational judicial

¹⁹ Helfer/Slaughter, *supra* n. 11, 287.

²⁰ This is a difference Letsas, *supra* n. 9, 39 misses when he argues that the ECtHR’s review and judicial reasoning are fully moralized human rights reasoning. While he may be right about ECHR rights being indistinguishable from national human rights, this does not necessarily mean that the ECtHR’s reasoning is just the same as that of national courts on ECHR rights.

²¹ See e.g. W Sinnott-Armstrong, ‘Weak and strong judicial review’ (2003) 22 *Law and Philosophy* 381.

review as illegitimate independently from the use of discretion by the court. Of course, the use of discretion or even judicial activism in the interpretation of human rights may increase the impact of supranational adjudication on national law. However, judicial review may be exercised without discretion or the activist interpretation of a legal rule. As a result, the debate pertaining to the opposition between judicial activism and judicial self-restraint ought not be conflated with that relative to the legitimacy of supranational judicial review.²² In what follows, I will try to keep the two issues distinct from each other and will focus exclusively on judicial review.

3. SUPRANATIONAL JUDICIAL REVIEW IN EUROPE

Supranational courts whose jurisdiction is compulsory and whose decisions are binding within states are rare. Recent developments have confirmed that the International Court of Justice's jurisdiction, for instance, is clearly not supranational: it does not have compulsory jurisdiction, its decisions are only binding between states and not within the latter's domestic legal order unless domestic law provides otherwise,²³ and they cannot be enforced judicially whether at the domestic or the international level. The same may be said about international human rights adjudication as there are no international judicial mechanisms of protection *stricto sensu*. Things are different at the regional level, however, where the monitoring of human rights instruments is ensured through regional human rights courts. The two main examples that are usually given of supranational adjudication and judicial review are European: the ECtHR and the ECJ.

Of course, from a European perspective,²⁴ those two courts have as much in common as they are different. While the ECtHR is the court created by an international human rights convention whose respect of ECHR rights by Contracting Parties is the sole function, the ECJ is the court of a supranational organisation, the EU, and has as its general function to scrutinize the respect of EU law (including EU fundamental rights²⁵) by Member States, EU institutions

²² On supranational judicial activism/restraint, see Letsas, *supra* n. 9, Mahoney, *supra* n. 11 for the ECtHR, and Maduro, *supra* n. 3, Weiler, *supra* n. 11 for the ECJ.

²³ See e.g. US SCt, *Medellin v. Texas*, 552 U.S. 491 (2008), confirmed (on this point) by the ICJ in *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals* (Mexico v. United States of America), Judgment of 19 January 2009, not published.

²⁴ As opposed to an American perspective: see e.g. Helfer/Slaughter, *supra* n. 11.

²⁵ I am not expanding here on the differences between (EU) fundamental rights and (ECHR) human rights, as this is a complex debate, but it suffices to remember that those European rights themselves are different in their legal nature or at least in their legal function.

and, to a certain extent, individuals. As a result, the two courts have a very different jurisdiction in terms of subjects and subject matters, and they also have a fundamentally different institutional background. Furthermore, both courts have evolved drastically since their creation in the 1950s. While it was clear since the beginning that the ECJ would play a crucial role through supranational judicial review, the ECtHR has only recently started to emancipate from a more subsidiary international-type adjudication. This evolution needs to be borne in mind in what follows, as it is not always easy to compare those two jurisdictions in a chronologically and substantially accurate way.

3.1. SUPRANATIONAL JUDICIAL REVIEW BY THE ECtHR

The ECtHR is an international court based in Strasbourg and an institution created by the ECHR under the aegis of the Council of Europe. It controls the application of the ECHR in the 47 Contracting States that have ratified it to date. It is one of the most accomplished and respected international human rights jurisdictions in the world, thanks in particular to the right of individual application before the European Court of Human Rights.

The ECtHR has recently strengthened its power of judicial review over its Contracting States' laws from what may be referred as a weak review to a stronger review. This has even led to the constitutional qualification of its review by an increasing number of academics.²⁶ In order to take the full measure of the kind of judicial review exercised by the ECtHR, it is useful to assess the Convention's status in domestic law before looking more closely into the scope of the jurisdiction of the Court over its Contracting States and the effects of its judgements in domestic law.

3.1.1. *The status of ECHR rights in domestic law*

The ECHR entered into force in its first Contracting States in 1953. Nowadays, the Convention is deeply rooted and well respected in most of its 47 Contracting States. This is due in particular to the specificities of the ECtHR's judicial review and in particular to the right of individual application before the Court. But not only that: the status of the ECHR in the domestic legal order is essential to

²⁶ See e.g. A Stone Sweet, 'On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court' (2009) 80 *Revue trimestrielle des droits de l'homme* 923–44, S Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge University Press, Cambridge 2006), 173, L Wildhaber, 'A Constitutional Future for the European Court of Human Rights?' (2002) 23 *Human Rights Law Journal* 161.

understand the scope of the Court's jurisdiction and its judgements' impact on domestic law.

In principle, the status of ECHR rights in a national legal order should vary from one Contracting State to the next depending on the status of international law within each legal order. Although the ECHR is an international treaty, its subject matter and rights-holders have rapidly turned it into supranational law, however. Its status in national law is almost equivalent, as a result, to that of domestic law and to domestic human rights.²⁷ This is clear from the validity, the effect and the rank of ECHR rights within domestic law.

First of all, the ECHR has immediate validity in most of its 47 Contracting States on the basis of those countries' monism. Even in dualist Contracting States, the Convention has now been incorporated or at least is routinely subsumed under domestic constitutional rights by domestic courts. Secondly, Convention rights are granted direct effect on the basis of Article 1 ECHR and its interpretation by the Court's case-law. Finally, the Convention's rank in most countries is at least that of ordinary legislation and is even sometimes constitutional or quasi-constitutional in the sense that it takes priority over contrary national legislation.

Of course, Convention rights only constitute minimal standards. When national human rights guarantees are more protective, they take priority. This is what the principle of favour contained in Article 53 ECHR foresees. The notion of minimal standards of protection is particularly problematic, however. This becomes clear in case of conflicts of rights where one right is necessarily restricted to protect the other one and where national law may therefore be said to protect the restricted right better. Another difficult case may arise when one right is granted absolute protection under national law and national law therefore precludes balancing in principle.²⁸ In such instances, the Court is not usually hindered by the principle of favour, provided, of course, it is invoked by a Contracting State to justify a restriction to an ECHR right.

3.1.2. *The jurisdiction of the ECtHR*

Another reason for the special status given to the ECHR in domestic law by comparison to other international human rights guarantees, and for its

²⁷ S Besson, 'The reception of the ECHR in the United Kingdom and Ireland' in H Keller / A Stone Sweet (eds), *A Europe of Rights. The Reception of the European Convention on Human Rights* (Oxford University Press, Oxford 2008), 31-106, S Gardbaum, 'Human Rights as International Constitutional Rights' (2008) 19:4 *European Journal of International Law* 749.

²⁸ *Odièvre v France* (n. 42326/98) EHRR 2003-III.

widespread reception in the domestic case-law in particular, is the supranational control exercised by the ECtHR.

Originally, the type of judicial control exercised by the Court was clearly meant to be and remain international. This becomes clear as the Court's monitoring function is primarily characterized by its subsidiarity. Accordingly, the ECtHR may only be effectively seized once all national remedies have been exhausted. This means that national judges remain the primary judges of the conformity of domestic law to the Convention. This has actually given rise to a rich interjudicial dialogue between national and ECtHR judges in the past.

Recently, however, the Court has started assessing the effectivity of national remedies in a very restrictive way, so as to waive the requirement to exhaust national remedies in an increasing number of cases. This is the case where no clear and rapid remedies are available in domestic law or where future violations are too important for the Court to wait.

In principle, the subsidiarity of the jurisdiction of the Court ought also to be protected with respect to the scope of its jurisdiction. In that context, states are recognized a certain margin of appreciation on issues on which there is no European 'consensus'. It is the case for sensitive moral issues or for intractable political situations.²⁹

Regrettably, however, the Court has never been very clear about the notion of 'consensus' and about the exact circumstances in which the margin of appreciation applies. This is an important criterion, as once the Court decides there is a consensus, it can be extremely creative and dynamic in the interpretation of the Convention. In such circumstances, the Court refers to the Convention as a so-called 'living instrument' and makes it fit 'present-day conditions'.³⁰ As a matter of fact, the Court is increasingly creative even in cases where there is no consensus among Contracting Parties.³¹

At the same time, the Court has repeatedly stated that the margin of appreciation decreases with the importance of the right violated or even with the importance of certain central dimensions of the right being violated.³² Further, the margin of appreciation does not dispense the Court from assessing the proportionality

²⁹ *Pretty v The United Kingdom* (n. 2346/02) EHRR 2002-III, *Leyla Sahin v Turkey* (n. 44774/98) EHRR 2005-XI, *Pretty v The United Kingdom* (n. 2346/02) EHRR 2002-III.

³⁰ *Fretté v France* (n. 36515/97) EHRR 2002-I, *Christine Goodwin v The United Kingdom* (n. 28957/95) EHRR 2002-VI.

³¹ *Hirst v The United Kingdom (No 2)* (n. 74025/01) EHRR 2005-IX, *B. and L. v The United Kingdom* (n. 36536/02) Judgment of 13 September 2005, not published.

³² *Jäggi v Switzerland* (n. 58757/00) EHRR 2006-X.

of the measures allegedly violating a Convention right. Again, however, the Court is not very strict in its application of the three classical prongs of the proportionality test (adequateness, necessity and proportionality *stricto sensu*). The test is often interrupted or botched, precisely by reference to the State's margin of appreciation, thus leading to a circular situation where Contracting States cannot invoke the margin of appreciation that is only applied on the basis of the Court's own assessment, but where they cannot rely on the Court's assessment of the proportionality of the measures they have taken either.

3.1.3. *The effects of a ECtHR's judgement in domestic law*

Besides those increasing inroads into the principle of subsidiarity of its jurisdiction, another element in the Court's practice provides clear signs of reinforcement of the nature and the scope of its judicial review: the impact of its judgements in domestic law.³³ To understand what the effects of a ECtHR's judgement are within domestic law, it is useful to distinguish the consequences of the judgement's binding nature in domestic law, on the one hand, from the mechanisms for the monitoring of the enforcement of the judgement in domestic law, on the other.

It is with respect to the binding nature of the Court's decision, first of all, that its review's supranational nature has gradually become evident.

In principle, and according to Article 46 ECHR, a ECtHR's decision is binding on all national authorities, whether legislative, executive or judicial. It does not have an invalidating effect, however, and is therefore regarded as merely declaratory. Further, it is up to the State's authorities to ensure a *restitutio in integrum*, by guaranteeing that the human rights violation stops, that it does not recur again and that its consequences are remedied. States have a duty of result, therefore, but a free choice of the means to reach that result. It follows that the Court cannot and should not provide directions in its decisions as to how they ought to be implemented. Its decisions are deemed as entirely individualised and hence as pertaining to the violating act or decision only. It is up to a state therefore to decide whether to change its legislation deemed contrary to the Convention, or merely to change its interpretation of that legislation. Nor does the state have to reopen the procedure and revise the judgement deemed in violation of the Convention; revision is recommended by the Committee of Ministers, but does not constitute a duty under the Convention.

³³ On those issues, see S Besson, 'Les effets et l'exécution des arrêts de la Cour européenne des droits de l'homme - Le cas de la Suisse' in B Ehrenzeller / S Breitenmoser (eds), *Die EMRK und die Schweiz* (Institut für Rechtswissenschaft und Rechtspraxis, St Gallen 2010), 125-199.

In all those respects, and *prima facie* at least, the binding nature of the decisions of the Court stems directly from Contracting States' international obligations and the regime of international state liability, and follows a traditional international approach as a result. The Court's case-law has gradually emancipated, however, leading to a more direct impact of the Court's decisions on domestic law.

