

**The Evolving Relationship Between the Court of Justice of the European Union and the European Court of Human rights Post-Opinion 2/13: Future Directions and Strategies.**

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**Abstract:** It's been almost ten years since the harsh Opinion of the Court of Justice of the European Union (CJEU) on the draft of the Accession Agreement to the European Convention on Human Rights (ECHR); the question that arise is how these two courts and their legal systems have managed to coexist after this backlash. Did this opinion have an impact on the Bosphorus doctrine of the European Court of Human Rights (ECtHR)? And more importantly, is the accession to the ECHR still a desirable option? Accession of the EU to the ECHR it's an obligation established under the European Treaties, so technically it must happen.

However, if negotiations for accession were re-initiated and followed the conditions requested by the CJEU in Opinion 2/13, the result would be a deprivation of the ECtHR's jurisdiction over some important matters, particularly those sensitive to human rights, such as the Area of Freedom, Security, and Justice (AFSJ). Therefore, accession would become less desirable and more costly in terms of protection of fundamental human rights.

It's hard to imagine that the CJEU would change its position and become more flexible about its most important principles: mutual trust and autonomy of the EU legal order. Since the possibility of accession seems still far away, it is important to find mechanisms to keep the dialogue between these two important courts open; to boost and improve judicial dialogue might be a way to help guarantee cohesion among the different judicial systems for protection of human rights across Europe.

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## **I. Introduction**

It's been almost ten years since the harsh Opinion of the Court of Justice of the European Union (CJEU) on the draft of the Accession Agreement to the European Convention on Human Rights (ECHR). The Treaty of Lisbon and in particular, article 6(2) of the Treaty of the European Union (TEU), provided the legal basis for EU accession; and with Protocol number eight, the institutions involved had a "negotiation mandate" (De Witte and Imamović, 2015: 686). Notably, the Protocol established that eventual agreement for accession shall preserve the specific characteristic of the Union, respect the competences of the Union and the powers of its Institutions (European Union, 2012). Hence, this Protocol gave the possibility to the CJEU to stop any kind of agreement that does not respect the specific characteristic of the Union; and to the surprise of many, the CJEU used that power. The CJEU ruled that the Accession Agreement is not compatible with the Treaties (Court of Justice of the European Union, 2014). The Court claimed that the Agreement 'is liable to adversely affect the specific characteristics and the autonomy of EU law' (De Witte and Imamović, 2015: 683). The Opinion of the CJEU has been perceived static, dogmatic, and controversial. The Court appears to prioritize safeguarding its own power and autonomy rather than embracing opportunities to learn how to collaborate and share competences on the protection of fundamental rights and freedoms in Europe. This approach has transformed the Accession Agreement and future potential negotiations into a power struggle. The question that arises is how these two courts and their legal systems have managed to coexist after this backlash. These two significant courts belong to distinct legal systems for the protection of human rights, coexisting within nearly the same territory. They have maintained a continuous and mutually influential relationship, as evidenced by numerous citations from the ECtHR by the CJEU, and vice versa, as well as by the renowned Bosphorus doctrine. Did this Opinion have an impact on the Bosphorus doctrine of the European Court of Human Rights (ECtHR)? And more importantly, is the accession to the ECHR still a desirable option? Accession of the EU to the ECHR it's an obligation established under the European Treaties, so technically it must happen. There are many and valid arguments in favour of accession. Accession could bolster the legitimacy of the EU, it would show how the Union is committed to protect fundamental rights, not only at the Member States level but also at the European institutional level. Indeed, being part of the European Convention on Human Rights would be another check and balance for the European system, it would mean to have an external scrutiny on the institutions of the EU, 'a new remedy for individuals against EU acts interfering with their fundamental rights' (De Witte and Imamović, 2015: 684). Accession would enhance coherence and consistency that would benefit both systems. Up until now the situation is

quite fragmented, it is not very clear what happens in cases of conflicts between the two courts, which institution has the last word. After accession the system of protection of human rights would work more smoothly. However, if negotiations for accession were re-initiated and followed the conditions requested by the CJEU in Opinion 2/13, the result would be a deprivation of the ECtHR's jurisdiction over some important matters, particularly those sensitive to human rights, such as the Area of Freedom, Security, and Justice (AFSJ). Therefore, accession would become less desirable and more costly in terms of protection of fundamental human rights. It's hard to imagine that the CJEU would change its position and become more flexible about its most important principles: mutual trust, autonomy, primacy and effectiveness of the European legal order. Since the possibility of accession seems still far away, it is important to find mechanisms to keep the dialogue between these two important courts open; to boost and improve judicial dialogue might be a way to help guarantee cohesion among the different judicial systems for protection of human rights across Europe. In addition, the accession of the EU to the European Convention is one modality of institutionalised arrangement, there might be a different way (Kuijer, 2020: 1008).

