

HETERARCHICAL CONSTITUTIONAL STRUCTURES IN THE EUROPEAN LEGAL SPACE

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The article focuses on the constitutional linkages between national legal orders, the EU legal order, and the ECHR Convention system. The first, and the main, question the article addresses is how these intertwined constitutional structures can be described. This article shows that the interrelationship of these legal orders could be best described as heterarchical as opposed to hierarchical. The article also tries to tentatively examine the meaning and influence of these heterarchical constitutional structures. The concept of heterarchy is used to illustrate the tension between constitutionalism and pluralism. Where constitutionalism builds a pre-set foundation and framework for governance, pluralism challenges hierarchical constitutional structures and highlights tension at the interfaces between different legal orders. The concept of heterarchical constitutional structures is used to describe those structures pertaining between legal orders which enable those legal orders to flexibly function together without predetermining any hierarchical relation between the orders. Thus heterarchical constitutional structures can be described as communicative in nature. The structures could also be described soft by their nature since they describe, but do not determine relations between different legal orders.

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I. INTRODUCTION

The European legal space consists of various different legal orders: national legal orders, the EU legal order, the ECHR Convention system, the United Nations legal system, WTO law and others. This article focuses on the constitutional linkages between national legal orders, the EU legal order, and the ECHR Convention system. The first, and the main, question the article addresses is how these intertwined constitutional structures can be described. This article shows that the interrelationship of these legal orders could be best described as heterarchical as opposed to hierarchical. The article also tries to tentatively examine the meaning and influence of these heterarchical constitutional structures.

In section two the concept of *heterarchy* is used to illustrate the tension between constitutionalism and pluralism. Where constitutionalism builds a pre-set foundation and framework for governance, pluralism challenges hierarchical constitutional structures and highlights tension at the interfaces between different legal orders. The concept of *heterarchical constitutional structures* is used to describe those structures pertaining between legal orders which enable those legal orders to flexibly function together without predetermining any hierarchical relation between the orders. Thus heterarchical constitutional structures can be described as *communicative* in nature. The structures could also be described soft by their nature since they describe, but do not determine relations between different legal orders.

Three interrelationships in the following three sections exhibit heterarchical constitutional structures. The article studies the principle of primacy, the doctrine on conforming interpretation, Member States as the masters of the treaties, and the principle of sincere co-operation in the relationship between EU and national legal orders. The doctrine of margin of appreciation is examined in the relationship between the ECHR Convention system and national legal orders. Finally, the principle of equivalent protection and the doctrine of margin of appreciation are considered in the relation between the EU and the ECHR Convention

system.

The last section draws upon previous sections and attempts to analytically answer a second research question: what is the jurisprudential impact of these heterarchical constitutional structures? Examples are drawn from the field of criminal law because of its close relation to national sovereignty and constitutional law. The main argument here is that a doctrine of sources of law needs to be reconsidered. In short, a rigid and pre-set doctrine of sources of law no longer satisfies today's pluralistic and heterarchical demands.

II. THEORETICAL BACKGROUND

The theoretical framework of this Article consists of two *isms*. First, constitutionalism, which means a will to exercise state power within a constitutional framework, or in other words, governance within pre-set conditions.¹ Constitutionalism is usually described as being about limiting the use of power by its division (legislature, executive and judiciary) through recourse to the principle of the rule of law, and by fundamental and human rights provisions.² Constitutionalism recognises the people (*demos*) as a legitimising source for state powers.³ And second, pluralism, which in short is about recognizing the plurality of legal orders, their partial overlapping nature, and their rival claims over authority.

Pluralism is not so much an attribute of law but rather an attribute of the social realm: a single social realm is affected by more than one legal order.⁴ Pluralism recognises the different legal and normative systems but its aim is not to create or suggest hierarchical structures between them.⁵ According to Daniel Halberstam, pluralism manifests itself especially well in the plurality of claims made over authority. It does not seek to settle the claims in one order, but instead is concerned about the accommodation persisting between different institutions and systems in the absence of

¹ Dieter Grimm, 'The Achievement of Constitutionalism and its Prospects in a Changed World' in Petra Dobner and Martin Loughlin (eds), *The Twilight of Constitutionalism?* (OUP 2010) 3–5.

² Michel Rosenfeld, 'Modern Constitutionalism as Interplay Between Identity and Diversity: An Introduction' (1992–1993) 14 *Cardozo L Rev* 497.

³ Grimm (n 1) 9.

⁴ John Griffiths, 'What is Legal Pluralism?' (1986) 24 *J L Pluralism & Unofficial L* 1, 12; Gunther Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism' (1991–1992) 13 *Cardozo L Rev* 1443, 1457, 1448.

⁵ Paul Schiff Berman, 'Global Legal Pluralism' (2006–2007) 80 *Southern California L Rev* 1155, 1166.

settled hierarchical structures.⁶

Legal reality clearly eschews the idea of one singular legal order in one geographical area or in one social realm. In addition to state actors, different international organisations, such as the UN, and different treaty organisations, such as different human rights treaties and organisations, are part of the pluralistic legal field.⁷ Since the pluralism of legal orders includes different organisations in addition to states, one can speak of the fragmentation of the constitutional field. Fragmentation in this context means that some legal orders are oriented only to specific tasks, and not to the entirety of tasks over which the states have control. The legal orders are separate from each other, but in legal reality they overlap and closely bound up with each other. Some of those legal orders might even share heterarchical constitutional structures.

As a response to increasing international activity among states,⁸ or perhaps because of the compensatory and reconstructionist need for constitutionalism arising from the compromises that it has undergone at the national level,⁹ the idea of constitutionalism has settled on the international or transnational level. Interdependence between states has increased and public interests are regulated increasingly beyond the states' constitutional framework.¹⁰ As a theoretical position, constitutional pluralism recognises that states are not the sole source of constitutional authority. There are also other post-state sites of constitutional authority.¹¹

Neil Walker has argued that the relationship between states and other sites of constitutional authority is best understood as heterarchical rather than hierarchical.¹² And specifically in relation to EU it has been argued that the EU and the Member States have only partial constitutional jurisdiction, because the constitutional field in Europe is manifold and

⁶ Daniel Halberstam, 'Local, Global and Plural Constitutionalism' in Gráinne de Búrca and JHH Weiler (eds), *The Worlds of European Constitutionalism* (CUP 2012) 175.

⁷ Keebet von Benda-Beckmann, 'Globalisation and Legal Pluralism' (2002) 4 Intl L FORUM du Droit International 19, 21.

⁸ Grimm (n 1) 3-4.

⁹ Anne Peters, 'The Merits of Global Constitutionalism' (2009) 16 Indiana J of Global L Studies 397, 404-405; Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures', (2006) 19 Leiden J Intl L 579; Anne Peters, 'Global Constitutionalism Revisited' (2005) 11 Intl L Theory 39, 40.

¹⁰ Peters, 'Global Constitutionalism Revisited' (n 9) 41.

¹¹ Neil Walker, 'Late Sovereignty in the European Union' in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing 2003) 4; Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 MLR 317.