To start with, in practice, the difference between the individual violation and the laws that led to that violation is difficult to draw. In most cases, the concerned state has no other choice but to amend or strike down the relevant legal norms. As a result, the Court's decisions are effectively declarations of non-conventionality of national laws, albeit non-invalidating ones. Furthermore, certain countries have recently introduced a revision procedure which enables courts to reopen a procedure and revise a judgement that has been deemed contrary to the Convention by the Court. This may, in certain circumstances, equate to giving an invalidating effect to the ECtHR's decisions. Finally, independently from such revision mechanisms, ECtHR's decisions purport to apply *erga omnes* and hence bind all 47 Contracting States and not only the state against whom the adverse judgement was rendered. As a result, in certain Contracting Parties, ECtHR's judgements have the same effects as Convention rights, whether they pertain to that state or another Contracting State. They are immediately valid, are vested with direct effect, and have a quasi-constitutional rank. They also bind judges prospectively in any future case. Adopted at the 2010 Interlaken Conference on the Reform of the Court, the Action Plan actually entails the objective to generalise the *erga omnes* effect of all judgements of the Court in all Contracting States.³⁴

If one refers, secondly, to the mechanisms available for the enforcement of the ECtHR's judgements, the supranational nature of the judicial review exercised by the Court becomes even more evident. It is important to distinguish between the mechanisms used by the Committee of Ministers and those of the Court itself.

The Committee of Ministers, i.e. the executive organ of the Council of Europe, is the institution officially in charge of monitoring the execution of the Court's judgements (Article 46 ECHR). It holds different meetings every year at which it follows up States' implementation (individual and general) measures and can provide help and advice to enhance the effectivity of the Court's judgements. It

³⁴ 19 February 2010, available at: www.eda.admin.ch/etc/medialib/downloads/edazen/topics/europa/euroc.Para.0133.File.tmp/final_en.pdf [last accessed 7 July 2010]. See e.g. A Mowbray, 'The Interlaken Declaration – The Beginning of a New Era for the European Court of Human Rights?' (2010) 10:3 *Human Rights Law Review* 519–28, P Wachsmann, 'Entre deux lacs – Quelques réflexions sur la Conférence d'Interlaken sur l'avenir de la Cour européenne des droits de l'homme' (2010) 21:83 *Revue trimestrielle des droits de l'homme* 511–34.

can pressure States through various political means such as interim resolutions. The most powerful means is, of course, suspension from the Council of Europe.

The Committee cannot, however, enforce the ECtHR's judgements on Contracting Parties which are not implementing the judgements. And this has become a sensitive issue in certain countries whose execution backlog is worrying. Given that the effectivity of judgements is part of the credentials of the Court and at the centre of its reforms, recent years have seen the adoption of various reports and measures meant to enhance the enforcement of the Court's judgements. The Protocol 14, that came into force on 1st June, 2010, actually improves the situation to a certain extent. It entails, first of all, the possibility for the Committee to seize the Court of an infringement procedure against a State which does not execute a judgement. Secondly, a follow-up system by the European Commissioner for Human Rights with the help of the European Network of National Human Rights Institutions has been put in place to pressure Contracting States to implement judgements.

In view of the structural difficulties met by some Member States and the repetitive claims made by victims of violations in those States, the Court started a few years ago to deal with the problem itself and to issue directives pertaining to the enforcement of its judgements.

First of all, the Court started, on the recommendation of the Committee of Ministers in 2004, to issue so-called 'pilot judgements' addressing precisely the structural issues to be fixed and indicating how to do so in domestic law. The consequence of pilot judgements is to freeze all similar claims made consecutively until the problems are resolved in the Contracting State concerned.³⁵ Besides general directives in pilot judgements, secondly, the Court has been issuing implementation directives in ordinary judgements since 2000.³⁶ It uses individual judgements to recommend general measures to remedy the violation of ECHR rights at hand. Beyond general measures, the Court has also started to recommend individual measures in its judgements, requiring a precise action from the violating state and hence limiting the choice of means available to the state when executing the judgement. The Court has done so, for instance, by requiring the liberation of a detainee in a judgement.³⁷

³⁵ *Broniowski v Poland* (n. 31443/96) EHRR 2004-V, *Hutten-Czapska v Poland* (n. 35014/97) EHRR 2006-VIII, *Scordino v Italy* (n. 36813/97) EHRR 2006-V, *Sejdovic v Italy* (n. 56581/00) EHRR 2006-II, *Cocchiarella v Italy* (n. 64886/01) EHRR 2006-V.

³⁶ *Scozzari and Giunta v Italy* (n. 39221/98, 41963/98) EHRR 2000-VIII, *Hasan and Eylem Zengin v Turkey* (n. 1448/04) Judgment of 10 October 2007, selected for publication.

³⁷ *Assanidze v Georgia* (n. 71503/01) EHRR 2004-II, *Ilascu and Others v Moldova and Russia* (n. 48787/99) EHRR 2004-VII.

Both types of directives (individual or general measures *per se* or in pilot judgements) have been contested by Member States as reaching beyond the review competences of the Court (and the wording of Article 46 ECHR³⁸). It is interesting to see that those States that are most opposed to this assertive development of the judicial review of the Court are Western European States, which base their resistance on democratic grounds. Those cooperating with the Court in pilot judgements, and those at the origins of this new practice, are by contrast Central and Eastern European Countries which see supranational judicial review as an ally to the development of their national democracies. Curiously, in the context of the democratic justification of the 'act of State' doctrine put forward by the Court in its case-law, those very judges from Central and Eastern European Countries that cooperated actively with the Court in pilot cases, have invoked the tyranny of the majority and the risks for national democracies to support the Court.³⁹ Democracy seems, in other words, to be used both to justify and to object to supranational judicial review and that use of the democratic critique of supranational review seems to vary depending on whether one is an Eastern and Central European State or a Western one.

The Court is showing no sign of weakening, however. It is actually developing means of controlling the implementation of its own cases, besides the possibility to use the new infringement procedure in force since 1st June 2010. There are two developments one may mention in this respect: the decoupling of the judgement on a just satisfaction from the judgement in condemnation, thus granting time for the Contracting State to remedy the situation before discussing the just satisfaction, but also at the same time exercising pressure and directly controlling the implementation of its case-law, and its increasingly intrusive requirements pertaining to the reopening of national procedures on the basis of a violation of Article 46 ECHR.

With respect to the latter, the Court has strengthened its review power lately by developing a new line in its case-law pertaining to the reopening of national procedures in Switzerland.⁴⁰ According to the Convention, there is in principle no duty to reopen a national procedure nor to revise a judgement deemed in violation of the Convention. The Committee of Ministers and the Court recommend doing so, but there is no corresponding duty. Of course, in practice, when the *restitutio in integrum* is only possible through a revision, this can create

³⁸ In fact the Court never mentions a clear conventional basis and mentions interchangeably Articles 41 and 46 ECHR. See Besson, *supra* n. 33.

³⁹ *Markovic and Others v Italy* (n. 1398/03) Judgment of 14 December 2006, selected for publication.

⁴⁰ See *VgT Verein gegen Tierfabriken v Switzerland (No 2)* (n. 32772/02) Judgment of 30 June 2009, selected for publication, *VgT Verein gegen Tierfabriken v Switzerland* (n. 24699/94) EHRR 2001-VI.

difficult situations if a Member State's procedure does not allow it. It is the case in criminal proceedings, but most controversially also in private law proceedings. In its *VgT II* judgement, the ECtHR decided that a refusal to revise, as opposed to the absence of a revision process, constituted a new fact that made the claim admissible. It also decided that Switzerland had violated the Convention and that the grounds given by the Swiss Federal Tribunal not to open a revision procedure were 'formalistic'. The implications of this new case-law are extremely important. First of all, States which have a revision procedure almost necessarily have to accept the revision of a judgement deemed contrary to the Court, whereas others do not have the same duties. Secondly, this in turn means that judgements of the Court now *de facto* have an invalidating effect, at least over national judicial decisions.

It is fair to say therefore in light of recent developments that the supranational judicial review exercised by the ECtHR now equates strong constitutional review of the kind we know in certain states in Europe.

3.2. SUPRANATIONAL JUDICIAL REVIEW BY THE ECJ

The ECJ is the second European court whose judicial review may be described as supranational, generally but also in the human rights context. The ECJ was created in 1951 with the first European Economic Community. It is the supranational court of a supranational organisation, the EU. It has since then been regularly reinforced, notably through the creation of a General Court and specialised courts, and through successive revisions of its Statute and procedures. It has jurisdiction over 27 EU Member States – which also happen to be Contracting Parties to the ECHR and are therefore submitted to the review of the ECtHR.

From the beginning, the ECJ's case-law has contributed to changing the nature of EU law. It has a generalist jurisdiction, but one that can issue binding judgements for States, EU institutions and individuals in the EU. As in the previous section on the ECtHR, assessing the supranational features of human rights adjudication by the ECJ requires, first of all, identifying the status of EU fundamental rights in domestic law, before turning to the scope of the ECJ's jurisdiction with respect to those rights and to the effects of its judgements in domestic law.

3.2.1. *The status of EU fundamental rights in domestic law*

The status of EU fundamental rights within the domestic legal order is the same as that of EU law in general. Their exact status will of course vary depending on

their sources within EU law, but they benefit in principle from the immediate validity, the direct effect and the primacy of EU law in domestic law. EU fundamental rights are, in other words, truly supranational law by definition.

The interesting element is that human rights were not part of EU law from the beginning. The founding treaties entailed no fundamental rights provisions. The EU had, and *stricto sensu* still has no competence in the fundamental rights context (see *a contrario* Article 51 EU Fundamental Rights Charter (Charter) or Article 6(1) Treaty on the European Union (TEU)). That competence remains to date an exclusively domestic one.⁴¹ EU fundamental rights were only developed gradually through the ECJ's case-law *qua* general principles of EU law and then codified first by a general clause in the EU Treaty and then later on in the EU Charter of Fundamental Rights. Nowadays, although EU fundamental rights remain general principles of EU law recognised and developed through the ECJ's case-law (Article 6(2) TEU), they are also guaranteed as part of EU primary law (Article 6(1) TEU) and, more specifically, as part of EU constitutional law.⁴²

For a long time, in order to compensate for the absence of fundamental rights from EU primary law, the ECJ recognised human rights stemming from national constitutional traditions, the ECHR and other international sources of human rights as general principles of EU law.⁴³ *Qua* general principles of EU law, their source is formally EU law and they are no longer treated as national law or international law within the EU legal order,⁴⁴ but their content remains national and international. As a result, although the ECHR, that is the most important source of EU fundamental rights according to the ECJ (it has 'special significance'⁴⁵), does not directly bind the EU as a Contracting State, but only its

⁴¹ See on that issue, O De Schutter, 'L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme: Feuille de route de la négociation' (2010) 21:83 *Revue trimestrielle des droits de l'homme* 535–71, 545–6.

⁴² Case C-402/05P and C-415/05P *Kadi* [2008] ECR I-6351. This does not affect their binding nature, and that of the ECHR *qua* general principles of EU law, but their rank within the European legal order, *vis-à-vis* EU fundamental freedoms and *vis-à-vis* international law norms. See S Besson, 'European Legal Pluralism after *Kadi*' (2009) 5 *European Constitutional Law Review* 237–64. See also B De Witte in this volume, Chapter 1.

⁴³ Case 11–70 *Handelsgesellschaft* [1970] ECR 1125, Case 36–75 *Rutili* [1975] ECR 1219.

⁴⁴ Their status, rank and effects in the EU legal order are not those of international law norms binding the EU – even by *de facto* succession along the lines of the GATT or through indirect Article 4(3) TEU duties along the lines of UN Security Council Resolutions. Of course, this is clear for the ECHR and the European Social Charter. The status of other international human rights conventions in EU law is a bit more difficult to assess when EU Member States and not the EU itself are parties to those treaties: see T Ahmed / I Butler, 'The European Union and Human Rights: An International Perspective' (2006) 17:4 *European Journal of International Law* 771, Besson, *supra* n. 42, I Butler / O De Schutter, 'Binding the EU to international human rights law' (2008) 27 *Yearbook of European Law* 277.

⁴⁵ See e.g. Case C-479/04 *Laserdisken ApS v Kulturministeriet* [2006] ECR I-08089. This implies a certain priority when ECHR rights conflict with other international human rights *qua* EU

Member States, it applies *qua* EU fundamental rights within the EU legal order and binds EU institutions and Member States *qua* EU law as result. This has implications for the nature of the duties connected to those rights and their respective content. The latter only reflects that of constitutional guarantees and the ECHR and may differ as a result from those rights' content as it is developed by the ECtHR and domestic jurisdictions.⁴⁶ Of course, following the mandate given to the EU by Article 6(2) TEU to accede to the ECHR, and if the negotiations currently held are successful,⁴⁷ the EU will one day be a Contracting Party to the ECHR and hence will be bound directly by ECHR rights and their interpretation by the ECtHR.