## **II The Bosphorus doctrine and the impact of Opinion 2/13**

In the European continent, various systems of human rights protection co-exist. Firstly, there is the protection at the national level facilitated by constitutional provision. Secondly, there is the legal framework provided by the Charter of Fundamental Rights of the European Union safeguarded through the oversight of the Court of Justice of the European Union. Lastly, we have the system established by the Convention on Human Rights, enforced by the European Court of Human Rights. There is no hierarchy between these legal systems, except for the Member States of the European Union which must respect primacy of EU law. The evident advantage is that when the national level fails in its objective of protection, there are two additional systems that can intervene, creating a system of checks and balances. However, challenges arise when both the Charter of Fundamental Rights and the European Convention are applicable. In such cases, determining which court has jurisdiction to take action - The Court of Justice or the European Court of Human Rights- can be complex. All twenty-seven Member States are also part of the European Convention, so the territory to which the Charter and the Convention apply is identical and the rights envisaged by both texts are quite similar. These two international courts have always been aware of each other, even if there is no institutional relationship. In fact, they developed a notably constructive and productive informal relationship, relying on mutual citation of case law. This practice not only enhances their legitimacy

but also fosters cooperation between them. CJEU has multiple times claimed that the European Convention does not constitute a legal instrument, since it is not incorporated into European law (Krommendijk, 2018). However, in the Charter we have article 52.3 (Charter of Fundamental Rights of the European Union 2012) that establishes a minimum standard of protection, represented by the European Convention. Still, this shall not prevent European law to provide a more extensive protection. On the other hand, the Strasbourg court uses any international document that could be relevant for the interpretation of the Convention, which includes the Charter. It is important to remember that this is just the will of the ECtHR, which isn't under any obligation to take into consideration the Charter. However, technically, even if the EU is not part of the Convention, when Member States are implementing European law, the ECtHR has the jurisdiction to act. The scope of the Convention is universal, and it includes any kind of state action. Thus, the Convention is indirectly applicable to the EU. Still, EU institutions and acts cannot be directly scrutinised by the ECtHR.

After the Bosphorus case in 2005, the ECtHR developed the recognised Bosphorus doctrine. The Court specified two important aspects in the Bosphorus case. Firstly, that Contracting Parties are allowed to transfer sovereign power to international organizations, but they remain responsible for all acts and omissions of their organs, “regardless of whether the act or omission was a consequence of domestic law or the necessity to comply with international legal obligations” (Locke, 2010: 530). In addition, when a State is acting under obligations of an international organization (such as the EU), as long as it is considered that the organization protect fundamental rights in a manner equivalent to the Convention, the ECtHR will presume that the state has acted in compliance with the Convention (Tobias, 2010: 530). The word equivalent does not mean identical, it means similar, so it could be difficult to precisely identify the threshold for equivalent protection. In addition, it's important to remember that this is just a presumption that can be rebutted. The Court has developed a two-stage test to decide whether to apply the presumption (Lock, 2010: 530). First, it analyses the International Organization, and check if there is an equivalent protection of fundamental rights. If that's the case, the Court will assume that actions taken by a state in compliance with obligations under the organization also comply with the Convention. The second stage is activated only if there is a manifest deficiency in protection. The Court looks at the specific situation of the case. Through an examination of the case and eventual manifest deficits, the Court will scrutinise the acts of the state and it could decide to rebut the presumption. If that's the case, the Court will subject the actions of the state to a closer scrutiny. Therefore, when a Member State is implementing European law, the ECtHR will be deferential and will not interfere. It's a compromise of the ECtHR in order to respect the autonomy