¹² *ibid.*

overlapping.¹³ The Union and the individual Member States could be seen to be creating a new kind of hybrid constitutional jurisdiction or sovereignty which is sometimes described as heterarchical rather than hierarchical.¹⁴ The concept of *heterarchy* is used to describe the new challenges of constitutionalism in the European area, but the denotation and semantics of heterarchy in this context has remained somewhat ambiguous. The word derives from the Greek words *heteros* (the other, different) and *archē* (meaning sovereignty). Whereas hierarchical constitutional structures suggest vertical, pyramid-like power structures and the existence of a single absolute highest authority in one area, the sovereign in the traditional sense, the concept of heterarchy could be used to describe a relatively new and different kind of sovereignty or reign that can be detected in European constitutional structures.

The concept of *heterarchy* then can be used to describe the tension between constitutionalism and pluralism. Where constitutionalism builds a pre-set foundation and framework for governance, pluralism challenges hierarchical constitutional structures and highlights tension at the interfaces between different legal orders. The concept of *heterarchical constitutional structures* is used to describe those structures pertaining between legal orders which enable those legal orders to flexibly function together without predetermining any hierarchical relation between the orders. Thus heterarchical constitutional structures can be described as *communicative* in nature. The structures could also be described soft by their nature since they describe, but do not determine relations between different legal orders.

One can picture the interrelationship between the legal orders by using the image of an onion. The most general system is the ECHR Convention system, in the sense that it sets minimum requirements for the national legal orders and for the EU legal order, and thus the ECHR Convention system constitutes the outermost layer of the onion. EU law sets requirements for national legal orders but not for the ECHR Convention system, thus constituting the middle layer of the onion. And finally, the national legal orders need to follow the requirements of both the ECHR

¹³ Neil Walker and Stephen Tierney, 'Introduction: A Constitutional Mosaic? Exploring the New Frontiers of Europe's Constitutionalism', in Neil Walker, Jo Shaw and Stephen Tierney (eds), *Europe's Constitutional Mosaic* (Hart Publishing 2011) 9.

¹⁴ *ibid*; Walker, 'The Idea of Constitutional Pluralism' (n 11); Matej Avbelj, 'Supremacy or Primacy of EU Law – (Why) Does It Matter?' (2011) 17 *ELJ* 744; Inger-Johanne Sand, 'Constitutionalism and the Multi-Coded Treaties of the EU: Changing the Concepts of Constitutionality' in Kaarlo Tuori and Suvi Sankari (eds), *The Many Constitutions of Europe* (Ashgate 2010) 52–53.

Convention system and EU law, and thus they are located at the inner core of the union. However, when considered in terms of function, the national legal orders constitute the outermost layer of the union. The national legal orders manage a diversity of tasks, some of which are not related to the EU's competence or the ECHR Convention system. In functional terms, the EU constitutes the middle layer, leaving the ECHR Convention system as the innermost layer or core of the union, since the ECHR's functions cover solely human rights issues.

III. HETRARCHICAL CONSTITUTIONAL STRUCTURES: EU LAW – NATIONAL LAW

There are a few principles in EU law which illustrate the heterarchical constitutional structures between the European Union and the individual Member States. The premise is that constitutionalism and pluralism are not mutually exclusive. The constitutions of the Union and the individual Member States can be seen as separate but at the same time as inseparable and integral owing to the communicative heterarchical constitutional principles.

The constitutionalization of EU law is often linked to the CJEU's case law which has aimed to strengthen the effectiveness of EU law,¹⁵ such as case law concerning primacy. The principle of effectiveness in EU law can be seen to derive from CJEU's case law but also a priori from the principle of loyalty. The EU constitution is perceived to be a collection of the norms that create a foundation for the European Union's legal order: the norms concerning the EU's institutions and their functions, the fundamental rights norms, and the fundamental principles and doctrines of the EU law enshrined in the EU primary law or recognised by the CJEU. The most important constitutional documents are the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU), the accession treaties and the Charter of Fundamental Rights in the European Union. The EU constitution is functionalized differently when compared with national constitutions since it covers relatively few of the tasks that are usually bound by state constitutions. The EU constitution is oriented in fulfilling the purpose of the Union. The objectives of the EU are the promotion of the Union's values, peace and security, and the establishment of the area of freedom, security and justice, the internal market, and the economic and monetary union (Article 3 TEU). The EU constitution contains also several provisions concerning the allocation of competences

¹⁵ Armin von Bogdandy, 'Founding Principles' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart Publishing – Verlag CH Beck 2011) 30.

between the EU and the Member States.

The communicative heterarchical constitutional principles build linkages between the EU constitution and the national constitutions, thus intertwining these constitutional orders one with the other. The heterarchical constitutional structures make the Union constitution an integral part of national constitutions. However, there is no strict hierarchical interrelationship between these legal orders. The legal orders of the Union and the individual Member States seem to be parallel and complementary. In a similar way Miguel Poiares Maduro has used the concept of *counterpunctual law* to describe EU constitutional law, meaning that the relationship between the legal orders of the Union and the Member States is not hierarchical.¹⁶ Four heterarchical constitutional principles are chosen as examples: the principle of primacy, the interpretation doctrine on conforming interpretation, Member States as the masters of the treaties, and the principle of sincere co-operation.

1. *The Principle of Primacy*

The CJEU has recognised the principle of primacy in its legal praxis. In the case of *Costa v ENEL*, the Court stated that the law stemming from the Treaty could not be overridden by domestic legal provisions, however they were framed. As is well known, the Court's interpretation of the primacy of European Union law is based on the direct applicability of regulations. The CJEU found that the application of Union law would be contingent if Union law did not have primacy over national legislation.¹⁷ The primacy of Union law can be seen to derive already from the agreements made by the Member States when they joined the European Union.¹⁸ In the case of the *Internationale Handelsgesellschaft*, the CJEU added that the EU law has primacy over constitutional principles as well.¹⁹ In the case of *Simmenthal*, the Court repeated that the scope of the primacy of European Union law extends over all of the Member States' legislation.²⁰ These cases demonstrate that the primacy of Union law extends over all aspects of the national law, including constitutions.

¹⁶ Miguel Poiares Maduro, 'Europe and the Constitution: What if this is as good as it gets?' in JHH Weiler and Marlene Wind (eds), *European Constitutionalism Beyond the State* (OUP 2003) 98.

¹⁷ Case C-6/64 *Flaminio Costa v ENEL* [1964] ECR I-00585.

¹⁸ Paul Craig and Gráinne de Búrca, *EU Law – Text, Cases, and Materials* (5th edn, OUP 2011) 258.

¹⁹ Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR I-01125, para 3.

²⁰ Case C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR I-00629, para 24.

A declaration concerning *primacy* is annexed to the Treaty of Lisbon. It refers to the Court's case law generally.²¹ There is no particular mention of primacy over constitutions. However, the fact that there is a declaration concerning the primacy principle annexed to the Lisbon treaty indicates that the principle is widely recognised and accepted by the Member States. Nevertheless, the principle's status in relation to the Member States' constitutions is not clearly defined in the declaration, which simply mentions that the Union law has primacy over the laws of the Member States. It is worth pointing out however, that as early as in the case of *Costa v ENEL*, the CJEU stated that primacy concerns national legislation 'however framed'. Even here, the primacy of Union law can be seen to concern all national legislation, including constitutions.