The ECJ started recognising fundamental rights in reaction to domestic constitutional courts. The latter increasingly faced a dilemma between respecting the primacy of EU law, on the one hand, and respecting their own constitutional rights or the ECHR, on the other. It is essential to emphasize therefore that EU fundamental rights developed negatively to protect Member States and individuals against the EU and its institutions, rather than to protect individuals against Member States themselves. Unlike the ECHR, their original justification was not to strengthen fledgling national democracies, but to reinforce the democratic legitimacy of the EU itself or, more exactly, to protect national democracies from the EU.⁴⁸ No wonder therefore that EU fundamental rights bind EU institutions in priority and not Member States. As there is no EU competence to legislate over fundamental rights that apply within Member States, the latter only bind Member States when they apply or derogate to EU law.⁴⁹ And this explains, moreover, why EU fundamental rights are more developed in areas in which EU law competences are important and where

fundamental rights. Contra de Witte, in this volume, I do not think that the special significance of the ECHR among sources of EU fundamental rights has any implications in terms of obligations: all EU fundamental rights, whether ECHR-based or not, bind the EU and Member States *qua* EU law (and more precisely both *qua* general principles and primary law).

⁴⁶ See Case T-99/04 *AC-Treuhand AG v Commission of the European Communities* [2008] ECR II-1501, para. 45. See also for a recent confirmation, Case C-465/07 *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-921.

⁴⁷ Their success requires the unanimous adoption of an international agreement between the EU, the 27 EU Member States, and the other 20 States of the Council of Europe (Art. 218(6) and (8) TFEU).

⁴⁸ See J Coppel / A O'Neill, 'The European Court of Justice: Taking Rights Seriously?' (1992) 29 *Common Market Law Review* 669, A von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' (2000) 37 *Common Market Law Review* 1307-1338, S Besson, 'The European Union and Human Rights: Towards a new kind of post-national human rights institution' (2006) 6(2) *Human Rights Law Review* 323-360.

⁴⁹ See Case C-260/89 *ERT* [1991] ECR I-2925. In spite of efforts to the reverse by the AG Maduro in Case C-380/05 *Centro Europa 7* [2008] ECR I-349, the Court still refuses to regard States as bound by EU fundamental rights in their own sphere of competence.

European integration is most incisive as a result.⁵⁰ This difficulty will not be alleviated by the EU's accession to the ECHR as the latter 'shall not affect the Union's competences' (Article 6(2) TEU, Protocol n. 8 to the Lisbon Treaty).⁵¹

When EU fundamental rights bind States, they do so as EU law and hence benefit from EU law's general status in domestic law. This has actually been particularly useful for the status of ECHR rights within dualist countries such as the United Kingdom or Ireland where EU law has secured the immediate validity of those rights within domestic law *qua* EU law. EU fundamental rights bind states immediately as valid law. They are in principle rights of direct effect that can be invoked directly by individuals against national authorities. And they take priority over any international legal rule *qua* EU constitutional law⁵² and over any national legal rule, even a constitutional one.⁵³

There are exceptions worth mentioning in that last respect. Horizontal clauses at the end of the Charter clarify the subsidiary role of EU fundamental rights. Those rights are to be considered as minimal guarantees when competing with national and international guarantees binding Member States that are more protective. This also applies to corresponding ECHR rights which would be more protective than EU fundamental rights (Article 53 Charter). Of course, it is difficult to know in practice when an ECHR right is better protected by EU law than by the ECHR. The interpretation of the respective provisions by the two courts' case-law makes the assessment diffuse, but so do conflicts of rights as one of the rights in conflict is necessarily restricted in favour of the other.⁵⁴ Another important qualification stems from Article 52(3) Charter which states that when EU fundamental rights 'correspond' to ECHR rights, they should be interpreted as providing at least the same level of protection. Of course, EU fundamental rights may go further. It is difficult, however, to identify when an ECHR right 'corresponds' to an EU fundamental right or vice-versa. This is not only the case *per se* due to different codifications of the same rights, but also due to the two courts' respective interpretations of those rights.

⁵⁰ This convergence between EU fundamental rights practice and the internal market can be noted in the recent case-law pertaining to trade unions in *Viking* (Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779) and *Laval* (Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767).

⁵¹ This is a particularly controversial issue as it is difficult to see how the EU may abide by its ECHR duties without competences to adopt positive and negative measures to protect human rights. See e.g. De Schutter, *supra* n. 41, 545–6.

⁵² Case C-402/05P and C-415/05P *Kadi* [2008] ECR I-6351.

⁵³ Case C-285/98 *Tanja Kreil v Bundesrepublik Deutschland* [2000] ECR I-69.

⁵⁴ See on conflicts of rights, S Besson, *The Morality of Conflict* (Hart Publishing, Oxford 2005), Ch. 12, E Brems (ed.), *Conflicts between Fundamental Rights* (Intersentia, Antwerp 2008).

3.2.2. *The jurisdiction of the ECJ on fundamental rights*

The ECJ is the institution that first recognized EU fundamental rights *qua* general principles of EU law. EU fundamental rights therefore remain intrinsically jurisprudential in nature even though they have long been guaranteed through primary and secondary law also.

The jurisdiction of the ECJ is not purely fundamental rights-centred, however, and fundamental rights are only a small part of its overall jurisdiction. Even when the ECJ applies EU fundamental rights, the scope and kind of review it applies demonstrate a clear absence of specialisation in the field. Thus, contrary to the ECtHR which specialises in human rights, the ECJ *qua* generalist jurisdiction could go much further than it does with supranational judicial review in the field of human rights. It has the potential but uses it with great restraint.

It is important to start by realising that individuals may only file a human rights complaint to the ECJ against an EU institution and not against Member States, and even then through one single procedure only: the annulment procedure (Article 263 Treaty on the Functioning of the European Union (TFEU)). As a matter of fact, conditions for the individual complaint are very restrictive (Article 263(4) TFEU) thus limiting the number of cases overall.⁵⁵ Most human rights decisions taken by the ECJ are decisions against states, however, and decisions that are taken either through the infringement procedure against a state (started by another state or the Commission, maybe on the basis of an individual complaint to the Commission but rarely so, Article 258–9 TFEU) or through the preliminary ruling procedure (started by a national court over the interpretation or validity of EU law, Article 267 TFEU). One should emphasize, however, that it is rare for the ECJ to face a conflict between national law and EU fundamental rights only, most cases will be cases in which EU law (e.g. fundamental freedoms) conflicts with national human rights and hence also with EU fundamental rights, thus giving rise to a balance of interests.⁵⁶ This balance of interests is as a matter of fact often in the end even left to the Member States, which have a positive duty to interpret domestic law in conformity with EU fundamental rights.⁵⁷

If the ECJ's jurisdiction in the field of fundamental rights is limited, so is the nature and scope of its review. Its approach to human rights is intentionally

⁵⁵ This is regarded as compatible with Article 13 ECHR and Article 47 Charter given that the duty to ensure effective judicial remedies is a domestic duty in priority (Article 19(2) TEU). See the Explanations relating to the Charter and joined to the Lisbon Treaty.

⁵⁶ It is important to note that in such cases, it is usually the fundamental right that is restricted in favour of the fundamental freedom (see e.g. Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-5659, Case C-36/02 *Omega* [2004] ECR I-9609, Case C-438/05 *Viking Line* [2007] ECR I-10779).

⁵⁷ See e.g. Case C-275/06 *Promusicae* [2008] ECR I-271, para. 65.

eclectic. Thus, the ECJ only addresses human rights issues when the parties to the case raise them and not *motu proprio* as a matter of constitutional order.⁵⁸ Contrary to a national constitutional court, the ECJ has no duty to interpret EU law, and even lesser so national law, in conformity with EU constitutional law and hence with EU fundamental rights. Further, even when the parties make a human rights argument, there is no obligation for the Court to settle the case on that basis if there is another ground to solve the issue at stake.⁵⁹ Interestingly, Advocate General Maduro has been arguing differently in his opinion in the *Kadi* case where he claims that the ECJ is the constitutional court of an autonomous legal order and therefore ought to review the legality of all acts of the Member States by reference to their compatibility with the EU Treaties *qua* constitutional charter.⁶⁰ At least in the *Kadi* case, Maduro was followed by the ECJ on this point.⁶¹

In all those cases, the ECJ applies the same kind of scrutiny to all violations of fundamental rights without distinction and has no human rights-specific kind of judicial reasoning and balancing. Interestingly, it has not (yet) transposed some of the practices it has developed in the context of the scrutiny of fundamental freedoms' restrictions to the field of fundamental rights.⁶² An important question that scope precludes addressing here is whether the ECJ will have to adapt as a consequence of the EU's accession to the ECHR. Based on its new ECHR duties, it may indeed have to examine human rights issues *ex officio* and in a more systematic fashion, and even to specialise its legal reasoning in human rights cases.

Despite those limitations in its scope, the ECJ's jurisdiction on human rights is not strictly speaking subsidiary. It does not require the exhaustion of national remedies. Nor does the Court have more limited discretion and scrutiny on those questions than it would on others. The proportionality test it uses is the same, for instance, and it has no particular duties to respect States' margin of appreciation.

All the same, the lack of EU human rights competence combined with the political nature of human rights, but also the fact that the ECJ *qua* supranational court is ill-equipped to assess facts and balance rights and decides consensually

⁵⁸ See Case C-301/06 *Ireland v. Parliament and Council* [2009] ECR I-593, para. 57.

⁵⁹ See Case C-376/98 *Germany v. Parliament and Council* [2000] ECR I-8419. See also Case C-73/07 *Tietosuojovaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy* [2008] ECR I-9831.

⁶⁰ Case C-402/05P and C-415/05P *Kadi* [2008] ECR I-6351.

⁶¹ Contrast the *Kadi* case with Case C-317/04 & 318/04 *Parliament v Council* [2006] ECR I-2457.

⁶² It suffices here to think of the different kinds of proportionality tests or of the theory of horizontal effect used by the ECJ in the context of fundamental freedoms.

without public majorities and open dissenting opinions of judges, have led to the kind of judicial restraint discussed before. The case-law indicates, for instance, that EU fundamental rights are regarded as minimal guarantees, thus allowing for higher protection by national or international human rights in each Member State (Article 53 Charter). This approach is exemplified by ECJ's decisions such as *Omega* or, most recently, *Arcelor*.⁶³ Of course, there are also limitations to this minimalist approach as exemplified in the *Michaniki* case: not all human rights arguments can justify a breach of the principle of the primacy of EU law.⁶⁴ The difficult question then is how to determine when this is the case.⁶⁵

3.2.3. *The effects of an ECJ's judgement in domestic law*

To understand what the effects of ECJ judgements pertaining to human rights are within domestic law, it is useful to distinguish the consequences of their binding nature in national law, on the one hand, from the mechanisms available for the enforcement of ECJ judgements, on the other.

With respect to the binding nature of the Court's decision, first of all, its review's supranational nature has always been evident.

The ECJ's judgements are binding and are part of the sources of EU law. Fundamental rights decisions of the ECJ benefit from the same binding nature as other ECJ judgements. Those judgements are immediately valid in domestic law and, most importantly, benefit from the primacy of EU law over national law. This means that ECJ decisions *qua* EU law generate a duty to leave contrary national law unapplied, and even eventually to its amendment. This implies, in other words, an invalidating effect of ECJ judgements on human rights, even if it is only indirectly through the action of domestic authorities themselves.

Of course, the specific effects of ECJ judgements in domestic law will depend on the judicial procedure used to issue that decision. Annulment judgements lead to

⁶³ Case C-36/02 *Omega* [2004] ECR I-9609, Case C-127/07 *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895.

⁶⁴ This is exemplified in the discussion by AG Maduro in *Michaniki* (Case C-213/07 *Michaniki AE v Ethniko Symvoulío Radioteleorasis and Ypourgos Epikrateias* [2008] ECR I-9999) and *Arcelor* (Case C-127/07 *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895), without there being a clear test or criterion, however.