and effectiveness of the legal order of the EU. Kuijter has defined the Bosphorus presumption as the ‘professional courtesy’ of the Strasbourg court (2020: 1002). The Bosphorus decision has been considered a proof of the silent cooperation and mutual respect between the two courts. Still, it is evident how fragile this mechanism is, as it isn’t based on any legal certainties. Therefore, it seems reasonable to question whether the harsh Opinion 2/13 has had any impact on the relationship between the two courts. Before Opinion 2/13, when the CJEU was dealing with cases regarding human rights, it was often relying on the European Convention and the ECtHR’ case law, the interpretation of fundamental rights was usually very similar to the one of the ECtHR. It’s important to underline that the Charter of Fundamental Rights of the EU was and still is considered as a quite recent text and that the CJEU is not focused only on human rights, it is a tribunal with broad competences that touch many different and complex areas. Therefore, the ECtHR could represent a model to follow as a human rights court, and its expertise on protection and interpretation of fundamental rights was and still is a useful tool to the CJEU. However, this is a relationship that goes both ways. Not only does the CJEU rely on the ECtHR and the Convention but also the ECtHR had been increasingly referring to the CJEU’ case law and the Charter. As it was mentioned in the introduction, they both assist each other in legitimising and establishing a uniform standard of protection of fundamental rights in continental Europe. As Lock points out, this cooperation ‘is not based on a legal duty to cooperate, but merely on comity (Lock, 2009: 381). At any moment, one of the two Courts or both, could unilaterally end this fruitful cooperation. During time, as the CJEU grew in power and competences, tensions between the two Courts have been accumulating, finding their final expression in Opinion 2/13. It’s important to take into consideration the nature of the EU and of the CJEU- which will be discussed later. The EU is an international organizations sui generis. The European project started off as an economic integration project, but it has since then evolved towards a more deep and political integration that created a complex system based on the autonomy, primacy and effectiveness of EU law, safeguarded by the CJEU. The intervention of the ECtHR in certain humanitarian sensitive areas has been perceived as a threat to primacy of EU law. For instance, from a Luxemburg perspective, judges of the Strasbourg court do not always deal properly with mutual trust in the context of the Dublin system, because they may not be sufficiently familiar with it (Krommendijk, 2018: 2). It would be possible to discuss whether these fears and tensions were legitimate and justifiable, but that has been the perception of reality by the CJEU, and the court has been acting accordingly.

After Opinion 2/13 it seemed that the CJEU ‘has become more reluctant to attach importance to the case law of the ECtHR’ (Krommendijk, 2018: 5). In J.N., the CJEU remarked that the examination of the validity of secondary law ‘must be undertaken solely in the light of the fundamental rights

guaranteed by the Charter' (Court of Justice of the European Union, 2016: para. 46). The CJEU wanted to remark that the EU has its own and autonomous catalogue of fundamental rights. Still, this does not mean that the CJEU, after Opinion 2/13 has stopped citing the Convention and ECtHR' case law. Even though, there has been an increase in basing its judgments solely on the Charter, in the years following the opinion, the Court has been relying on the work of the ECtHR. It would be difficult to determine whether this preference for the Charter is due to the impact of Opinion 2/13 or it is about the CJEU affirming its own legal system of protection of fundamental, or maybe both reasons. In addition, the pattern that the CJEU follows in citing ECtHR' case law is not very clear. In case *Aranyosi*, which concerned two of the fundamental principles of EU, namely mutual trust and mutual recognition in a highly humanitarian sensitive area, specifically the Framework Decision on the European Arrest Warrant, the CJEU decided, against all odds to prioritize the protection of individuals against inhuman and degrading treatment against the principle of mutual trust and mutual recognition. The Court based its reasoning on the case of the ECtHR and the ECHR. In particular, CJEU derived from the Article 15.2 of the Convention, the prohibition of derogation from Article 4 of the Charter, which enshrines the prohibition of inhuman or degrading treatment or punishment (Court of Justice of the European Union, 2016: para. 86). Again, in the 2017 *C.K.* ruling and in the 2019 *Jawo* ruling, the Luxemburg court opted for a higher standard of protection of fundamental rights over the principle of mutual trust, in accordance with the ECtHR approach (Gomes, 2022: 92). The tendency seems to be that when the CJEU is dealing with complex cases, it relies on the ECtHR and ECHR to help strengthen its arguments and conclusions (Krommendijk, 2018: 10). From a Luxemburg perspective, it seems that Opinion 2/13 has not been a significant game changer, which is not entirely surprising given the harshness of the Opinion. It's reasonable to assume that, for the sake of the protection of fundamental rights and keep fostering cooperation, the CJEU adopted a cautious behaviour to minimise any potential damage that could have affected both legal systems. Maintaining a defensive approach like that in the Opinion would have further deteriorated the relationship between the two courts, at the expense of the true and fundamental purpose of the existence of these two judicial bodies.