The primacy of Union law does not establish any absolute hierarchy of powers between the Union and the Member States. The principle of primacy simply expresses a rule concerning the *application* of law between the Union legislation and the Member States' domestic legislation. According to the principle, Union law prevails over national law, but the national law will not be declared invalid by the Union Courts²². From a heterarchical perspective, the principle of primacy is not understood to be about the validity of law.²³ The primacy of Union law simply expresses *a rule concerning the application of law* in areas where the Member States have transferred their powers or competences or sovereignty to the Union. The CJEU has stated this in the case *IN.CO.GE*. When national law is incompatible with EU law, the national law does not become 'non-existent'. Instead the national courts must simply 'disapply that rule'.²⁴

The principle of primacy seems to be somewhat similar in nature to connecting factor rules, at least in situations where there is an obvious clash of norms between EU and national law provision. However, the principle of primacy is not a connecting factor rule, because it can also function as a weighing and balancing principle in cases where the norm conflict can be avoided by interpreting national law provisions in line with EU law provisions. In other words, the principle of primacy can lead to either EU law-oriented interpretation or, in some cases, to the non-application of a provision of national law, leaving the national law

²¹ Declaration Concerning Primacy [2010] OJ C83/33.

²² Joined Cases C-10 to 22/97 *Ministero delle Finanze v INCOGE'90 Srl, Idelgard Srl, Iris'90 Srl, Camed Srl, Pomezia Progetti Appalti Srl (PPA), Edilcam Srl, A Cecchini & C Srl, EMO Srl, Emoda Srl, Sappesi Srl, Ing Luigi Martini Srl, Giacomo Srl and Mafar Srl* [1998] ECR I-06307, para 21. See also Allan Rosas and Lorna Armati, *EU Constitutional Law, An Introduction* (Hart Publishing 2010) 55-56.

²³ Avbelj (n 14) 750-51.

²⁴ *INCOGE'90* (n 22) para 21.

provision still valid but non-applicable in that particular case.

In situations of norm conflict between national and EU law, the principle of conforming interpretation offers an important means to resolve the conflict compared to non-application of national law provision. Conforming interpretation means that Member States have an obligation to interpret national law harmoniously and in conformity with EU law as far as is possible. If national law cannot be applied in conformity with EU law, such domestic law must be held inapplicable.²⁵ Conforming interpretation cannot lead to interpretation of national law *contra legem*.²⁶ In all cases where EU-influenced national law is applied, the indirect effect of EU law is at hand regardless of whether the national law in question has or has not been amended as a result of the implementation of EU law into national law.²⁷ Conforming interpretation applies to all EU law²⁸, including provisions which are directly applicable or have direct effect. The meaning of conforming interpretation is however emphasized in relation to directives. When the indirect effect is given to the EU provision, the national provision maintains its position as the provision that is applied primarily.²⁹ In the field of criminal law, the principle of legality restricts the indirect effect because criminal liability cannot be determined or aggravated on the basis of a framework decision or directive alone.³⁰ Thus the interpretation of penal provisions is possible only within the wording of a national penal provision.³¹ The principle of conforming interpretation can be seen as an expression of heterarchical structures between EU law and national law as well. Its influence and the heterarchical structure might be seen to be at its strongest in the field of criminal law because of the principle of legality.

It is essential to distinguish *primacy* from *supremacy*, because each has a different connotation. Supremacy refers to hierarchical structures between the Union and the Member States, to supreme legal acts and to the validity of norms, whereas primacy refers to heterarchical structures and to the

²⁵ Case C-157/86 *Mary Murphy and others v An Bord Telecom Eireann* [1988] ECR 00673, para 11.

²⁶ Case C-105/03 *Criminal proceedings against Maria Pupino* [2005] ECR I-05285, paras 43, 47.

²⁷ Sakari Melander, *EU-rikosoikeus* (WSOY 2010) 91.

²⁸ *Murphy and others* (n 25) para 11.

²⁹ Juha Raitio, *Eurooppaoikeus ja Sisämarkkinat* (Talentum 2010) 234–37.

³⁰ *Pupino* (n 26) paras 44–45; Case C-14/86 *Pretore di Salò v Persons Unknown* [1987] ECR 02545, para 20; Case C-80/86 *Criminal proceedings against Kolpinghuis Nijmegen BV* [1987] ECR 03969, para 14.

³¹ Melander (n 27) 92.

possible sidelining of norms when laws are applied.³² Understanding this terminological distinction is relevant to a comprehensive understanding of the nature of the EU legal order.

Primacy seems to be the term chosen and used by the CJEU to describe the interrelationship between EU law and national law. In the context of the supremacy or primacy of the Community or Union law the CJEU seems to have used the English term ‘supremacy’ or ‘supreme’ in only three cases. In the most recent of these cases (1973), the CJEU used the term ‘primacy’ (*primauté*) in its French-language version. In the other two cases, the terms *prééminent* (adjective) or *prééminence sur* (noun + preposition) were used in the French-language version, which translate into English as *pre- eminent*, *pre-eminence*, *precedence over*.

In the case of *CILFIT*, the CJEU has stated that all language versions are equally authentic and that the interpretation of Community or Union law requires a comparison between the different language versions. Moreover, EU law needs to be interpreted in the light of the provisions of Union law as a whole and the objectives of the Union.³³ However, the French language has a special position because the CJEU uses French as the common working language. Deliberations are taken and judgments are drafted in French. After this, the judgments are translated into the language of the case.³⁴ Therefore, it is useful to compare other language versions to the French version.

In the case of *Walt Wilhelm*, the Court stated that ‘Article 87(2)(E), in conferring on a Community institution the power to determine the relationship between national laws and the community rules on competition, confirms the supremacy of Community law’. In French the phrase is ‘*le caractère prééminent du droit communautaire*’.³⁵ In case 93/71 the term *supremacy* is among the keywords in the judgment, but appears nowhere else in the text of the judgment. The French version of the decision uses the phrase ‘*prééminence sur le droit interne*’,³⁶ which refers to ‘pre-eminence’ or ‘supremacy’ because of the preposition *sur*, equivalent to the English prepositions *on*, *over*, *upon*. In the case of *Fratelli Variola*, the

³² Likewise, Avbelj (n 14) 744.

³³ Case C-283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR I-03415, paras 17–20. See also Elina Paunio and Susanna Lindroos-Hovineimo, ‘Taking Language Seriously: An Analysis of Linguistic Reasoning and Its Implications in EU Law’ (2010) 16 ELJ 395, 396.

³⁴ Anthony Arnall, *The European Union and its Court of Justice* (OUP 2006) 13.

³⁵ Case C-14/68 *Walt Wilhelm and others v Bundeskartellamt* [1969] ECR I-00001, para 5.

³⁶ Case C-93/71 *Orsolina Leionesio v Ministro dell’agricoltura e foreste* [1972] ECR I-00287.

Court has stated that the supremacy of the Community legal system is a fundamental principle of Community law. The French version of the judgment uses the phrase '*le principe fondamental de la primauté de l'ordre juridique communautaire*'.³⁷ *Primauté* does not refer to 'supremacy', but to the primacy of the Community legal order instead.