⁶⁵ This shows that the minimal v. maximal protection debate is still quite pertinent in the EU albeit in a new context, if the problem originally was the lack of human rights protection in the EU, the problem has now become the breadth of EU human rights protection. See e.g. the exchange between LFM Besselink, 'Entrapped by the maximum standard: on fundamental rights, pluralism and subsidiarity in the European Union' (1998) 35 *Common Market Law Review* 629, and JHH Weiler, 'Fundamental Rights and Fundamental Boundaries: on the Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space' in *The Constitution of Europe* (Cambridge University Press: Cambridge, 1999), 102.

the annulment of EU legal acts deemed contrary to EU law. Decisions pertaining to the validity of national law cannot be taken through the annulment procedure, however, but through the infringement procedure. Infringement decisions are binding, but in a declaratory way, and it is up to national authorities to enforce them. Finally, preliminary rulings bind national courts which have to settle the concrete case, but they bind all national authorities as well and sometimes *ex tunc*. Strictly speaking, therefore, the ECJ's human rights review is weak in that ECJ decisions cannot directly invalidate national law or decisions, or require the re-opening of a national procedure.

This is only a *prima facie* conclusion, however. The preliminary ruling procedure enables the ECJ to play a central role in national adjudication. In the majority of ECJ cases on human rights, i.e. in preliminary rulings, the cooperation between the ECJ and national courts and the fact that the latter retain the competence to decide in the concrete case has helped improve the enforcement rate of ECJ decisions. True, the preliminary ruling procedure has become less and less horizontal and more and more vertical overall and hence supranational in recent times: the national courts have little discretion about the cases they have to submit to the ECJ and about the ways in which they ought to implement them in practice. Furthermore, as indicated before, infringement decisions of the ECJ benefit from the primacy of EU law and this secures sufficient pressure to lead to the indirect annulment of national law or decisions contrary to the judgement.

If one refers, secondly, to the mechanisms available for the enforcement of the ECJ's judgements, the supranational nature of the judicial review exercised by the Court is just as evident. It is important to distinguish, however, between the European Commission and the Court itself.

The Commission reviews the application of infringement judgements and may even launch a further infringement procedure against a State that does not apply such a judgement. Accordingly, a new infringement decision may be released by the ECJ itself (Article 260 TFEU). This could actually apply, in principle, to all ECJ judgements: the non-implementation of any judgement by the Court can give rise to an infringement procedure. Furthermore, there is always the possibility of an action in liability against the State under domestic law but based on EU law principles:⁶⁶ a state whose legislative, executive or judicial authorities do not comply with an ECJ decision may be deemed responsible and be condemned to pay damages. As a result, the enforcement of ECJ decisions can

⁶⁶ Joined cases C-6/90 and C-9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* [1991] ECR I-5357, Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1996] ECR I-1029, Case C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECR I-10239.

itself be judicial (whether by the ECJ or by national courts) and is not left to interstate cooperation only. This is further evidence, if needed, of the supranational nature of adjudication by the ECJ in the human rights context.

3.3. EUROPEAN SUPRANATIONAL JUDICIAL REVIEW COMPARED

The time has come to contrast and compare the characteristics of supranational judicial review exercised by the two European courts in the human rights context. The result of this comparison will provide the basis for a democratic assessment in the third part of this chapter.

As a preliminary remark, it is important to emphasise that the two courts' jurisdictions have reinforced each other. They have been mutually empowered *vis-à-vis* national institutions through their cooperation and this applies to their respective relations to domestic courts or political authorities.⁶⁷ It is because the ECJ has constantly reinforced its jurisdiction that the ECtHR was able to become bolder in the exercise of its own review powers. And in return, it is because EU Member States are so closely scrutinised by the ECtHR in the human rights context that the ECJ has had to strengthen its own control mechanisms in the human rights context. As a result, it is difficult to compare them as completely separate tribunals exercising different and unconnected forms of judicial review.

Clearly, especially when compared with other international human rights courts or bodies, the two European courts qualify as supranational courts, exercising supranational judicial review in the field of human rights. Their jurisdiction is compulsory, their decisions are binding within domestic legal orders *vis-à-vis* all domestic institutions, and they may be invoked directly by individuals.

Of course, when one looks more closely, the ECJ was always a supranational court exercising supranational judicial review in a supranational organisation, whereas the ECtHR started as an international court applying an international Convention in the framework of an international organisation. It is only gradually that the latter has turned into a supranational court both through the supranational status of ECHR rights and the strengthening of its judicial review powers. At the same time, however, individual applications for violations of human rights by states have always been at the core of the ECtHR's jurisdiction,

⁶⁷ See Helfer/Slaughter, *supra* n. 11 on this mutual emulation and overall effect. See also L Scheeck., 'The relationship between the European Courts and Integration through Human Rights' (2005) *Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht*, available at: www.zaoerv.de, de Witte in this volume.

whereas the ECJ has not always been competent in the human rights field. Even nowadays, it cannot receive individual applications against states and only examines human rights violations by states in the context of preliminary rulings or infringement procedures. Even when it is against EU institutions that individual applications are filed, the conditions for an individual to open an annulment procedure are very strict thus leaving most human rights-based procedures against EU institutions to other applicants than individuals. As a result, there are very few direct human rights cases before the ECJ – although the ECJ is under increasing albeit indirect fundamental rights pressure these days.⁶⁸ In fact, it is the place of human rights in the EU legal order that is in question, in contrast to a European Convention entirely dedicated to the protection of human rights: EU fundamental rights developed negatively against the EU to protect national democracies against EU law,⁶⁹ whereas the ECHR was adopted to protect national democracies against themselves.

In what follows, I would like to compare the ECJ and the ECtHR with respect to three features of supranational judicial review: the courts' jurisdiction, their scope of review and, finally, the effects of their judgements.

In terms of jurisdiction, first of all, both courts apply the same set of human rights to the same core States, across the board for the ECtHR and in the field of application of or derogation to EU law for the ECJ. The jurisdiction of the ECJ is more limited than that of the ECtHR as a result, but when they overlap, they are largely similar through the evolution of both courts' jurisdiction. First of all, ECHR rights are a sub-group of the rights applicable by the ECJ, albeit the most significant one. Those rights bind states as national human rights would, whereas EU fundamental rights benefit from the status of EU law within domestic legal orders. The supranational status of ECHR rights has been gradually developed through the case-law and state practice. They are minimal guarantees and may be subsided by stronger national rights for ECHR rights, and by stronger national and ECHR rights for EU fundamental rights. Second, not all 47 States submitted to the ECtHR belong to the 27 Member States of the ECJ, but the 27 EU Member States are submitted to both courts' review. Finally, the ECtHR can review the respect of human rights in all areas of national law including those corresponding to EU competences,⁷⁰ whereas the ECJ only has jurisdiction in the scope of

⁶⁸ One may mention the development of horizontal effects of fundamental rights, transnational discrepancies in the protection of fundamental rights and the constant restriction of the scope of purely internal situations to which EU fundamental rights do not apply.

⁶⁹ Even when fundamental rights are said to bind Member States, it is only in the scope of application or derogation to EU law, and primarily to ensure a uniform application of EU law across all Member States and therefore to protect national democracies not so much against themselves, but against others in the EU.

⁷⁰ See ECtHR, *Bosphorus v Ireland* (n. 45036/98) EHRR 2005-VI.

application of or derogation to EU law. It is important to note that certain political questions are excluded from the scope of jurisdiction of the ECtHR, but (almost) no longer of the ECJ (Articles 275–6 TFEU).

The scope of review, secondly, is similar in both courts. It was not always like that, but with time the ECtHR has gained a scope of review that is less subsidiary, and for instance, its application of the consensus principle and of the margin of appreciation is elastic. By contrast, the ECJ's review was never limited by a consensus or respect for the margin of appreciation of states. True, contrary to the ECtHR's, the ECJ's review is not concrete and individual, as it can only examine human rights violations in preliminary ruling and infringement procedures. However, the ECJ need not wait for the exhaustion of national remedies to be seized of a case, whereas the ECtHR's review remains clearly subsidiary in that respect. Of course, one may argue that since most human rights cases before the ECJ come through the preliminary ruling procedure, the relationship to national courts is as central before the ECJ as before the ECtHR. The recent verticalisation of the preliminary ruling procedure on the part of the ECJ, however, confirms the increasing supranational nature of the review that is exercised in that context as well.

As to the effects of their decisions, finally, both courts exercise weak judicial review in theory: their decisions are binding, but cannot lead to the invalidation of domestic law or decisions. In practice, however, the place of the ECJ in national procedures through preliminary rulings and the individual and general measures ordered by the ECtHR are close to constituting evidence of a strong form of judicial review. The same may be said about the re-opening of national procedures as a result of the primacy of decisions of the ECJ, and of the recent case-law pertaining to the revision of national decisions following the ECtHR's case-law. The monitoring of the enforcement of their decisions differs, however: while it remains very political for the ECtHR – with a few exceptions as confirmed by the increasing role of the ECtHR in the monitoring of its decisions – it is clearly judicial for the ECJ (through an infringement procedure).

In conclusion, one cannot but note the following paradox: the ECJ's supranational strong judicial review is used nowadays in the field of human rights, but only in a belated and bridled fashion and not to its maximal potential, whereas the ECtHR's international judicial review has developed and emancipated in the course of fifty years into strong supranational judicial review, solely focused on human rights and that goes beyond its strictly legal jurisdiction.

This seeming paradox is no longer one when the two courts are placed back into their respective political and institutional context: that of a supranational organisation like the EU for the ECJ (with no human rights competence) and of

an international convention like the ECHR and the Council of Europe (solely dedicated to human rights) for the ECtHR. The justification of human rights (notably by reference to democracy), and the democratic legitimacy of judicial review in those two contexts is bound to be entirely different. To understand why, I will, first, discuss the democratic legitimacy of supranational judicial review in general and provide, on that basis, a democratic assessment of the two courts' exercise of judicial review, before coming back to the relationship between them in the final section.

4. THE DEMOCRATIC LEGITIMACY OF SUPRANATIONAL JUDICIAL REVIEW

4.1. THE DEMOCRATIC LEGITIMACY OF JUDICIAL REVIEW *TOUT COURT*

As mentioned before, the question of the democratic legitimacy of (strong) judicial review is a well-known topic in legal and political philosophy. Scope precludes summarising the state of the debate.⁷¹ I will restrict myself to a few reminders as this will shed some light onto my discussion of the legitimacy of *supranational* judicial review.

⁷¹ See e.g. the arguments presented by e.g.: R Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press, Cambridge Mass. 1996), J Elster, *Ulysses and the Sirens, Studies in rationality and irrationality* (Cambridge University Press, Cambridge 1984), J Elster, 'Introduction' in J Elster / R Slagstad (eds), *Constitutionalism and Democracy* (Cambridge University Press, Cambridge 1988), J Elster, 'Limiting majority rule: alternatives to judicial review in the revolutionary epoch' in E Smith (ed), *Constitutional Justice under old Constitutions* (Kluwer, The Hague 1995), J Elster, *Ulysses Unbound* (Cambridge University Press, Cambridge 2000), JH Ely, *Democracy and Distrust* (Harvard University Press, Cambridge Mass. 1980), F Michelman, 'Foreword: traces of self government' (1986) 100 *Harvard Law Review* 4, F Michelman, 'Law's Republic' (1988) 97 *Yale Law Journal* 1493, J Habermas, *Between Facts and Norms* (MIT Press, Boston 1998), S Freeman, 'Constitutional Democracy and the Legitimacy of Judicial Review' (1990) 9 *Law and Philosophy* 327 and the critiques put forward by e.g.: J Waldron, 'Freeman's Defense of Judicial Review' (1994) 13 *Law and Philosophy* 27, J Waldron, *Law and Disagreement* (Oxford University Press, Oxford 1999), Ch. 12 and 13, J Waldron, 'Judicial review and republican government' in C Wolfe (ed.), *That Eminent Tribunal* (Princeton University Press, Princeton 2004), J Waldron, 'The core of the case against judicial review' (2006) *Yale Law Review* 1346, M Tushnet, *Taking the Constitution away from the Courts* (Princeton University Press, Princeton 2000), R Bellamy, 'Constitutive Citizenship versus Constitutional Rights: Republican Reflections on the EU Charter and the Human Rights Act' in T Campbell / KD Ewing / A Tomkins (eds), *Skeptical Essays on Human Rights* (Oxford University Press, Oxford 2001), 15–40, R Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, Cambridge 2007), R Bellamy, 'The Democratic Constitution: Why Europeans should avoid American Style Constitutional Judicial Review' (2008) 7 *European Political Science* 4–8, 9–20.