On the other hand, what about the Strasbourg perspective and the Bosphorus presumption. Opinion 2/13 was perceived as a disappointment, nobody expected the rejection, and, most importantly, nobody expected that tone from the CJEU. Some described it as a "legal bombshell, fundamentally flawed and an unmitigated disaster" (Kuijer, 2020: 1005). However, in 2016 the ECtHR confirmed the application of the Bosphorus presumption on equivalent protection through a judgement. The

court did not just apply the presumption, but it also gave an important clarification, regarding the principle of mutual trust and mutual recognition, that former president Dean reported in his speech:

“(…) where the courts of a state which is both a Contracting Party to the Convention and a member State of the European Union are called upon to apply a mutual recognition mechanism established by EU law, they must give full effect to that mechanism where the protection of Convention rights cannot be considered manifestly deficient. However, if a serious and substantiated complaint is raised before them to the effect that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by European Union law, they cannot refrain from examining that complaint on the sole ground that they are applying EU law” (Spielmann, 2017: 16).

The ECtHR wanted to send a message to the CJEU about its intention to scrutinise more the EU when implementing measures based on mutual trust and mutual recognition that involves fundamental rights. However, also the ECtHR kept relying on the charter and the CJEU’ case law to strengthen its legitimacy, its arguments and conclusions. Neither of the two judicial bodies wanted to enter in an open conflict, which would have been very difficult to resolve, and they attempted to avoid it. At stake were their credibility, authority, legitimacy and more importantly an effective protection of fundamental rights. New negotiations to discuss about a new accession agreement were resumed in June 2020, but then the pandemic crisis, the rule of law crisis, war in Europe intervened, causing the urgency of this matter to fade. Nonetheless, it is important to note that in the recent rule of law crisis, the two courts have been working together to address this new threat, relying on each other.

### **III. Is accession to the ECHR still desirable?**

What if negotiations for accession were re-initiated and followed the requirements and conditions proposed by the CJEU. Would accession still be desirable? Would it be beneficial for the regional protection of human rights in the European continent? To answer these questions, it seems necessary to briefly resume the issues that the CJEU has found in the draft accession agreement. According to the Court, the draft agreement fails to respect the specific characteristics and the autonomy of the European legal system. It does not provide any coordination between article 53 of the Convention, which allows contracting parties the power to have higher standards of protection of fundamental rights than those guaranteed by the ECHR, and article 53 of the Charter which has a similar provision that must be interpreted in light of the Melloni judgment. Member states can apply higher standards of protection only if, by doing so, they always respect the primacy, unity, and effectiveness of EU law. CJEU claims coordination between these two articles to protect the primacy of the EU legal system. Another issue regard Protocol number 16 of the Convention that enables higher courts to send

questions and asks an opinion to the ECtHR. According to the CJEU, this could create some friction with the preliminary ruling mechanism. What if national courts were to instrumentally circumvent the CJEU in an attempt to avoid its judgment? In addition, the ECtHR would be able to provide opinions on EU law which is not something that the CJEU is willing to accept. Article 344 of the TFEU establish that member states must resolve controversy between them, regarding interpretation and application of EU law, through European mechanisms, including the CJEU. After accession, member states would face the possibility to resolve interstate controversy about EU law through the ECHR. In the draft agreement, there was also a proposal to introduce two rather complicated mechanisms aimed at preserving the specificity of EU: the co-respondent mechanism and the prior involvement mechanism), specifically designed for the EU and its legal system. However, according to the CJEU these mechanisms are controlled by the ECtHR and its discretion; and again, they would require the ECtHR to interpret EU law and that is inadmissible to the CJEU. Most importantly the draft agreement does not respect one of the fundamental principles of EU, mutual trust, particularly important for the human rights sensitive Area of Freedom, Security and Justice (AFSJ). This principle requires to consider all member states to be complying with EU law and fundamental rights recognised by EU law. Accession would require member states to check on each other when EU law imposes on them an obligation of mutual trust. In the eyes of the CJEU, this would disrupt the balance of the EU. Last but not least, after accession the ECtHR would have jurisdiction over matters of Common Foreign and Security Policy (CFSP), an area of EU law over which the CJEU has reduced jurisdiction. The idea of another international court having jurisdiction over an area of law almost beyond the reach of the CJEU is inconceivable to this court. As academics have pointed out, most of these arguments can be addressed by simply sitting at the table of negotiations, make some modifications, additions and clarifications. After all, the draft accession agreement was only a draft, and it could have been subjected to further modifications. However, the tone of the Opinion, as well as the arguments made, seems to indicate the CJEU' willingness to make accession as difficult as possible. De Witte and Imamović highlighted that some of these arguments don't even relate to accession, but rather are internal issues of the EU (2015: 694), which the CJEU attempts to externalize and shift the burden onto the ECtHR. For instance, concerning arguments regarding Protocol 16 (higher courts having the possibility to asks opinions to the ECtHR), this Protocol does not permit national courts to evade their obligations under EU law. In particular, the obligation that entails the duty to refer a preliminary question to the CJEU regarding interpretation or validity of EU law (De Witte and Imamović, 2015: 696). This Protocol simply adds another useful instrument for dialogue between the ECtHR and higher courts of contracting parties on human rights matters. Thus, this distrust towards national courts is an issue internal to the relationship between the CJEU and national

courts. The CJEU instrumentally used this argument to claim that autonomy of the EU legal system would be put in danger after accession.