It is undeniable that the Court has sometimes used terminology that can be interpreted as referring to 'supremacy', at least in the case 93/71. However, the Court has not used the English terms 'supreme' or 'supremacy' in this context since 1973, and the French-language version in the case from 1973 refers to 'primacy'. The UK acceded to the European Communities in 1973³⁸ and thus the two earlier cases (14/68 and 93/71) have been translated into English at a later date.

The plurality of official languages poses a challenge and therefore teleological reasoning is essential in interpreting Union law. Owing to the use of several official languages, indeterminacy of the meanings of words in the Union law is greater than in national legal orders, and it is often difficult to determine precise meanings for words. Teleological interpretation in the EU law context guarantees uniform application of EU law at the national level better than literal interpretation, for example.³⁹ Teleological interpretation aims to fulfil the objective and purpose of the EU treaties and also the effectiveness of EU law. The setting of strict hierarchical structures between EU law and national law has probably not been the aim behind the primacy case law. Rather its purpose seems to be the effectiveness of EU law. The CJEU's phrasing in *Costa v ENEL* illustrates this argument quite well. The Court stated that '[t]he obligations undertaken under the treaty establishing the Community would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories'.⁴⁰

In the 2000s, the Court frequently used the term *primacy of Community law* or, in French, *primauté du droit communautaire*,⁴¹ and the term *primacy of*

³⁷ Case C-34/73 *Fratelli Variola SpA v Amministrazione italiana delle Finanze* [1973] ECR I-00981, para 15.

³⁸ [1972] OJ L73. English became an official language of the Communities in 1973.

³⁹ Miguel Poiars Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' (2007) 1(2) EJLS 1, 6-9. See also Paunio and Lindroos-Hovinheimo (n 33) 397-399, 409.

⁴⁰ *Costa v ENEL* (n 17).

⁴¹ For example Case C-314/08 *Krzysztof Filipiak v Dyrektor Izby Skarbowej w Poznaniu* [2009] ECR I-11049, Case C-2/08 *Amministrazione dell'Economia e delle Finanze and Agenzia delle entrate v Fallimento Olimpclub Srl* [2009] ECR I-07501, Joined Cases C-392 and C-422/04 *i-21 Germany GmbH and Arcor AG & Co KG v Bundesrepublik*

Union law, or in French *principe de primauté du droit de l'Union*.⁴² The declaration concerning primacy annexed in the Lisbon treaty also uses the term 'primacy' instead of 'supremacy.' Even if in the late 1960s and early 1970s the Court might have tried to establish a continual legal praxis on the supremacy of Community legal order over national legal orders, it appears as if the phrase 'primacy of Union law' is preferred today, given the language used in the Court's case law and in the declaration annexed to the Treaties.

2. *Member States as the Masters of the Treaties*

The principle of the Member States as Masters of the Treaties is set out in Article 48 TEU, which regulates the amending of the Treaties. Treaty amendments that are made at the Intergovernmental Conference (in an ordinary revision procedure) enter into force after being ratified by all the Member States (Article 48(4) TEU). The treaty amendments can either increase or reduce the Union's competences. In addition, Article 50 TEU stipulates that any Member State can withdraw from the Union. These provisions demonstrate that the ultimate power to amend the Union's constitution and/or to withdraw from the Union lies with the Member States. Article 50 TEU is a novelty in the Lisbon treaty.

It could be argued that Article 50 embodies a heterarchical structural idea especially well. A State's belonging or not belonging to the Union is voluntary, and therefore the Union's legal order does not rank higher than the legal order of the Member State. If the EU constitutional law had *supremacy* over national constitutional law, then the option to withdraw would not seem to be in line with supremacy. And this rationale supports the claim that primacy is a preferred concept for describing the interrelationship between EU law and national law.

3. *Principle of Sincere Cooperation*

Article 4(3) TEU stipulates the scope and substance of the principle of sincere cooperation, also known as the principle of loyalty. The principle applies to both the Union and the Member States. Article 4(3) TEU stipulates that 'the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties'. In addition to the Member States and their public authorities, the Union's institutions must follow the principle. This obligation can be

Deutschland [2006] ECR I-08559, Case C-234/04 *Rosmarie Kapferer v Schlank & Schick GmbH* [2006] ECR I-02585, C-453/00 *Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren* [2004] ECR I-00837.

⁴² Case C-409/06 *Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim* [2010] ECR I-08015.

seen to include the requirements arising from the principles of subsidiarity and proportionality. Since the commitment to loyalty is not restricted to the Member States only, the principle of sincere cooperation can be seen to express a heterarchical structure of the EU legal order. Without the principle of sincere cooperation, the binding nature of Union law would lose its meaning, or in other words, be inflated. The principle of primacy would also lose its impact. The principle of primacy and the principle of sincere cooperation are closely connected, and both foster the effectiveness of Union law.

IV. PRINCIPLES OF HETRARCHICAL STRUCTURES: ECHR REGIME – NATIONAL LAW

Constitutional Status of ECHR Convention System in National Legal Orders. In the case of *Loizidou*, the European Court of Human Rights (ECtHR) has stated that the Convention is a ‘constitutional instrument of European public order’.⁴³ It is not entirely clear, however, whether the ECHR has a constitutional status in all of the judicial systems of its contracting parties.⁴⁴ The manner of incorporation of the ECHR (or of international treaties in general) varies. Some countries have a monist system, while others have a dualist one. Regardless of the manner in which the Convention is accepted into the national legal orders, the ECHR has the status of a binding international treaty and the Convention’s norms become part of the national legal orders. The hierarchical status of the Convention varies among the contracting parties and the Convention affects those contracting parties which are Member States of the EU, also via EU law.⁴⁵

The ECHR concerns human rights issues only and therefore represents a functionalised legal regime. If and when the ECHR is considered constitutional by nature, one needs to keep in mind that the Convention has no effect on other parts of the constitutions of the contracting parties other than human rights and fundamental rights and their monitoring systems.

It is reasonable to start by noticing that some scholars find it quite problematic to refer to the ECHR as a constitutional document. One

⁴³ *Loizidou v Turkey* App no 15318/89 (ECtHR, 23 March 1995), para 75.

⁴⁴ Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights – The Impact of the ECHR on National Legal Systems* (OUP 2008).

⁴⁵ Matti Pellonpää and others, *Euroopan Ihmisoikeussopimus* (Talentum 2012) 47–50; Helen Keller and Alec Stone Sweet, ‘Assessing the Impact of the ECHR on National Legal Systems’ in Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights – The Impact of the ECHR on National Legal Systems* (OUP 2008) 683.

problematic aspect is the lack of a separation of powers in the ECHR Convention system. The ECtHR functions as a judiciary but the contracting parties act as both the legislature (as the constitutional assembly) and the executive quarter.⁴⁶

The status of the ECHR varies considerably from one Contracting Party to another. Some contracting parties recognise that the Convention has a constitutional status within their legal order. For example, nowadays Austria finds this as an indisputable fact.⁴⁷ The Austrian Constitutional Court has stated directly that the ECHR has been elevated to constitutional status. However, the Austrian Constitutional Court has set limits on the authority of the ECHR by declaring that the state authorities are bound to the constitutional principle of state organisation even if there would be a discrepancy between them and the Convention (*An die verfassungsrechtlichen Grundsätze der Staatsorganisation ist der Gerichtshof aber auch im Falle eines Widerspruches zur Konvention gebunden*).⁴⁸ In the Netherlands, the ECHR even has supraconstitutional status.⁴⁹ This Article resembles much the principle of primacy in EU law: both of them lead to the non-application of contradicting national provision but do not nullify the provision in question.