Arguments for the legitimacy of judicial review abound. For obvious reasons, the most interesting ones, however, are not those based purely on legitimacy, but those based on democratic legitimacy itself.⁷² In a nutshell, democracy is the political regime in which all those whose fundamental interests are directly affected by a decision ought to be included among those deciding. Democratic arguments for judicial review often rely on a democratic precommitment argument that justifies the limitations imposed on democracy by reference to some kind of self-commitment, just as one may precommit oneself not to drive when having drunk by handing over one's car keys to a friend, the people in a democracy are claimed to have handed over to judges the right to adjudicate on certain fundamental values on which they disagree and may decide wrongly. On such an approach, judges are part of the democratic process and their function is a contribution to democracy.⁷³

More specifically, there are three democracy-based arguments in favour of judicial review, and especially a constitution-based review of democratic legislation in a constitutional democracy.⁷⁴

The first one, widespread in US constitutional theory,⁷⁵ pertains to the tyranny of the majority or counter-majoritarian argument and the need to protect the minority against the majority. Judicial review controls the majority's decisions when they threaten the minority. The second argument pertains to the conceptual precedence of human rights and the fact that democracy cannot exist without human rights guarantees and hence without their judicial protection outside of the political process. Judicial review protects the pre-conditions of democracy against democracy itself. The final argument is that of expertise or information. Judges often know better or more at least than parliamentarians, and their

⁷² See e.g. Harel, A, 'Rights-based Judicial Review: A Democratic Justification', (2003) 22 *Law and Philosophy* 247, Alexander, L, 'Is Judicial Review Democratic? A Comment on Harel', (2003) 22 *Law and Philosophy* 277.

⁷³ See e.g. Habermas, *supra* n. 71, Elster, *supra* n. 71. See for a discussion, Waldron 1999, *supra* n. 71, Besson, *supra* n. 54.

⁷⁴ Theoretically, the democratic legitimacy of judicial review may be distinguished from that of the constitutional entrenchment of human rights. In practice, however, the more entrenched rights are, the more constrained the legislature is and the more powerful the judiciary becomes when it has judicial review.

⁷⁵ See the excellent discussion of the American and European models of judicial review by Stone Sweet, *supra* n. 6. Interestingly, judicial review where it exists at the domestic level in Europe came later than supranational judicial review in the 1950s and 1960s and was mostly based on the international example. It is the case, for instance, in Spain or in Germany. It would take too long to discuss the historical connections between the two and how a reconsideration of the democratic legitimacy of supranational judicial review of the kind I am proposing would affect national judicial review where it exists in Europe. It is important to stress, however, that the original connection between supranational judicial review and national democracy may explain why post-1950 national judicial review in Europe may not be considered as as problematic from a democratic point of view as pre-1950 judicial review in Europe and the US.

expertise can enhance or compensate the lack of epistemic qualities of the democratic process. Others stress judges' deliberative quality and hence their contribution to contestation and hence responsiveness that is a central value in a democracy. Both arguments can be used to emphasize the contribution of judicial review to the deliberative quality of judicial debates themselves or, more broadly, of political debates outside the judicial arena.⁷⁶

Objections to those arguments are just as well-known. Generally, the democratic precommitment model is regarded as flawed for different reasons: one may mention the difficulty of the transposition of the model of individual precommitment to a collective subject like a people, the differences between individual incapacity and political akrasia, the epistemic difference between the two situations, the priority of the judgement of a few judges over the deliberation of the many, or disagreements among judges themselves and the use of majority voting between them.⁷⁷

Regarding the three specific arguments mentioned before, various objections may be put forward, albeit in reverse order. First of all, the existence of widespread and persistent reasonable disagreement about issues of justice and morality, even among judges, makes it difficult to assess and compare the epistemic quality of institutions. Further, information may be more diversified among and accessible to parliamentarians than it is to members of the judiciary. Further, the very circumstances of politics also make it important to respect and trust the ability of each of us collectively. In fact, the human rights argument requires giving priority to the judgement of the many over that of the few, since the contrary would imply distrusting the very abilities human rights aim at protecting and furthermore in the very exercise of devising the content of our own mutual rights. Secondly, co-originality may be contested as being never quite granted, in which case one may venture that equality will most probably be the primary or reference value in the mutual relationship between human rights and democracy, thus undermining the legitimacy of judicial review. Finally, political equality justifies majority rule and provided majorities change and people take turn in being in the majority, majority rule protects minority rights in a more egalitarian way.⁷⁸

True, these objections imply guaranteeing (possibly through constitutional entrenchment) a minimal protection of human rights and hence potentially organising a weak judicial review of those rights, without which there could not be a functioning democracy. However, this means in turn that those very rights

⁷⁶ See e.g. Habermas, *supra* n. 71, Michelman, *supra* n. 71, Follesdal 2009, *supra* n. 11, 604–5.

⁷⁷ See Waldron 1999, *supra* n. 71, Besson, *supra* n. 54.

⁷⁸ See Waldron 1999, *supra* n. 71, Besson, *supra* n. 54.

are recognised democratically and guaranteed so as to allow (and even trigger) further deliberation in practice. It also implies that judges exercising weak judicial review are democratically elected and accountable. Finally, their exercise of review should not lead to striking down legislation but merely to request new deliberation and decisions on a given question, thus enhancing responsiveness and debate. The point of the present democratic assessment of judicial review is not therefore to reject the latter blankly in a sterile 'either-or' opposition, but to make sure (weak) judicial review is organised so as to be democratically accountable and that the chain of responsiveness between all democratic institutions (including the judiciary) is in place.

4.2. THE DEMOCRATIC LEGITIMACY OF JUDICIAL REVIEW IN THE SUPRANATIONAL CONTEXT

4.2.1. *Reassessing the issue*

Interestingly, the question of the democratic legitimacy of supranational judicial review has not been addressed extensively yet, at least from a philosophical perspective.⁷⁹ This is quite surprising, at least *prima facie*. Questions pertaining to the democratic legitimacy of international institutions and international law have indeed become pervasive. Paradoxically, however, the more intrusive supranational human rights review becomes in the national sphere of sovereignty and hence the more impact it potentially has on domestic democracy, the more effective⁸⁰ and hence the more successful it is deemed to be. Its legitimacy is barely ever mentioned or only to stress that it is precisely not in contention.⁸¹

A first reason for this state of affairs may be that supranational adjudication stems originally from an international agreement and that international law has only recently started to be regarded seriously as law by legal theorists and as an object of moral judgement by political philosophers. Even when international law is regarded as law and its legitimacy is discussed, consent is usually put forward as the major justification for international law's authority. However,

⁷⁹ See, however, Follesdal 2008 and 2007, *supra* n. 11, Letsas, *supra* n. 9.

⁸⁰ See the seminal paper by Helfer/Slaughter, *supra* n. 11 referring to the two European courts as paradigms of 'effective supranational adjudication'.

⁸¹ See e.g. Gardbaum, *supra* n. 27. This may explain why those who may be cautious about strong judicial review in the national context are ready to endorse it in the supranational context and when asked for justifications, are ready to use a Dworkinian theory of adjudication they would not apply to national circumstances. It is not a surprise, for instance, that the first theory of supranational human rights adjudication at the ECtHR stems from a Dworkinian legal theorist (Letsas, *supra* n. 9).

consent is neither a sufficient nor a necessary condition of legitimacy.⁸² Nor is it correct to identify consent with democracy and democratic legitimacy.⁸³

Another, more serious reason lies in the largely uncontested legitimacy of international human rights standards. No one would dare contest their justification as readily as one does contest other international law norms' legitimacy. And even if they did, they would not readily submit that justification to the same criteria as other norms of international law – and especially not to consent, but not necessarily to democracy either. This is even more so as international human rights historically found part of their justification in the reinforcement of national democracies. While democracy did not fare that well as a binding international principle, human rights were much more consensual and subsumed other principles such as democracy in particular.⁸⁴ Since international human rights and their adjudication mechanisms were regarded as intrinsically connected from the beginning in Europe, it is difficult to contest the legitimacy of supranational human rights adjudication, even on democratic grounds.

As I have argued elsewhere, however, the democratic legitimacy of international human rights is an important albeit complex question that cannot simply be swept away because it cannot be addressed along the same lines as that of other international law norms. True, it calls for a more careful answer given the intricate and mutual relationship between human rights and democracy within any given polity, and the interesting addition of an international dimension in either human rights law or in democratic decision-making.⁸⁵ Furthermore, there is no necessary conceptual link between the legitimacy of international human rights and that of supranational human rights judicial review. While it is true that human rights adjudication contributes to the interpretation of human rights and hence, if it is legitimate, to their legitimacy, the reverse is not necessarily the case. International human rights are indeterminate about the best ways of protecting them institutionally. This is the case in domestic law, but even more so in international law given the difference in nature between international and

⁸² See A Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford University Press, Oxford 2004), S Besson, 'The Authority of International Law – Lifting the State Veil' (2009) 31:3 *Sydney Law Review* 343–80.

⁸³ See Buchanan, *supra* n. 82, Besson, *supra* n. 82.

⁸⁴ See Letsas, *supra* n. 9, Moravcsik, *supra* n. 8. Interestingly, the ECHR mentions the notion of 'democratic society' among the conditions set for the restriction to certain rights under the Convention. The Convention thus has its own in-built (human rights-based) definition of what a democratic society is and when that society ought to restrict human rights to protect itself.

⁸⁵ See Besson, *supra* n. 14, S Besson, 'The Right to Have Rights – From Human Rights to Citizens' Rights and Back' in M Goldoni / C McCorkindale (eds), *Arendt and Legal Theory* (Hart Publishing, Oxford 2011), forthcoming.

domestic human rights and the latter's necessary contextualisation in domestic law and through domestic institutions. Finally, times and circumstances have changed in Europe, national democracies have developed and consolidated, including through national human rights catalogues and judicial institutions of their own and no longer need the kind of supranational law and/or judicial review they put in place in 1945 or at least not necessarily in the same way.⁸⁶

As a result, it is possible, I would like to argue, to isolate the question of the democratic legitimacy of supranational human rights adjudication from that of the legitimacy of international human rights themselves. The difficulty is double, however: does supranational judicial review really raise the same questions as national judicial review in terms of democracy? And how about the answers: are they radically different?

4.2.2. *Different questions*

Interestingly, the questions raised by supranational judicial review are not entirely the same as the ones discussed before. The concepts of democracy, human rights and judicial review need to be re-qualified in this new context.

First of all, the kind of democracy we are talking about needs to be re-qualified across legal orders in a complex political community such as the European Union. It is unclear indeed which is the polity whose democratic institutions are concerned by the exercise of supranational judicial review and which institutions in that polity are the relevant ones.

On the one hand, democracy needs to be re-qualified *at the European level*. The concern is not only the impact of judicial decisions on national legislative and executive powers, but also on European legislative and executive ones, that is, in other words, on the separation of powers (even of a *sui generis* kind⁸⁷) at the European level. It suffices in this respect to refer to the conflicts between the European Parliament or the European Commission and the ECJ, or between the Council of Europe's Committee of Ministers and the ECtHR, in the context of the execution of the Court's judgements, to understand what is at stake. Furthermore, it is probably impossible and undesirable to separate the different

⁸⁶ One may even argue that European supranational judicial review was only meant as an example, and as a temporary replacement for what would have to be done eventually at the domestic level. See Stone Sweet, *supra* n. 6 on the relationship between supranational and national judicial review in Europe.

⁸⁷ The institutional balance principle in the EU may be equated with a *sui generis* form of separation of powers that is both horizontal and vertical. Of course, the specificities of the separation of powers in the EU are a reason for caution in an institution-sensitive discussion of judicial review.

levels of democratic representation given the disaggregation of legislative functions and the re-aggregation of those functions that has occurred at different levels in Europe. Thus, double or even triple forms of democratic representation at the European level (through direct representatives of EU citizens, through representatives of national parliaments, and through governmental representatives of States) make the chain of democratic legitimacy more complex and hence more difficult to unpack in terms of the precise democratic impact of supranational judicial review. A further layer of complexity may be added if non-judicial European institutions side with one of the European courts in its exercise of judicial review of national legislation.