One of the main objections of the CJEU regard the principle of mutual trust. As already mentioned, the problem lies in the fact that once member states becomes contracting parties to the ECHR, it would require them 'to check that another member states has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States', in this sense, 'accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law' (Court of the European Justice, 2014: parr. 194). It's quite curious how the CJEU links the principle of mutual trust with the autonomy of the EU legal order. It's a connection never made before, mutual trust is not explicitly listed in the Treaties, yet it is still considered a fundamental principle. However, the fact that accession would truly undermine this principle and disrupt the balance of the EU seems a bit of an exaggeration. Hence, to render the draft accession agreement acceptable to the CJEU, it would be necessary to exclude any possibility for member states to review another member state' compliance with the ECHR in all cases, which would also deprive the ECtHR to have jurisdiction on cases related to the principle of mutual trust. This already sounds controversial, and in addition the principle of mutual trust regulates one of the most human rights sensitive areas, the AFSJ and the Framework Decision of the European Arrest Warrant. In these areas of law, the CJEU have already had the tendency to prioritize the principle of mutual trust over the protection of fundamental rights. At first, the CJEU established a high threshold to rebut the presumption of compliance with fundamental rights. Minor violations of fundamental rights are not sufficient, there must be systemic deficiencies in the national legal system (Gomes, 2022: 94). Hence, within the EU legal order, 'Member States are generally not in a position to refuse compliance with an AFSJ instrument on the basis that there are deficits in procedural or fundamental rights in terms in another member state' (Lock, 2020: 435). The logic rests on the principle of mutual trust, the idea that all member states are respecting fundamental rights envisaged by EU law, thus obviating the need for mutual checking. Unfortunately, this idea that all member states are equally respecting fundamental rights is quite idealistic, as evidenced by the numerous cases involving asylum seekers dealt with by the court, and today, amid the rule of law crisis. The EU is not a federal state, it is composed by 27 different member states, each with distinct political system, legal systems, and cultures. It is risky to assume that all member states are complying with the standard of protection of human rights. There cannot be mutual trust if the pillars of constitutional democracy are missing. Regulating the EU legal system on normative terms might be a risky endeavour when the protection of fundamental rights is involved.

In *MSS v Belgium and Greece*, an afghani citizen left Kabul and entered the EU through Greece. According to Dublin Regulation, the member state of first arrival is responsible to examine the application of an asylum seeker coming from a third country. The applicant did not present a request for asylum in Greece and then made his way to Belgium. The Belgian authorities proceeded to return him to Greece based on Dublin Regulation, but then the applicant requested to the Belgian authorities to set aside the order to leave the territory. Since ‘the unlikelihood of his application for asylum being properly examined and the appalling conditions of detention and reception of asylum-seekers in Greece’ (European Court of Human Rights, 2011: para. 27). Belgian authorities refused to judicially review its requests based on the presumption that Greece was complying with its obligations under EU law (mutual trust). The ECtHR established that the principle of mutual trust could not result in “blind trust” where rights protected by the Convention were at risk (Lock, 2020: 439). The interesting aspect is that a few months later, the CJEU was faced with a similar case. The court unexpectedly adopted the line of reasoning of the ECtHR, making the doctrine on mutual trust less stringent (Lock, 2020: 440). However, the threshold to rebut the presumption of compliance was still high, but then the court in the 2017 *C.K.* ruling and in the 2019 *Jawo* ruling, further smoothed the mutual trust doctrine in favour of the protection of fundamental rights (Gomes, 2022: 92). The CJEU clarified that, in order to allow a rebuttal of the presumption of mutual trust, national authorities could consider whether a serious and a real risk of individual violation exists (Bohacek, 2022: 116). The CJEU likely decided to follow the ECtHR to avoid a potentially difficult conflict to resolve had the two courts adopted opposing approaches; this was especially pertinent in 2017 and 2019 following the CJEU’ harsh Opinion on accession. However, the case law and the approach of the ECtHR proved particularly influential on the CJEU, pressuring this court to rule in favour of fundamental rights protection.