In Finland, the ECHR has been incorporated into national legislation and it has the formal status of ordinary law, but the ECHR is seen to have constitutional status only indirectly, because the provisions of the ECHR have had a great influence on the Finnish fundamental rights reform in 1995 where ECHR provisions were used as examples for new Finnish fundamental rights provisions.⁵⁰ Similarly, Norway and Sweden enacted new statutes in order to fill gaps in their constitutions with respect to the

⁴⁶ Evert Albert Alkema, 'The European Convention as a Constitution and its Court as a Constitutional Court' in Paul Mahoney and others (eds) *Protection des Droits de l'Homme: La Perspective Européenne, Protecting Human Rights: The European Perspective – Studies in memory of Rolf Ryssdal* (Carl Heymanns, 2000) 45, 62.

⁴⁷ Daniela Thurnherr, 'The Reception Process in Austria and Switzerland' in Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights – The Impact of the ECHR on National Legal Systems* (OUP 2008) 325.

⁴⁸ Collection number 11500 (Austrian Constitutional Court, 14 October 1987) 3–5 <http://www.ris.bka.gv.at/Dokumente/Vfgh/JFR_10128986_86B00267_01/JFR_10128986_86B00267_01.pdf> accessed 4 May 2013. See also Nico Krisch, 'The Open Architecture of European Human Rights Law' (2007) LSE Law, Society, and Economy Working Papers 11/2007, 15 <<http://www.lse.ac.uk/collections/law/wps/WPS11-2007Krisch.pdf>> accessed 4 May 2013.

⁴⁹ The Dutch Constitution of 1983 Article 94.

⁵⁰ Pellonpää and others (n 45) 79.

ECHR.⁵¹

In the Spanish constitution, the ECHR is ranked below the national constitution but above (conflicting) national statutes (Articles 95 and 96 of the Spanish Constitution). As far as basic rights are concerned, the Spanish constitution stipulates that the provisions concerning fundamental rights and liberties will be interpreted in conformity with the international treaties, especially ECHR, which Spain has ratified (Article 10 of Spanish Constitution).⁵² In Italy, the ECHR has the status of ordinary law.⁵³

Helen Keller and Alec Stone Sweet have assessed the impact the ECHR has on national legal orders. Even though it might seem rational at first glance that the reception of the ECHR would be more effective in monist countries than in dualist countries, Keller and Sweet argue that *ex ante* there is no causal linkage between the monist or dualist posture of a state and the effective reception of the ECHR. The effectiveness of the reception of the ECHR also depends on what kind of hierarchical status is given to the ECHR in national legal orders, which reflects the potential constitutional status of the ECHR. However, what really defines the constitutional status of the ECHR is the judicial practice of state parties, and not so much how the ECHR has been incorporated into the legal order.⁵⁴

Regardless of the fact that the ECHR constitutes some kind of surrogate Bill of Rights and that it protects more of a minimum standard of human rights and is seen as having a complementary or supplementary role in the national system of protection of rights, the ECHR may be considered to have a constitutional status in the legal orders of the contracting parties.⁵⁵ The impact of the incorporation of ECHR into national legal orders and the way the ECHR regime operates after its transformation through Protocol no 11 (individual application procedure) supports the claim that

⁵¹ Ola Wiklund, 'The Reception Process in Sweden and Norway' in Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights – The Impact of the ECHR on National Legal Systems* (OUP 2008) 182–184; Alec Stone Sweet, 'The European Convention on Human Rights and National Constitutional Reordering' (2012) 33 *Cardozo L Rev* 1859, 1865.

⁵² The Spanish Constitution of 1978. See also Mercedes Candela Soriano, 'The Reception Process in Spain and Italy' in Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights – The Impact of the ECHR on National Legal Systems* (OUP 2008) 403–404; Krisch (n 48) 6.

⁵³ Candela Soriano (n 52) 403–406.

⁵⁴ Keller and Stone Sweet (n 45) 682–86.

⁵⁵ *ibid* 701–06.

the ECHR Convention system would be constitutional in nature.⁵⁶

Some principles of the ECHR regime seem to be essentially heterarchical. These are the doctrine of margin of appreciation (and proportionality analysis) and the doctrine on equivalent protection. Margin of appreciation is a doctrine that enables flexible co-operation between national legal orders and the ECHR regime when the State Parties restrict the Convention rights. The doctrine leaves room for State Parties to strike a balance between the common good of society and the rights of individuals,⁵⁷ as there is room for the national authorities to determine whether an interference with the right is ‘necessary in a democratic society’.⁵⁸ The state parties are free to choose the measures they adopt to fulfil the obligations deriving from the ECHR.⁵⁹ The extent of the discretion varies in relation to different Articles of the Convention, depending on how detailed the text of the Article is.⁶⁰ Moreover, the principle of proportionality imposes limits on the margin of appreciation. The doctrine has been developed in order to strike a balance between national views on human rights and the uniform application of the Convention.⁶¹

Margin of appreciation relates also to a methodological issue concerning the interpretation of the Convention as a living instrument. This type of *evolutive interpretation* was developed against the background of the Second World War. The intention behind it was to give flexibility to the interpretation of the Convention, bearing in mind that situations which the drafters of the Convention could not have foreseen might evolve in the future.⁶²

In *Tyrer*, the ECtHR stated that ‘the Convention is a *living instrument* which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions’. In the *Tyrer* case, a juvenile court in UK had

⁵⁶ Stone Sweet (n 51) 1859–860.

⁵⁷ Murat Tümay, ‘The “Margin of Appreciation Doctrine” Developed by the Case Law of the European Court of Human Rights’ (2008) 5 Ankara L Rev 201, 201.

⁵⁸ Jeffrey A Brauch, ‘The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law’ (2004–2005) 11 Columbia J Eur L 113, 116.

⁵⁹ “*Relating to certain aspects of the laws on the use of languages in education in Belgium*” v Belgium (Merits) App no 1474/62, 1677/62, 1769/63, 1994/63, 2126/64 (ECtHR, 23 July 1968), para 10.

⁶⁰ Brauch (n 58) 120.

⁶¹ Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2001) 2–3.

⁶² Tümay (n 57) 209–210; Alastair Mowbray, ‘The Creativity of the European Court of Human Rights’ (2005) 5 Human Rights L Rev 57, 58.

sentenced a fifteen-year-old citizen to birching. The ECtHR evaluated whether birching would constitute inhuman and degrading punishment within the meaning of Article 3 of the Convention. The ECtHR stated that even if judicial corporal punishment would have strong deterrent effects, the Court must be influenced by the ‘developments and commonly accepted standards in the penal policy of the Member States’, thus relying on the methodology of the Convention as a living instrument. The Court found that the use of the judicial corporal punishment of birching constituted a breach of Article 3 of the Convention.⁶³ The methods of interpretation of the Convention can be described as both dynamic and evolutive, and practical and effective.⁶⁴ The evolutive and dynamic approach supports the ECtHR’s case law on margin of appreciation because if there were no room for discretion the Convention parties could not interpret the Convention in a dynamic and evolutive fashion.