On the other hand, democracy also needs to be re-qualified *at the national level*. National democracy is not only affected in its legislative dimensions, but is impacted as a whole *qua* national sovereignty. This explains the strong national supremacy reactions to supranational human rights adjudication in recent times, both by national executives and even by judicial bodies.⁸⁸ Furthermore, supranational judicial review affects the overall institutional balance in a given state. Indeed, not all national institutions are losing equally in democratic power from supranational judicial review. Thus, supranational judicial review affects the national separation of powers. On the one hand, the judiciary in certain European States has been reinforced by the development of the ECtHR's power of review.⁸⁹ This is also a well-known reality in the EU where national judges have been empowered by European integration and their cooperation with the ECJ.⁹⁰ It is more and more difficult therefore to separate the activity of supranational judges from that of national judges. Of course, the possibility of interjudicial dialogue may actually influence supranational case-law, thus alleviating the impact of supranational judicial review on national democracy. The reverse may also be true: the national legislature may be reinforced by supranational judicial review and the triggering of political remedies at national level. The ECtHR's pilot cases, for instance, and their structural measures have reinforced the position of the Parliament in Poland.⁹¹ In short, therefore, the nature of national democracy itself is evolving as a result not only of post-national law-making processes, but also of supranational judicial review. And sometimes even in opposite directions, which makes the assessment more difficult.

⁸⁸ See e.g. BVerfG, B. v. 14.10.2004 (2 BvR 1481/04 – *Görgülü*), BVerfGE 111, 307 (328).

⁸⁹ Many European States that had no system of constitutional review of legislation have introduced one after their accession to the EU (e.g. Finland).

⁹⁰ This has been famously thematized by Weiler, *supra* n. 11.

⁹¹ See e.g. the discussion in W Sadurski, 'Partnering with Strasbourg: Constitutionalization of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments' (2009) 9:3 *Human Rights Law Review* 397–453.

A second qualification is in order: the human rights that constitute the basis of supranational judicial review are a complex set of European human rights applicable across legal orders in the European Union. It is unclear indeed whose human rights are the rights that are applied through judicial review of national laws and what is their relationship to the democratic polity at stake. What remains uncertain, more specifically, is whether these guarantees are entrenched against the democratic will and in what way that entrenchment has been made democratically legitimate.

There is *per se* no entrenchment of European human rights in European law. Of course, some of those rights can be said to have a higher material rank among the norms of European law due to their *jus cogens* nature (e.g. Articles 2, 3, 4 and 7 ECHR based on Article 15 ECHR) or to their nature as general international law norms.⁹² However, those categories and the material hierarchies that follow are contested in international law.⁹³ This triggers difficult questions pertaining to the relation between supranational human rights regimes and other *prima facie* equivalent norms or regimes of international law, such as State or international organisations' immunities, State responsibility, etc.⁹⁴ European human rights do not (yet) constitute, in other words, the Constitution of the European legal order.⁹⁵ Similar normative conflicts may arise between EU fundamental rights that are deemed constitutional norms of EU law⁹⁶ and other norms of EU primary law, as it is often the case between EU fundamental rights and fundamental freedoms.

⁹² See e.g. B Simma / P Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens and General Principles' (1988–1989) 12 *Australian Year Book of International Law* 82 on the sources of international human rights.

⁹³ Of course, this does not apply within the case-law of the ECtHR, as exemplified by the decisions *Waite and Kennedy* (*Waite and Kennedy v Germany* (n. 26083/94) EHRR 1999-I) or *Bosphorus* (ECtHR, *Bosphorus v Ireland* (n. 45036/98) EHRR 2005-VI) and the equivalence test imposed on conflicting international legal regimes such as the law of international organizations. That case-law is not entirely consistent, however, as demonstrated by the *Behrami* case with respect to binding UN law (ECtHR, *Behrami v France* (n. 71412/01, 78166/01) (2007) 45 EHRR SE 10). In this respect, it will be interesting to see what the ECtHR decides in the *Nada v Switzerland* case that is currently pending before it (n. 10593/08). In that case, indeed, the ECtHR is likely to follow its *Bosphorus* presumption and hence abide by the ECJ's *Kadi* decision while at the same time innovating by applying the *Bosphorus* test to UN law and no longer only to EU law. On the potential scenarios, see Besson, *supra* n. 42, A Ciampi, 'The Potentially Competing Jurisdiction of the ECJ and the ECtHR' (2009) 28 *Yearbook of European Law* 601–9.

⁹⁴ See e.g. *Al-Adsani v The United Kingdom* (n. 35763/97) EHRR 2001-XI, *Markovic and Others v Italy* (n. 1398/03) Judgment of 14 December 2006, selected for publication.

⁹⁵ Contra: Gardbaum, *supra* n. 27.

⁹⁶ See Case C-402/05P and C-415/05P *Kadi* [2008] ECR I-6351. The contours of EU constitutional primary law remain to be determined, however. See the discussion in Besson, *supra* n. 42.

Of course, once contextualised or vernacularised at the national level as should be the case,⁹⁷ European human rights are usually transformed, or at least identified with constitutional human rights norms – with or without incorporation.⁹⁸ This raises the whole democratic question anew from within the national constitutional order. Supranational judicial review is used to enforce the equivalent of a domestic set of human rights on the national political process, albeit from the outside. This contributes to the entrenchment of those rights within the domestic legal order without, however, going through the democratic channels of constitutional entrenchment and thus circumventing the democratic precommitment argument – at least at the domestic level.⁹⁹ The same may be said about EU fundamental rights that stem from ECHR rights and national constitutional traditions as those rights benefit from the primacy of EU law over all national legislation, including national constitutional law. They become as a result a source of supraconstitutional rights whose respect can be reviewed from the outside.

This reality also creates a further complexity, however: supranational human rights judicial review sometimes creates hierarchies among supranational and constitutional human rights within national law. In doing so, supranational judicial review interrupts the sensitive balance that has been attained in the domestic legal order between entrenched constitutional human rights and democracy. This has been the case in certain countries, like Switzerland, where constitutional review is weak, but where ECHR rights and supranational review by the ECtHR have introduced unprecedented judicial review at the domestic level as the Swiss Federal Court exercises strong conventional review of domestic legislation. The reverse can also be true, however, as exemplified by Ireland where ECHR rights are not granted the same status as national constitutional rights in constitutional review.¹⁰⁰

Finally, with respect to the concept of judicial review itself, a few qualifications are needed. There is indeed more than just one supranational court at stake in Europe. It is difficult therefore to single out the institution whose review is under democratic scrutiny.

One may draw at this stage from the flourishing literature that pertains to inter-judicial relations in Europe.¹⁰¹ On the one hand, supranational courts are not

⁹⁷ See S Besson, 'Human Rights – Moral, Political, ... or Legal? First Steps in a Legal Theory of Human Rights' in T Childress (ed.), *The Role of Ethics in International Law* (Cambridge University Press, Cambridge 2011) forthcoming.

⁹⁸ See Gardbaum, *supra* n. 27, Letsas, *supra* n. 9.

⁹⁹ See my discussion of the democratic qualities of the British and Irish incorporations of the ECHR, especially when compared with Switzerland: Besson, *supra* n. 27.

¹⁰⁰ See Besson, *supra* n. 27.

¹⁰¹ See e.g. Maduro, *supra* n. 3, Benvenisti, *supra* n. 11.

one of a kind, thus making the picture more complex. Furthermore, special kinds of strong judicial review exercised by national courts when they apply supranational human rights as opposed to domestic human rights should not be underestimated; supranational judicial review is not only exercised by supranational courts as a result. Of course, national courts are usually the ones in direct contact with supranational courts and the ones distilling their influence in domestic law. It is the case for the ECtHR given the necessary exhaustion of local remedies and for the ECJ in the context of preliminary rulings. This explains the emphasis on judicial dialogue on the part of both the ECJ and the ECtHR. While judicial dialogue with national courts may be seen as a way to alleviate the democratic impact of supranational judicial review, it may also be seen as having a multiplying effect through the convergence of the two European courts on a given issue.

On the other hand, the proliferation of international but also of supranational judicial entities in Europe makes it difficult to isolate one tribunal in particular. When their scopes of jurisdiction overlap, the ECJ and the ECtHR tend in most cases to collaborate and organize their respective jurisdictions along the lines of a complex principle of minimal equivalence (at least from the perspective of the ECtHR).¹⁰² The coordinated exercise of supranational jurisdictions adds a layer of complexity to the appreciation of their democratic impact at the national level. It suffices to think of the cases in which the two Courts' interpretations of the same ECHR rights have diverged and of the quandaries thus created for Contracting States.¹⁰³ But the reverse can also be true: a discrepancy between national law and two similar European judicial decisions may reinforce the impact of supranational judicial review on domestic law, triggering the democratic question anew. With the EU's accession to the ECHR, the two courts should coordinate and converge even more on human rights matters, thus reinforcing that difficulty.

¹⁰² For a survey of the approaches of each court *vis-à-vis* the other one and their convergence or divergence, especially following the *Bosphorus* case (ECtHR, *Bosphorus v Ireland* (n. 45036/98) EHRR 2005-VI), see de Witte in this volume, and Spielmann in this volume. See also Scheeck, *supra* n. 67, S Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis' (2006) 43:3 *Common Market Law Review* 629, Rosas, *supra* n. 2, G Harpaz, 'The ECJ and its Relations with the ECtHR' (2009) *Common Market Law Review* 105, J Callewaert., 'The European Convention on Human Rights and European Union Law: A Long Way to Harmony' (2009) 6 *European Human Rights Law Review* 768.

¹⁰³ This has been the case either in terms of diverging interpretations of the same rights in different contexts or in terms of a different balancing of interests or legal qualification of the facts (see e.g. Case C-17/98 *Emesa Sugar* [2000] ECR I-665, or *Koua Poirrez v France* (n. 40892/98) EHRR 2003-X).

4.2.3. *Different answers*

In view of those new qualifications of the questions, the answers are also bound to differ from those put forward at the domestic level. Interestingly, objections to supranational judicial review are even stronger than at the national level, precisely by virtue of some of the inherently democratic qualities of domestic (weak) judicial review, at least in functioning constitutional democracies.

First of all, it is clearly more difficult to put forward a democratic precommitment argument in favour of supranational human rights catalogues and for supranational judicial review on the basis of those catalogues than it is in the domestic context. Domestic human rights, when they are entrenched in a Constitution, do indeed draw part of their legitimation *qua* superior legal norms from the democratic nature of that constitutional entrenchment. One may mention, for instance, an inclusive constituent assembly, high-quality deliberations and the requirement of supra-majorities or unanimity.

ECHR rights instruments take the form of European treaties adopted in an intergovernmental manner.¹⁰⁴ Democratic control mostly occurs at domestic level therefore and usually only in an indirect way (except in countries like Switzerland where a referendum on international treaties may be called for). Even when that democratic control takes place, it is usually through a (parliamentary or even a popular) vote in an all or nothing fashion, rather than through deliberation over the text itself during international negotiations. Moreover, once ECHR rights are granted a constitutional or quasi-constitutional status in domestic law, it is not usually through legislation or constitutional reform, but through judicial practices. As to EU fundamental rights that stem from common constitutional traditions, it is still up to the ECJ to recognise them as general principles and hence to determine whether they are sufficiently widespread to be regarded as common. Once they become part of EU law, those rights benefit from a supraconstitutional status in national law without going through any of the democratic channels for constitutional precommitment of that kind whether at the domestic or at the European level. The democratic credentials of EU fundamental rights that stem from the Charter or other primary or secondary EU law sources are better, of course, at least from an EU perspective but that may also be challenged from a domestic perspective. And this difficulty actually goes to the heart of the matter and explains why there is no EU legislative competence in the human rights context to date.

In any case, it is difficult to see which polity would actually be pre-committing itself: can one speak of a European democratic polity in the Council of Europe? If

¹⁰⁴ See Simma/Alston, *supra* n. 92 on the sources of international human rights law.

there were such a European polity, it would be an imbricated polity made of the 47 European national polities. And if so, along which lines? The Council of Europe's Parliamentary Assembly does not have binding legislative functions and does not actually entail direct representatives of the citizens of the 47 Contracting States but parliamentary delegations. Moreover, it is neither involved in the ECHR drafting and revision processes nor in its interpretation, the former is left to Contracting States and the latter to the ECtHR. The same questions may be replicated with respect to the EU. The EU has gradually developed into a *sui generis demoi-cracy* and a political community of communities that is pluralist, multi-level and multi-layered.¹⁰⁵ It is a democracy of states and individuals and ought not to replace national democracies in Europe. As a matter of fact, one may actually venture that the EU has no human rights competence precisely because of the democratic implications of adopting human rights in any given political community.¹⁰⁶ Instead, it has its own kind of hybrid human rights regime that stems bottom-up from the national traditions and international guarantees of its Member States and corresponds to its special brand of *demoi-cracy*.

All this should make clear how any talk of democratic precommitment, at least in a statist understanding, is clearly precluded with respect to European human rights.