As Lock underlined, what would have happened in these cases if the EU had been a part of the ECHR, under the conditions set by CJEU? (2020,445) The ECtHR would not have any jurisdiction on cases relying on mutual trust. In addition, member states could not be held accountable under the Convention for failing to check another member state compliance with convention rights. Accession would therefore result in a reduced protection of human rights (Lock, 2020: 446). Thus, the pluralism in the regulation of protection of human rights between two distinct international courts did not bring fragmentation; on the contrary it had the opposite effect, contributing to the harmonisation of the system.

This assessment remains valid until the CJEU is prepared to reconsider its approach to mutual trust, including its connection to primacy, effectiveness and autonomy of EU law. This does not imply to

sacrifice mutual trust for the sake of human rights protection; rather both should be reconciled. As mentioned above, this could entail revising mutual trust doctrine and creating mechanisms and instruments that aims to incorporate both, protection of fundamental rights and mutual trust into the legal system. At the beginning, to accommodate the CJEU and to not be too invasive, this approach could be confined to particular human rights sensitive areas, such as the AFSJ. However, considering the tone of the Opinion and the redundant defensive approach of the CJEU towards the primacy, autonomy, and effectiveness of EU law, it seems unlikely that CJEU would concede, especially on the issue of mutual trust. This is due to the inherent characteristics of both the CJEU and the EU, which will be further elaborated upon in the next chapter. Additionally, it would not be beneficial either to re-open negotiations to discuss accession. As it was mentioned in the introduction, the approach of the CJEU has transformed the process of accession into a power struggle. After the Opinion, accession is not about sharing competences, checks and balances and human rights, but defending the primacy and autonomy of EU law. Therefore, the negotiation process would result in a zero-sum game, a win-lose situation, where benefits to the CJEU and the EU legal systems comes at the direct expense not only of the ECtHR but also of the protection of fundamental rights. Under these circumstances, accession would probably create further frictions between the two international courts. For negotiations to yield a different outcome and render accession desirable, the CJEU would need to entirely change its approach, its attitude should be of dialogue and openness. The relationship between these two courts should be a partnership and not a dictatorship where the CJEU dictate terms and conditions. The aim should not be accession under CJEU terms, but the aim should be to find compromises and to try to solve problems at each step. Surely there must be considerations of the specificity of the EU, it's not a state and it's not a simple international organization either, but this should not stand in the way of improving the protection of fundamental rights in the European continent. In the current situation, the CJEU is concerned about protecting its system and its specificity. Hence, there seems to be very little room for compromise and partnership, as the primary focus is on safeguarding the EU legal system. Primarily, the emphasis should be on improving the protection of fundamental rights at the regional level and how to do that in a multilevel system. By doing that the approach should be of problem solving rather than engaging in a power struggle.

#### **IV. Nature of the European legal order: mutual trust and autonomy (Charter centrism)**

An important premise needs to be made before entering the content of this chapter. The aim here is to try and understand the source and the reasons of the approach of the CJEU in front of accession and in the Opinion 2/13. Where does this defensive approach come from? Such comprehension could pave the way for addressing the accession issue more effectively.

In a more general sense, it seems appropriate to consider some factors regarding the nature of the EU that could affect the EU legal structure and, therefore, condition the approach of the CJEU. First of all, it is fundamental to remember that the EU is an international organization sui generis; it is not a conventional international organization, nor is it an association of states forming a federal union. In fact, it is something in between, which makes things quite complicated. Consequently, it stands out as unique in its category, and this also affects its relations with external actors, such as the ECtHR. In addition, ‘the EU is itself not yet a finished product; it is in the process of evolving and the form it finally takes still cannot be predicted’ (Borchardt, 2016: 46). While evolving, its institutions and in particular, the CJEU, adapt and develop new principles and mechanisms for its functioning and for the protection of its own autonomy, effectiveness and primacy. In fact, the EU legal order is based on principles that can be found in the Treaties but also on principles and mechanisms that are the result of this evolving process, directly stemming from the case law of the CJEU. The principle of mutual trust and its corollary, mutual recognition are among them. This evolving process, which has been transitioning from purely economic integration to a deeper level of political integration, is not isolated. Instead, it must be interpreted in constant relation with its member states and when it comes to the protection of human rights, also with the ECtHR. Even though, the EU is not part of the ECHR, the two courts share parts of their jurisdictions, making their cooperation and coordination inevitable. The former president of the Federal Constitutional Court of Germany defines the judicial structure of Europe as a “kinetic sculpture which consists of an ensemble of balanced parts which are not revolving around their own axes but are instead constantly engaged in a dialogue triggered by the movements of the other parts” (Spielmann, 2017: 19). This renders the legal structure of the EU particularly complex and also potentially fragile. Secondly, as Borchardt underscores, the EU ‘is created by law and it is a Union based on law’ (2016: 89). Its origin lies in the Treaties, and it operates and pursues its objectives through means of law. Unlike a sovereign state, the EU is not governed by the threat of the use of force; rather, it is governed by EU law, which regulates the function of its institutions, their relationship with each other and provides them with legal instruments that bind member states and its citizens (Borchardt, 2016: 89). Hence, the EU relies on voluntary compliance from member states. That is why the autonomy, effectiveness and primacy of this legal system are extremely important, especially to the ultimate advocate of European law, the CJEU. Thirdly, there is always a tension between the EU of the Treaties, the EU governed by the Council of the European Union – thus representing the member states and their interests - and the EU governed by the European Commission, which advocates for the interests of the EU as a whole. This also encompasses the CJEU, the guardian of EU law. Even if the EU has achieved a certain level of political integration and autonomy, this constant tension could potentially affect and weaken the legal structure of the