It needs to be kept in mind that even though the Convention needs to be interpreted in a dynamic and evolutionary way, the interpretation must be tied to the text of the Convention. There are also limitations to the margin of appreciation. The ECtHR has tried to bring clarity to the doctrine by introducing a balancing of the importance of the right with the importance of the restriction. The margin is narrower if, for example, free speech, and especially free political speech, is restricted.⁶⁵ By contrast, the margin is wider when a state restricts a right in order to protect national security.⁶⁶ The more consensus there is between the ECHR member states on a particular issue, the narrower the margin of appreciation is on that issue. By the same token, diversity in understanding a particular issue increases the margin of appreciation. This latter limitation is, to some extent, difficult to determine precisely. Is there a need for European consensus or international consensus? When is consensus at hand, when can we recognise it, and ultimately, who decides?⁶⁷ Margin of appreciation expresses acceptance of pluralism of legal orders and it enables flexible co-operation between the legal orders. Thus, margin of appreciation could be seen to represent a heterarchical constitutional structure pertaining between the ECHR Convention system and national legal orders.

⁶³ *Tyrer v The United Kingdom* App no 5856/72 (ECtHR, 25 April 1978), paras 30–35.

⁶⁴ *Christine Goodwin v The United Kingdom* App no 28957/95 (ECtHR, 11 July 2002), para 74.

⁶⁵ Brauch (n 58) 148, 126–27.

⁶⁶ *Klass and Others v Germany* App no 5029/71 (ECtHR, 6 September 1978), paras 49–50, 59–60. See also Brauch (n 58) 127.

⁶⁷ Brauch (n 58) 128, 144–145. See also Ignacio de la Rasilla del Moral, ‘The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine’ (2006) 7 *German LJ* 611, 617.

V. INTERRELATIONSHIP OF EU LAW AND ECHR CONVENTION SYSTEM

Protection of fundamental and human rights entered into EU law as a result of the supremacy/primacy case law. The protection of fundamental and human rights in Union law increases the acceptability of the primacy doctrine⁶⁸ by assuring the Member States that the Community guarantees fundamental and human rights while Community law is applied.

I. *Current Interrelationship of EU Law and the ECHR Convention System – The Situation Before the EU's Accession to the ECHR: Doctrine of Equivalent Protection*

In the *Kadi* case the CJEU has given guidelines concerning the interrelationship of Union law and international law from the Union's perspective. The Union must respect international law⁶⁹. However, from the CJEU's perspective, the Union's constitutional principles have primacy over international law obligations '[...] an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition for their lawfulness [...]'.⁷⁰

The CJEU's rulings are effective only within the Union's municipal legal order. Therefore, conflicts in the obligations of the Member States of the Union in the arena of international law will be solved by the rules of public international law.⁷¹ This means that a separation must be made between conflicts of Union law and international law within the Union legal order and of those possible conflicts the Member States face because the Member States ought to respect both their obligations to the Union and the obligations deriving from other international treaties. This also means that CJEU can give judgments concerning the interpretation of EU law but the EU Member States need to ensure that they comply with their obligations deriving from both EU law and international law.

The rules of public international law can be found in the Vienna

⁶⁸ Elizabeth Defeis, 'Dual System of Human Rights: The European Union' (2007–2008) 14 ILSA J Intl & Comparative L 1, 2.

⁶⁹ Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-06351, para 291.

⁷⁰ *ibid* para 285.

⁷¹ *Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-06351, Opinion of AG Poiares Maduro, para 39.

Convention on the Law of Treaties⁷² (VCLT) for example. The VCLT applies to treaties made between states (Article 1)⁷³. According to Article 27 of VCLT, 'a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. Therefore it can be argued that a Member State of the EU cannot invoke regional Union law provisions, which are directly applicable or have been implemented by the Member States, as justification for its failure to perform some other obligations it has based on international treaty. Since EU law can be perceived to be an integral part of the Member States' legal orders, the interpretation that Union law could be parallel with Member States' domestic law within the scope of Article 27 VCLT can be seen as a valid argument.

Article 351 of TFEU regulates the status of agreements that are concluded before 1 January 1958, or for acceding States, before the date of their accession. The rights and obligations arising from those agreements are not affected by the provisions of the Treaties.⁷⁴ This means that if a EU Member State has ratified the ECHR before its EU membership, there will be no changes to the obligations deriving from the ECHR Convention system. However, the EU Member States are obliged to 'take all appropriate steps to eliminate the incompatibilities established' (Article 351(2) TFEU). This provision expresses the more general principle of loyalty. EU Member States ought to realise their obligations deriving from both EU law and international law to the fullest. Article 351 TFEU and the embodiment of the principle of loyalty it contains demonstrates heterarchical constitutional structures between EU law and international law from the EU law perspective.

The ECtHR has had cases concerning the question of whether an EU Member State has violated the ECHR by simply implementing Union law.⁷⁵ In *Matthews*, the ECtHR stated that even though EU Member States have subsequent obligations arising from the Union treaties, they still have the responsibility to execute their obligations arising from the ECHR.⁷⁶ In *Bosphorus*, the ECtHR stated:

⁷² UN Treaty Series, Registration Number I-18232.

⁷³ The Convention applies only to those treaties that are concluded after the entry into force of the VCLT (Article 4) 27 January 1980.

⁷⁴ See also Magdalena Ličková, 'European Exceptionalism in International Law' (2008) 19 J Intl L 463, 471-75.

⁷⁵ *Matthews v the United Kingdom* App no 24833/94 (ECtHR 18 February 1999); *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland* App no 45036/98 (ECtHR, 30 June 2005). See also Ličková (n 74) 479-482.

⁷⁶ *Matthews* (n 75) paras 32-35. See also Ličková (n 74) 480.

[A] Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. (...) The state is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention.⁷⁷

This conclusion is consistent with the Article 351 TFEU described above.

In the *Bosphorus* case, the ECtHR also created a doctrine of equivalent protection of human rights according to which state actions taken in compliance with legal obligations such as those deriving from Union membership are justified as long as the organisation in question is considered to protect fundamental rights. The protection must cover both the substantive guarantees and the mechanisms controlling their observance. The protection ought to be considered as at least equivalent to that for which the Convention provides. If the protection provided by the organisation is seen to be equivalent, the presumption will be that a state has not departed from the requirements of the Convention when it does no more than implement legal obligations deriving from its membership in the organisation. The ECtHR has specifically stated that protection of fundamental rights in EU law can be considered equivalent to that of the Convention system.⁷⁸

It is worth noting that any such equivalence is not considered to be continual unconditionally. Any findings of equivalence can be reviewed if there are relevant changes in the protection of fundamental rights. A presumption of equivalence can be rebutted if the protection of Convention rights is seen to be manifestly deficient when considered in the light of the circumstances of a particular case. The equivalence of EU law with the ECHR that was found in the *Bosphorus* case was reasoned *inter alia* by stating that the Charter might become part of the Union's primary law.⁷⁹ Since the Charter nowadays has the same legal value as the Treaties, the presumption of equivalence is arguably quite strong.