Of course, the difference in European human rights' democratic regime may lie in the difference of nature between international human rights and domestic human rights. One may follow Hannah Arendt and her aporia of international human rights¹⁰⁷ in this respect: given the intricate relationship there is between democracy and human rights, the only international human right there can be is the right to have human rights in a given polity where there can be a democratic justification of human rights *qua* rights of the citizen.¹⁰⁸ If there is one international human right whose legitimacy is to be found outside the democratic polity, it is precisely the right to belong to such a polity and be vested with rights in that polity.¹⁰⁹ Except for that right, however, the primacy of the democratic

¹⁰⁵ See e.g. K Nicolaidis, 'We, the Peoples of Europe...' (2004) *Foreign Affairs*, November/December 2004 97–110, S Besson., 'Ubi Ius, Ibi Civitas. A Republican Account of the International Community' in S Besson / JL Marti (eds), *Legal Republicanism – National and International Perspectives* (Oxford University Press, Oxford 2009), 204–37, S Besson, 'Institutionalizing global demoi-cracy' in L Meyer (ed.), *Justice, Legitimacy and Public International Law* (Cambridge University Press, Cambridge 2009), 59–81.

¹⁰⁶ See Besson, *supra* n. 82.

¹⁰⁷ See H Arendt, "'The Rights of Man': What Are They?' (1949) 3:1 *Modern Review* 24–36, H Arendt, 'The Decline of the Nation-State and the End of the Rights of Man', in *The Origins of Totalitarianism* (Penguin, London 1951).

¹⁰⁸ See Besson, *supra* n. 85.

¹⁰⁹ See JL Cohen, 'Rethinking Human Rights, Democracy and Sovereignty in the Age of Globalization' (2008) 36:4 *Political Theory* 578, Besson, *supra* n. 82.

polity is confirmed even more strongly in the case of the protection of other international human rights.

As a matter of fact, the difference in nature and hence in democratic pedigree explains why European human rights are usually drafted as more general norms than national constitutional rights. They are also conceived as minimal requirements rather than as maximal standards. European human rights are, in other words, necessarily incomplete norms that gain their democratic legitimacy from their reception in a national legal order through various reception mechanisms.¹¹⁰ This difference in nature also reveals how misguided it would be to assimilate too readily European human rights to domestic constitutional rights and to give them the same rank in the domestic legal order or at least to give them the same role in judicial review of democratic legislation.¹¹¹ Of course, the buck then passes to those very reception mechanisms which have to be as democratic as possible to account for the rank then granted to those rights in the national legal order. It also implies revisiting the relationship between national and international human rights once they are all 'constitutionalised' at the national level, so to speak. This form of 'constitutional novation', as it were, is analogous to what European and international lawyers see happening to other European and international legal norms in national legal orders, except that it has constitutional rank in the case of human rights and hence generates a constitutional form of pluralism with a complex democratic legitimation.

All this proves, in other words, that European human rights cannot be compared to an entrenched set of constitutional rights protected from the national democratic process albeit on the basis of a democratic decision, and whose protection as a result may be taken away from the hands of national authorities to protect them against their own whim and vested in the hands of the judiciary, be it a supranational judiciary. Except for the right to have rights, they are minimal rights that need to be received and contextualised and hence legitimised democratically before they can be used judicially to review democratic legislation domestically. As to the international democratic legitimation of those minimal rights, it occurs through enhancing the democratic credentials of domestic decision-making processes that contextualise and develop human rights minima,

¹¹⁰ On those reception mechanisms, see Keller/Stone Sweet, 'The Reception of the European Convention on Human Rights in European Legal Orders', *supra* n. 15, 11–36. See also Helfer, *supra* n. 16 on 'embeddedness' of ECHR rights within Contracting Parties' legal order.

¹¹¹ In this sense, I differ from Letsas, *supra* n. 9 who argues, on the basis of the non-international nature of European human rights, that the concepts of consensus and margin of appreciation have no justification in the ECtHR's reasoning. While I agree with the former prong of his reasoning, I think he too quickly associates European human rights with constitutional rights and hence the Court's reasoning with a national constitutional court's. It is precisely the democratic process of reception of those rights in the domestic order that requires respecting States' margin of appreciation.

on the one hand, and through developing the democratic nature of international decision-making processes, on the other.¹¹²

Second, if one turns to specific critiques of supranational judicial review itself, the reasonable disagreement objection is even stronger in the context of supranational judicial review than in the domestic context.

To start with the disagreement argument, how could one possibly claim that judges from 47 different countries could disagree less among themselves than judges within each country? Or, to refer to the expertise argument, that they even could know better than those of each respective country or than the legislatures in each respective country? True, judicial politics are often put forward as the way to resolve intractable questions of constitutional pluralism, questions national legislatures have not addressed and left to the judiciary. This argument would seem *prima facie* to be even stronger in the case of an external supranational judge. But why would supranational judges have the legitimacy needed to resolve difficult questions which are, after all, questions left to domestic politics according to the principle of democratic subsidiarity and hence left to national parliaments? How could they do so without reference to the democratic process, however complex, multi-level and multi-layered that process has become? Of course, ECtHR judges are not only selected by Contracting States as ECJ judges are, but also by the CoE Parliamentary Assembly. This does not, however, make them as politically accountable as domestic judges.¹¹³

These difficulties may actually explain why traditional international judicial review is usually organised so as to remain subsidiary and merely declaratory, but also why it was intended to respect States' margin of appreciation and interpret international human rights in a contextualised and dynamic way that can adapt to the evolution of domestic societies. It also generally aims at enhancing the power of domestic judges by creating interjudicial partnerships and dialogue rather than hierarchies. On that model, domestic judges can remain the ultimate judges to actually exercise weak or strong judicial review of democratic acts or decisions on the basis of supranational human rights law, but according to their domestic democratic arrangements. One may actually venture that the transformation of the ECHR into supranational law and of ECHR rights into quasi-constitutional rights within domestic legal orders, thus associating national institutions to the implementation of those human rights domestically, is a development that may be more legitimate than supranational judicial review. It may somehow even be regarded as antithetic to the latter.

¹¹² See Buchanan, *supra* n. 82, A Buchanan, 'Human Rights and the Legitimacy of the International Order' (2008) 14 *Legal Theory* 39–70, Besson, *supra* n. 82.

¹¹³ See also Follesdal 2009, *supra* n. 11, 605.

Hence the reactions of Western democracies, in which ECHR rights are embedded and well received through democratic channels, to the increasingly strong kind of review exercised by the ECtHR. The vernacularisation or reception of European human rights within the political processes in each of the 47 Contracting States, and especially the older ones, constitutes a much more legitimate way of protecting those rights than supranational judicial review. Of course, the situation may well be different in young or disfunctioning democracies. One may draw here on discussions of the justification of constitutional precommitment in post-1989 national democracies in Europe.¹¹⁴ This is particularly illuminating in the case of the ECtHR since the 47 States are divided on the increase of judicial review powers, which divide actually matches the very border between Western and older democracies, on the one hand, and Central and Eastern and more recent democracies in Europe, on the other.

It is quite paradoxical therefore to observe the Council of Europe recommend a deeper reception of the ECHR within domestic law and hence the reinforcement of the principle of subsidiarity,¹¹⁵ while at the same time allowing the Court to reinforce its own review powers through its case-law. It is as if, in other words, the ECHR and its Court were facing within its own membership two historical phases at the same moment in time: a new group of States legitimately looking for what the former group got when it first entered the Convention system, but not longer needs and actually legitimately rejects for democratic reasons.

The contrast that lies in this two-speed Europe of rights has become particularly clear within the EU as well. Among EU Member States, the ECtHR's bold supranational velleities are not perceived as well as East of the EU. This is even more the case as supranational judicial review by the ECJ was not meant initially to be used to promote human rights against national legislatures. The ECJ reviews the laws of a complex polity whose laws are integrated in domestic legal orders. The absence of human rights competence of the EU and the way in which European human rights including the ECHR have become sources of EU law and hence benefit from supraconstitutional rank in domestic law sit uneasily with the use of supranational judicial review by the ECtHR in this area, to say the least. And this in turn explains retrospectively the clashes that have occurred between the two courts and culminated in the adoption of the *Bosphorus* test by the ECtHR.¹¹⁶

¹¹⁴ See e.g. J Elster, 'Rebuilding the boat in the open sea: Constitution-making in Eastern Europe' (1993) 71 *Public Administration* 169–217, Sadurski, *supra* n. 91.

¹¹⁵ For instance, through an obligation to establish an individual right to constitutional review in domestic law: see the 2010 Interlaken Action Plan (*supra* n. 34).

¹¹⁶ ECtHR, *Bosphorus v Ireland* (n. 45036/98) EHRH 2005-VI.

5. EUROPEAN LEGAL PLURALISM AND THE RELATIONSHIP BETWEEN EUROPEAN COURTS

5.1. THE ROLE OF EUROPEAN HUMAN RIGHTS REVIEW IN CIRCUMSTANCES OF LEGAL PLURALISM

It should be clear by now that the key to the relationship between the two European courts and national courts, but also between themselves, depends on their institutional and political framework, however complex that framework may have become in Europe. When that relationship is assessed from outside the judicial box, the differences between the two institutions become clearer and so should their respective functions in the European legal order *lato sensu*. They are no longer two supranational judicial actors relating to each other and to national judicial actors along mere judicial lines, but they are also institutions relating to other non-judicial institutions at different levels in a complex democratic supranational community. And those relations to non-judicial institutions, once they are unpacked, shed light on the relations European courts ought to have to national courts and to one another.

This conclusion is particularly important in reference to the ways in which supranational human rights review is used to resolve normative conflicts in circumstances of legal pluralism in Europe. The real question behind legal pluralism is one of validity, rank and effect of legal norms stemming from other legal orders within a given legal order. Answers to those questions have to be found in what makes a legal norm legitimate and valid and hence in particular in the democratic community itself.¹¹⁷ It is only by reverting to democracy that legitimate decisions can be taken in case of normative conflicts and the absence of legal hierarchies. All legal orders cannot be deemed as equivalent and their relationships cannot be organised in a comparable fashion, especially when they have individuals and states or only individuals as subjects.

In the European Union, the very refined *demoi*-cratic regime that was developed within the European legal order during the past fifty years can account for the legitimacy of EU law. It justifies a pluralist relationship between national and EU law within the European legal order. To know which rules should take priority in case of conflict, this implies looking to the processes that are most inclusive of all those potentially affected in their fundamental interests in each case. It is a form of mutual subsidiarity that may go either way: in favour of national or of European law. By contrast, that subsidiarity is only one-way when it applies to

¹¹⁷ See Besson, *supra* n. 42. See also A Buchanan / R Powell, 'Constitutional Democracy and the Rule of International Law: Are They Compatible?' (2008) 16:3 *Journal of Political Philosophy* 326-49.

the relationship between ECHR rights and national law in the absence of a supranational political community and democratic connection between those legal orders.

Of course, judges are among the first institutions to be faced with normative conflicts. However, this does not mean that they are alone with this task. Supranational adjudication ought not be assessed in isolation from other institutions in a democracy. Nor should its judicial review be legitimised without reference to the other national and supranational legislative institutions it relates to.

In the European Union, this implies taking account of the European Parliament, the Council and the Commission, but also of national parliaments. The European political community is indeed a *demoi*-cratic one. Recent efforts in the Lisbon Treaty to connect the Parliament to the election of the ECJ and national parliaments to the ECJ's review mechanisms are to be supported. Clearly, the ECJ should be responsive to both national and European legislative processes. Again, the test of democratic inclusion may work as a legitimate criterion in case of conflicts. By contrast, the ECtHR is not part of a political community, not even a *sui generis* one like the EU and the only political institutions it relates to are national parliaments and executives. Their relation is clearly one that should be more responsive than it is now and should complement the interjudicial relationship between the ECtHR and national courts.

Of course, human rights adjudication is particularly sensitive in the absence of an EU competence in the human rights context. This is particularly obvious given the mutual relationship between human rights and democracy in a political community.¹¹⁸ The exercise of judicial review in the area was not only belated, as a result, but it is bridled. The fear is indeed that the ECJ may not be able to cope sufficiently well with the need of accountability to national and European democratic institutions in this field. Paradoxically, as we saw before, the ECtHR seems to have had more leeway in the development of a supranational judicial review in the field of human rights, whereas it did not have this kind of review from the beginning. The democratic resistance is only starting to mount now in Western and older democracies in Europe.