EU. These factors explain in parts the reason why the CJEU strongly upholds the primacy, effectiveness, and autonomy of EU law. However, this does not imply that safeguarding the EU legal system should compromise fundamental values, such as fundamental rights. It's not a matter of choosing one or the other; rather, it's about finding a balance.

Furthermore, there is a significant distinction between the ECHR and its court and the EU and the CJEU, primarily in their nature, functioning and their objectives. These differences have implications not only on their case law and how they determine judgments but also on their relationship with each other. The ECtHR is entrusted by contracting parties to apply the Convention on Human Rights, it ensures that the rights and guarantees envisaged in the Convention are respected, interpreted, and implemented correctly in the domestic legal systems of its contracting parties. Therefore, its objective is focused on the protection of human rights and corrections of eventual violations. In other words, its only focus is on human rights and nothing else. It is not part of a supranational organization which aims to a deeper political integration, and it does not share competences with member states. Its scope of harmonization is limited to human rights. The ECHR established a minimum standard of protection which contracting parties could further expand it. Nonetheless, the scope of the Convention relies on two tools of interpretation established by the ECtHR, that makes compliance a little less stringent (Niedźwiecka, 2022: 138). One is the margin of appreciation doctrine envisaged in Protocol 15, which provides room for flexibility for contracting states in interpreting and applying convention rights, hence it limits the level of interference of the ECtHR (Niedźwiecka, 2022: 138). In fact, it has been abused by states, such as Poland and Hungary to justify their changes in their legal systems at the expense of the rule of law. The other instrument is the living instrument doctrine, which 'allows the interpretation of the convention rights in consideration of the changing social reality to protect human rights more effectively' (Niedźwiecka, 2022: 138). As it is evident from these two instruments, there is certain room for manoeuvre for contracting parties in the interpretation of convention rights, which leaves more margin to governments and domestic legal systems to adapt to the standard established by the convention. On the other hand, for the CJEU, the protection of human rights is just one of the objectives of the court. The CJEU is entrusted by the Treaties, hence its member states, to secure the uniform interpretation of EU law, to secure compliance with it and monitor the validity of secondary EU law. The CJEU has to guarantee the autonomy, effectiveness and primacy of EU law. Despite the EU's commitment to protect fundamental rights and adoption of the Charter of Fundamental Rights (CFR), the role of human rights is significantly circumscribed within the EU's internal policies particularly due to the limited scope of application of the Charter. In fact, article 51 of the Charter states that its provisions are only applicable when member states are implementing EU law and more

importantly that the Charter does not establish any new power or task for the EU. Therefore, the ability of the CJEU to monitor protection of human rights is quite limited and especially, strongly constrained by EU law. This strongly affect how the CJEU deals with cases of potential violation of human rights. Where the ECtHR might perceive a particular violation as a threat to human rights, the CJEU might perceive it as a threat to the autonomy and effectiveness of EU law. The objective of the ECtHR is to remedy and eventually prevent potential violation of human rights, while the objective of the CJEU is to ensure unity within the EU legal order (Niedźwiecka, 2022: 139). This difference in the purposes and the objectives clearly affect how the courts function. It is briefly mentioned above, how the ECtHR functions in relation to its contracting parties through the doctrine of the margin of appreciation and the living instrument doctrine. Creating a room for manoeuvre for governments and legal system to adapt to the convention rights. The CJEU cannot afford such room, autonomy, effectiveness and primacy of EU law are fundamental, if Union law were to be interpreted and applied differently from one state to another, its application would be jeopardised (Borchardt, 2016: 80). In addition, the CJEU being part of the EU, has another objective: integration. That is why the court has developed new principles, such as mutual trust, to define its scope and ensure its proper functioning.