It could be argued that nowadays the presumption of equivalence symbolises a heterarchical structure between the EU legal order and the ECHR Convention system. It has brought flexibility to the interrelationship of these two European legal systems by the presumption

⁷⁷ *Bosphorus* (n 75) paras 153-54.

⁷⁸ *ibid* paras 155-56, 165.

⁷⁹ *ibid* paras 155-56, 159.

that the EU does respect fundamental and human rights because it is founded by the Member States as the framework for co-operation and because the legitimacy of EU law is ultimately reliant on the approval of the Member States.

2. *The Relationship between EU Law and the ECHR after the EU's Accession to the Convention: Normalisation and Margin of Appreciation*

According to Article 6(2) TEU, the Union shall accede to the ECHR. The Steering Committee for Human Rights has given a report to the Committee of Ministers concerning the Union's accession to ECHR.⁸⁰ The next presentation is heavily based on that report. As far as possible, the Union ought to have the same rights and obligations as the other Contracting Parties.⁸¹ Accession to the ECHR would mean that all acts, measures and omissions of the Union, will be subject to the control exercised by the ECtHR,⁸² and that the decisions of the ECtHR, in cases to which EU is a party, will be binding on all of the EU's institutions, including the CJEU.⁸³

The case law concerning the presumption of equivalence that was established in the *Bosphorus* case might come to lose its meaning in relation to EU law. If the presumption of equivalence were to remain, it would establish unequal standing between the different parties, because EU would be privileged by it.⁸⁴ The ECtHR might renounce the *Bosphorus* case law after EU's accession⁸⁵ which would bring EU in line with the other parties of ECHR. This might be preferable following already from the Draft Accession Agreement explanatory report, according to which the Convention control mechanism should be applied to the EU, as a main

⁸⁰ Steering Committee for Human Rights, 'Report to the Committee of Ministers on the Elaboration of Legal Instruments for the Accession of the European Union to the European Convention on Human Rights' CDDH(2011)009. There are disagreements on the content of the draft. See also Friends of Presidency (FREMP), 'Accession of the EU to the ECHR: Working Document from the Presidency' (DS 1675/11).

⁸¹ Steering Committee for Human Rights (n 80) 16, 19.

⁸² *ibid* 15.

⁸³ *ibid* 18.

⁸⁴ Xavier Groussot, Tobias Lock and Laurent Pech, 'EU Accession to the European Convention on Human Rights: a Legal Assessment of the Draft Accession Agreement of 14th October 2011'(2011) 218 *Eur Issues* 1, 4; Tobias Lock, 'The ECJ and the ECtHR: The Future Relationship between the Two European Courts' (2009) 8 *L and Practice of Interl Courts and Tribunals* 375, 395.

⁸⁵ Lock (n 84) 396; Laurent Scheeck, 'The Relationship between the European Courts and Integration through Human Rights' (2005) 65 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 837, 862.

rule, in the same way as it applies to the other contracting parties.⁸⁶ The Draft Accession Agreement remains unclear on the matter, which means that the ECtHR can return to the issue later on.⁸⁷

The Draft Accession Agreement enables the ECtHR to review EU primary law.⁸⁸ The Court could, however, only investigate whether EU law is compatible with the Convention. In other words, it could not declare provisions of EU law invalid. This means that the exclusive jurisdiction and interpretative autonomy of EU law would remain with the CJEU.⁸⁹ The Draft Accession Agreement also clarifies circumstances in which the CJEU can review EU law-related cases before the review of the ECtHR. The main rule is that the applicant must exhaust only the remedies in the legal order of the main respondent, whether it is the EU or an EU Member State, but not the remedies of the co-respondent. If the EU is the main respondent, the applicant must first exhaust all remedies in the EU legal order, which are the general court and the CJEU. If the EU is a co-respondent (meaning that the main respondent is an EU Member State; the status of co-respondent is voluntary), the CJEU can review the case before the ECtHR reviews it. Equally, if the EU is not a co-respondent in a case where an EU Member State is the main respondent, the CJEU cannot review the case. In such situations the only way the CJEU could have reviewed the case would be if a national court had asked for a preliminary ruling from the CJEU at an earlier stage during the national proceedings.⁹⁰

If the Union's accession to the ECHR complies with this draft agreement made by the Steering Committee, the Union would have the same obligations as the State parties of the Convention. This could mean that there could be changes in the interpretation of some provisions of Union instruments. For example, human rights violations could be seen as an excuse to not surrender a person to another state based on the issue of a European arrest warrant (EAW), because EU law ought to comply with the ECHR⁹¹. Differences in national law, or regional transnational law,

⁸⁶ Steering Committee for Human Rights (n 80) 16.

⁸⁷ Groussot, Lock and Pech (n 84) 9.

⁸⁸ Steering Committee for Human Rights (n 80) 7; Groussot, Lock and Pech (n 84) 9.

⁸⁹ Groussot, Lock and Pech (n 84) 9–10.

⁹⁰ Steering Committee for Human Rights (n 80) 24–25; Groussot, Lock and Pech (n 84) 14–15.

⁹¹ Case C-399/11 *Stefano Melloni v Ministerio Fiscal* (ECJ, 26 February 2013). In *Melloni* the CJEU considers the Framework Decision on the European Arrest Warrant to be compatible with the ECHR. See also Samuli Miettinen, 'CJEU judgment in C-399/11 *Melloni*: Member States may not offer a 'greater level of protection' than under the

compared to the Convention are not acceptable excuses for not complying with the Convention.

The whole idea of the Convention is to bring coherence to the protection of human rights in the European area. The Union's accession would enhance this coherence.⁹² Following accession, the doctrine on equivalent protection concerning EU law might get renounced by the ECtHR for the sake of equal standing of the Convention contracting parties. The EU's position as a contracting party would thus become normal when compared to the state parties. The Union would have negative and positive obligations arising from the Convention, and it would have the same margin of appreciation in fulfilling its obligations as the state parties have.

VI. CONCLUSIONS

The various European legal systems are linked in complex ways. This contribution aimed to clarify some of those linkages. Constitutions at the European level have been given only some of the functions traditionally held by national constitutions. Given key differences between European and national constitutional functions, how should the norms described in the previous sections be modelled? This section reflects on the meaning and influence of heterarchical constitutional structures and draws some tentative conclusions. However, further study on their influence would be welcome. What is the purpose of such structures? How do these structures manifest themselves in different branches of law? Criminal law is used as an example when answering these questions because of its close connections to national sovereignty and constitutional law. Criminal law is also a good example because the principle of legality imposes fairly strict requirements for the ways in which criminal law may be applied.

EU constitutionalism differs from state constitutionalism in at least one vital aspect. State constitutionalism is about imposing limitations on the use of power and of hierarchical structures within the polity. EU constitutionalism is, in addition to these, about heterarchical constitutional structures between the EU polity and the individual Member States. Neither the Union nor the Member States occupy an absolute higher hierarchical level in the constitutional structure. Rather, the common constitutional framework for the Union and the Member States could be described as parallel, complementary or integral.