The differences between the two courts (belated or original and bridled or unbridled human rights review) do not seem so paradoxical once the connexion

¹¹⁸ See von Bogdandy, *supra* n. 48, Besson, *supra* n. 48. This explains why AG Maduro's proposal in *Centro Europa* (Case C-380/05 *Centro Europa* [2008] ECR I-349) to ensure a mutuality between legal orders in the respect for fundamental rights fails to convince: not only is it contrary to the absence of EU competence in the human rights context, but it is contrary to the kind of *demoi*-cracy in place in the European Union.

between human rights and democracy is revealed. In a complex supranational political community like the EU in which democracy is multi-levelled, human rights protection and human rights review of legislation are more difficult to ensure legitimately. The ECtHR's supranational human rights review, by contrast, is only a concern for national legislatures, as there is no competing political community developing on the basis of those rights at the European level – at least not besides that of the EU.

5.2. THE CONSEQUENCES FOR THE RELATIONSHIPS BETWEEN EUROPEAN COURTS

What is the upshot of all this in terms of judicial relations and interpretation of the same European human rights in different European legal orders? Since those human rights are the human rights of a complex supranational political community, i.e., the EU, democracy ought to constitute the common frame of reference. In those conditions, democratic subsidiarity becomes the guiding principle in supranational judicial review in Europe.¹¹⁹ This applies between European courts and national courts, as much as between European courts themselves.

In the relationship between either of the two European courts and a national court, on the one hand, it is important to distinguish between what ought to be expected from each of the two European courts.

When the ECJ is competing with national courts and reaches a different interpretation of the same right or a different balancing of the same conflicting rights and interests, democratic subsidiarity requires that the legal norm stemming from the most inclusive institution and decision-making process takes priority. Judicial reasoning based on a common identity and shared values between legal orders cannot resolve difficult normative conflicts.¹²⁰ Democratic subsidiarity constitutes the only plausible tie-breaker. This should *a fortiori* also be the case when the ECtHR is in a competition situation with a national court. The fact that the Convention is not part of an autonomous legal order and the Court itself is not part of a supranational or international institutional framework of its own besides that of the Council of Europe explains how democratic

¹¹⁹ On subsidiarity, see Buchanan/Powell, *supra* n. 117.

¹²⁰ It suffices to see the limitations of that reasoning in *Michaniki* (Case C-213/07 *Michaniki AE v Ethniko Symvoulío Radiotileorasis and Ypourgos Epikrateias* [2008] ECR I-9999) or *Arcelor* (Case C-127/07 *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895). This is also confirmed by AG Maduro's reasoning who reverts to the primacy of EU law at the last stage in his argument.

subsidiarity ought to be even stronger between the ECtHR and national courts than between the ECJ and those courts.

With respect to the relationship between the two European courts, on the other, the difference between the two courts and their respective relationships to national courts helps us see more clearly what their mutual duties should be. This argument is the upshot of the *relation à trois* that exists between those courts.¹²¹

When the ECtHR is competing with the ECJ and reaches a different interpretation of the same right or a different balancing of the same conflicting rights and interests, the former should give way to the latter. It is a form of *subsidiarity within subsidiarity*, if the ECtHR is subsidiary to national courts, it is even more subsidiary to the ECJ which is the supranational court of the European legal order and has closer ties to national and European democracies than the ECtHR.

Interestingly, this approach corresponds to the contextual deference to EU law and the ECJ's case-law recently demonstrated by the ECtHR in areas in which EU law and the ECJ have a more developed and advanced practice but also a practice that corresponds to its own political and social context.¹²² This has been the case in the field of anti-discrimination law, for instance.¹²³ More generally, subsidiarity within subsidiarity seems to have become the rule between the two courts ever since the *Bosphorus* case in 2005.¹²⁴ In that case, the ECtHR has established a refragable presumption according to which EU law is presumed to grant equivalent protection to ECHR rights and ought not therefore be reviewed through the control of implementation acts taken by EU Member States, unless that presumption is reversed because the protection ensured is not comparable to that of the ECHR.¹²⁵

The justification of that presumption has been widely disputed by human rights scholars across Europe, and it now has found a clear democratic justification in

¹²¹ On this relationship, see Besson, *supra* n. 42.

¹²² See Spielmann, in this volume, for similar conclusions.

¹²³ See e.g. *Stec and Others v The United Kingdom* (n. 65731/01, 65900/01) EHRR 2006-VI, *D. H. and Others v Czech Republic* (n. 57325/00) Judgment of 13 November 2007, selected for publication.

¹²⁴ Confirmed in *Kokkelvisserij (Coöperatieve producentenorganisatie van de nederlandse Kokkelvisserij U.A. v The Netherlands* (n. 13645/05), Judgment of 20 January 2009, selected for publication).

¹²⁵ On the *Bosphorus* case, see B Conforti, 'Le principe d'équivalence et le contrôle sur les actes communautaires dans la jurisprudence de la Cour européenne des droits de l'homme' in Breitenmoser, S, et al. (eds), *Human Rights, Democracy and the Rule of Law. Liber Amicorum Luzius Wildhaber* (Dike, Zürich 2007), 173, C Costello, 'The *Bosphorus* Ruling of the ECHR: Fundamental Rights and Blurry Boundaries in Europe' (2006) 6(1) *Human Rights Law Review* 87–130.

this chapter. It was not a pragmatic decision inspired by the functional division of labour between two courts with similar albeit overlapping jurisdiction, or by mere comity and mutual respect between those courts.¹²⁶ As a matter of fact, the democratic argument put forward in this chapter also helps understand that to overrule that presumption, a substantive discussion pertaining to the equivalence of human rights protection will not be enough. The *Solange II* test, on which *Bosphorus* is based,¹²⁷ is a much richer test than authors are usually ready to concede. As confirmed by recent revivals of that test in the case-law of the Czech Constitutional Court, democracy is as important a component of the rule of law as human rights. One may even venture that this democratic reservation is what lies behind the ECtHR's position in *Behrami* and further cases in which the Court did not want to mingle with its Contracting Parties' obligations stemming from their membership in other supranational organisations and potentially, one may argue, with the democratic arrangements made in connection to membership in those organisations.¹²⁸

The relationship between the two European courts in the context of human rights protection and review will now go through a process of re-configuration in the context of the EU's accession to the ECHR. While one may be tempted to see the accession as marking the continuation of the *Bosphorus* test, the argument made in this section has hopefully demonstrated that it will toll its knell.¹²⁹ As discussed previously, the negotiations aiming at the EU's accession to the ECHR have awakened the sore question of the EU human rights competence precisely because it implies a shift from the current hybrid human rights regime that applies in the EU towards a more municipal model of human rights.¹³⁰ And this also means entering into a new stage in the political and democratic development of the EU. In this context, the relationship between the EU legal order and its Member States' legal orders will change, but also that between the ECJ and the ECtHR pertaining to human rights as a result. The ECJ's human rights review of domestic law will have to become bolder and more coherent, while the ECtHR's human rights review of EU law will have to come closer to the subsidiary review it ought to be applying in its relationships to domestic courts¹³¹ and hence less subsidiary than it has been since the *Bosphorus* presumption was put in place.

¹²⁶ And clearly not a *de facto* accession, as some commentators have argued it is: no Contracting Party to the ECHR benefits from a presumption of compatibility with the latter!

¹²⁷ *Bosphorus v Ireland* (n. 45036/98) EHRR 2005-VI.

¹²⁸ *Behrami v France* (n. 71412/01, 78166/01) (2007) 45 EHRR SE 10.

¹²⁹ See also De Schutter, *supra* n. 41, 544, 565.

¹³⁰ See Besson, *supra* n. 85. See also S Besson, 'International Human Rights and Democracy: Learning from the EU' (2011) 4:1 *Ethics and Global Politics* 19–50.

¹³¹ Following De Schutter, *supra* n. 41, 563–6 this does not, however, mean that the exhaustion of local remedies under Article 35 ECHR should necessarily imply the exhaustion of both EU and domestic remedies in cases that pertain to a Member State's decision applying EU law. The respect of the obligation to introduce a preliminary ruling under Article 267 TFEU, when

6. CONCLUSION

This chapter's starting point was that questions pertaining to the articulation between legal orders and courts in Europe would best be answered by thinking from outside the judicial box and by replacing the two European courts in their institutional and political context, both domestic and European. The aim of the chapter was double: it was, first of all, to explore some of the philosophical questions related to the democratic legitimacy of supranational judicial review based on human rights in Europe, and, secondly, to see how that discussion could help clarify practical questions pertaining to recent developments in the human rights review exercised by both courts and difficulties pertaining to their relationship to national courts and among themselves.

My argument was three-pronged. The first step was to define what supranational judicial review means in Europe and to discuss the recent sharpening of the kind of judicial review exercised by both European courts in the human rights context. Important similarities, but also key differences were identified between the two courts in this respect. The ECJ's supranational strong judicial review has been used in the field of human rights, but only in a belated and bridled fashion and not to its maximal potential, whereas the ECtHR's international judicial review has developed in the course of fifty years into strong supranational judicial review that goes beyond its legal jurisdiction. Reasons for those *prima facie* paradoxical differences lie in their respective political and institutional context: that of a supranational organisation for the ECJ (with no human rights competence) and of an international convention (solely dedicated to human rights) for the ECtHR. Supranational judicial review in the EU was only put at the service of human rights late in the history of the EU and not to protect national democracy against itself but against the EU, and hence to consolidate the European political community. As a result, the justification of human rights (notably by reference to democracy), and the democratic legitimacy of judicial review in those two contexts are bound to be entirely different.

In the second part of the chapter, I turned to that very philosophical question and have re-qualified it to fit the European supranational context in terms of democracy, human rights and judicial review. Not only does supranational judicial review raise different questions in terms of its compatibility with democracy, but those questions also call for different answers. I have argued that the democratic objection is stronger at the supranational level than in the domestic context. Paradoxically, however, the more incisive supranational

the conditions of that obligation are fulfilled, is indeed part of Member States' duties under EU law and its violation constitutes not only a violation of EU law and hence of Article 35 ECHR, but also a violation of Article 6(1) ECHR.

human rights review becomes, the more successful it is perceived to be. I ventured that the reason might be that the question cannot be answered satisfactorily before we have a clear idea of the justification of international human rights and of their relationship to democracy. Also, supranational judicial review in the field of human rights was originally intrinsically linked to human rights protection by the ECHR. After untying both questions (European human rights and democracy, on the one hand, and European human rights and judicial review, on the other), I have argued that they have not resisted the passing of time in Western European democracies where democratic legitimacy requires the national reception of human rights and stronger ties between European courts and national ones and between European courts and national parliaments. Differences identified earlier between the two courts (belated or original and bridled or unbridled human rights review) are not so paradoxical when the connexion between human rights and democracy is made. In a complex supranational political community like the EU in which democracy is multi-levelled, human rights protection and human rights review of legislation are more difficult to ensure legitimately. The ECtHR's supranational human rights review, by contrast, is only a concern for national legislatures, as there is no competing political community developing on the basis of those rights at the European level – at least not besides that of the EU.

The third step in my argument was to discuss some implications for the relationship between the two European courts in circumstances of legal pluralism. Since European human rights are the human rights of a complex and *demos*-cratic supranational political community and European courts ought to relate to many European publics, democracy constitutes the common framework of reference and source of legitimacy of the conflicting sources and norms applicable in each case. In those conditions, democratic subsidiarity becomes the guiding principle in supranational judicial review in Europe. As a result, when the ECtHR and the ECJ are competing with national courts, the most inclusive and democratic legal source should be given priority. It follows from that relationship and from the principle of subsidiarity within subsidiarity, that when the ECtHR is competing with the ECJ on issues of EU law, the former should give way to the latter. This is what the two courts have been doing lately, and the equivalence presumption has now not only found its normative justification, but judicial practice has also gained a richer test of how to go about overturning that presumption when needed.

Three general conclusions may be derived from this study: first of all, the institutional context of European courts explains key features of their own brand of supranational judicial review; second, the institutional framework, and more particularly the democratic context of European judges at the ECJ and at the

ECtHR is very different and arguments for the justification of supranational judicial review by both courts differ accordingly; and, finally, those institutional differences within each legal order affect how both courts ought to relate to national courts, and accordingly to each other in circumstances of legal pluralism within the same European legal order *lato sensu*. Exciting times lie ahead of us with the EU's accession to the ECHR in view and the related re-configuration of the relationship between the two European courts. Let us hope that that new articulation will pay due regard to the inherently democratic nature of human rights and the complex structure of the European democratic polity.