European Arrest Warrant' (*Research, Consultancy and Teaching in EU Law*, 26 February 2013) <<http://miettinenlaw.com/author/samulimiettinenlaw/>> accessed 15 March 2013.

⁹² Steering Committee for Human Rights (n 80) 16.

The heterarchical constitutional principles described above, mainly the principle of primacy and the doctrine concerning margin of appreciation, aim at flexible co-operation between different legal orders. This reduces the need to create new rules simply to connect different constitutional orders. Heterarchical principles are principles properly so called: they are more open to case-specific interpretation than strict rules. This is both their strength, and their weakness.

A concept of *deep pluralism* has been used to describe a situation 'where actors of each legal order proceed without systemic regard for the coherence of the whole'.⁹³ Flexible heterarchical constitutional structures which facilitate cooperation between the EU and its Member States contribute to deepening cooperation without clearly defining the constitutional relationship. Some preliminary steps have been taken towards a more clearly defined relationship. For example, the declaration concerning primacy has been annexed to the Lisbon Treaty. Article 6(2) TEU now explicitly stipulates that the Union shall accede to the ECHR convention.

Special characteristics of national constitutions can flourish within the European constitutional setting. Article 4(2) TEU states that the EU respects the national identities of the Member States. Heterarchical constitutional principles emphasise voluntariness in the relationship between the EU and the Member States. Article 50 TEU makes it possible for the Member States to leave the Union.⁹⁴ Thus, EU law must be acceptable in order to legitimize its position in the material sense, as well as its role in the national legal orders. Article 67(1) expresses respect for different legal systems and traditions of the Member States in the context of criminal law cooperation.

The principle of conforming interpretation gives an important role to national legislation. The field of criminal law is sensitive from the perspective of national sovereignty. The use of conforming interpretation is therefore restricted in this context, as presented above in section three. A framework decision or a directive cannot independently determine or aggravate criminal liability.⁹⁵ Therefore the principle of primacy should not to be considered absolute. The principle of primacy is applied only after determining that national legislation cannot be interpreted harmoniously

⁹³ Mattias Kumm, 'Rethinking Constitutional Authority: On the Structure and Limits of Constitutional Pluralism' in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart Publishing 2012) 40.

⁹⁴ What obligations the Member States would have to fulfill if they wish to leave the Union is another question.

⁹⁵ *Pretore di Salò* (n 30) para 20; *Kolpinghuis* (n 30) para 14; *Pupino* (n 26) paras 44-45.

with EU law in the case in question. In cases where national legislation and its EU law-oriented interpretation do not allow determination or aggravation of criminal liability, the principle of primacy cannot be used as an alternative means for determining or aggravating criminal liability. In cases like these, limits to the use of conforming interpretation and the restriction on the principle of primacy expresses one of the sub-principles of the principle of legality: the principle of strict construction, also known as the prohibition of analogous application to the detriment of the accused (*nulla poena sine lege stricta*). The limits to the use of the principle of conforming interpretation and the restriction on the principle of primacy in the field of criminal law also represent heterarchical structures between the EU legal order and the national legal orders quite well since the restrictions show that strict preset hierarchical structures have not been established between the orders.

The Lisbon Treaty also introduced the so-called emergency brake procedure. Article 82(3) TEU (concerning procedural cooperation) and Article 83(3) TEU (concerning the approximation of substantive criminal law) are likely to prevent situations described in the paragraph above where the EU legislator might otherwise create criminal legislation which Member States consider excessive.⁹⁶ The emergency brake procedure can be seen as a more efficient expression of the more general principle of subsidiarity in fields of shared competence such as criminal law. In the fields of shared competence draft legislative acts are forwarded to national Parliaments so that they can review whether the draft legislative act is in compliance with the principle of subsidiarity.⁹⁷ If at least a quarter of the votes given to the Parliaments declare that proposed criminal legislation does not comply with the principle of subsidiarity, the draft will be reviewed.⁹⁸

In the emergency break procedure, where an EU Member State considers that ‘a draft directive would affect fundamental aspects of its criminal justice system’, it can ask for a referral to the European Council. This suspends the ordinary legislative procedure. The wording that is used, ‘fundamental aspects of criminal justice system’, seems to leave quite a wide margin of appreciation for the Member States to use the emergency brake. Before the Lisbon Treaty, there was no need for an emergency

⁹⁶ Of course this does not affect to the possibility that the implementation acts by the Member States can be delayed.

⁹⁷ Protocol on the Application of the Principles of Subsidiarity and Proportionality [2012] OJ C326/206, Article 6.

⁹⁸ *ibid* Article 7(2).

break because third pillar instruments required unanimity.⁹⁹ The wording of the emergency brake procedure now clearly acknowledges that there are differences between national criminal justice systems. The emergency brake procedure enables discussions concerning the proposed directive in the European Council. A consensus is required for the determination of the suspension of the legislative process. Thus the procedure creates material legitimacy for the directive.

The limited scope for employing conforming interpretations or primacy in the field of criminal law as well as the emergency brake procedure in the EU criminal law legal bases show that cooperation within the EU framework is quite flexible and also takes national special characteristics into account. The use of mutual recognition as the primary principle¹⁰⁰ for cooperation in criminal matters also expresses the heterarchical nature of such cooperation. Heterarchical constitutional principles are elastic. They enable flexibility in cooperation. Heterarchical principles bring legitimacy to EU criminal law legislation because they take into account national specificities. Deeper studies on the influence of heterarchical constitutional structures in the field of criminal law, and in other fields, are required.

The picture formed by the constitutions of the individual Member States, the EU and the ECHR convention system can be seen as a dynamic whole. On one hand the CJEU considers the ECHR and the ECtHR case law¹⁰¹ as an important and fundamental source for its own argumentation. At the same time, the ECHR case law concerning the principle of equivalent protection has simplified transnational cooperation for Member States that are implementing, interpreting and enforcing these European norms. Both European courts seem to take the special characteristics of the other system into account.

Two further general conclusions can be drawn. First, the formal status of the European regional legal orders in the national legal orders is not the determining factor when assessing their influence on national legal orders. How the European regional legal orders are valued and how effectively they are applied in national legal practices are of greater importance.

⁹⁹ Petter Asp, *The Substantive Criminal Law Competence of the EU* (Jure Förlag 2012) 140.

¹⁰⁰ Presidency Conclusions Tampere European Council 15 and 16 October 1999, para 33.

¹⁰¹ For example concerning the principle of legality see case of C-63/83 *Regina v Kirk* [1984] ECR I-02689, para 22; Joined Cases of C-189/02 P, C-202/02 P, C-205/02 P – C-208/02 P and C-213/02 *Dansk Rørindustri and others v Commission of the European Communities* [2005] ECR I-05425, paras 215–220.

Second, the doctrine of sources of law needs to be reconsidered. A doctrine of sources in European law should not aim to establish a strict hierarchical model encompassing the different legal orders. Instead, more weight ought to be given to the different *communicative principles* between the legal orders, such as the principle of primacy and the doctrine of margin of appreciation. National legislation differs from European regional legal orders in that it functions as the framework and infrastructure for the European regional legal orders. Different legal orders do not need to be hierarchically interrelated, even though each of the systems has an internal hierarchy of norms. This demonstrates that different communicative principles apply between the legal orders.