The principle of mutual trust, it was developed through the case law of the CJEU to ensure a smooth cooperation in those areas of law and instruments that are based on the principle of mutual recognition, mainly the AFSJ and also in the internal market. Understanding its nature and role in the European legal structure might be helpful for better comprehending the CJEU' justification for considering it as a constitutional principle and therefore as untouchable. The EU shares competences with the member states and it is not a finalized project; therefore, not all areas of law are completely integrated and harmonized. In the absence of uniform rules, the CJEU has established this integration method (principle of mutual recognition) 'to expedite and simplify cross-border cooperation among member states by ensuring the recognition of various legal products (e.g. judicial decisions or legal standards) of individual member states within others' (Bohacek, 2022: 110). This principle does not logically function without mutual trust; thus, there must be some level of trust in the legal systems of all the member states in order to recognize their legal products as valid and eliminate the need for checking each other. There cannot be mutual recognition without mutual trust and vice versa. The reasoning behind these principles is that the EU is based on certain values, which are expressed in Article 2 TEU (including respect for human rights) and therefore shared by all member states (Bohacek, 2022: 112). Moreover, the laws produced by EU institutions (secondary law) also reflect those values, and since all member states are bind by this law, they are also respecting those values. As already mentioned, mutual trust and mutual recognition are particularly present in the Area of

Freedom, Security and Justice, but they are also necessary for the effective functioning of the internal market. In fact, they ensure the proper functioning of the four basic freedoms (freedom of goods, capital, services, and people) (Bohacek, 2022: 111). The significance and necessity of this principle are quite evident, it represents the foundation on which the EU stands and it's also essential to the process of integration. Mutual trust tries to compensate in those areas which are particularly sensitive due to issues of sovereignty. Therefore, it is understandable how the CJEU has given this principle such fundamental and structural importance, what is not understandable and justifiable is creating a hierarchy among the fundamental values of the EU and mutual trust. In fact, mutual trust and mutual recognition cannot be used at the expense of other fundamental values such as protection of human rights. Space must be made for both of these important principles and objective; a balance must be found. In addition, the adherence of a member state with the values of article 2 TUE is checked during the accession process, but things might change in the future (Bohacek, 2022: 118). The rule of law crisis in Hungary and Poland is a valid point to this argument. Thus, the fact that a country recognises some values does not guarantee that it will always respect them (Bohacek, 2022: 118). One could argue that the justification for mutual trust is related to the fact that these values are reflected in EU law (both primary and secondary law), therefore, member states, in complying with EU law, are also respecting them. However, compliance and implementation with EU law are never flawless and may be affected by various national factors, including political and administrative systems, which can differ among members states. Again, the rule of law crisis is a striking example. Furthermore, EU law does not have the competence to cover all areas, in lack of harmonization, the risk is that 'the duty of trust may result in a breach of fundamental rights' (Bohacek, 2022: 123). Moreover, the approach of the CJEU is to prioritize the effectiveness, autonomy, and primacy of EU law, hence, to protect the principle of mutual trust above almost anything else. However, the point here is not to decide between protection of human rights and mutual trust and mutual recognition. Rather, it's about finding a way to avoid using mutual trust at the expense of the protection of fundamental rights. Lowering the threshold to rebut the presumption on mutual trust could be one way. When a risk of violation of fundamental rights is established, the CJEU could rebut the presumption and conduct an assessment of the situation, considering also the ECHR and the case law of its court (Bohacek, 2022: 126). Systemic deficiencies could still be considered as indicators of risks, but they should not be an indispensable requirement (Bohacek, 2022: 126). In this way mutual trust would avoid the risk of becoming 'blind trust'.

Among fundamental principles of the EU legal order, we have also the principle of autonomy. Like the principle of mutual trust, it is not explicitly stated in the EU Treaties; nevertheless, it is a

foundational principle developed by the CJEU and deeply embedded in its jurisprudence. Indeed, the court strongly rejected the draft accession agreement, perceiving it as a threat to the autonomy of the EU legal order. The principle of autonomy means that EU law does not depend on national or international law for its validity; EU law “stems from an independent source of law” (Eckes, 2020: 3). This principle exists to ensure that EU law is interpreted and applied uniformly across all member states. When the EU was created, member states transferred sovereign rights to the EU and therefore the CJEU. However, ‘the validity and interpretation of EU law are now autonomous and no longer rooted in and depending on the sovereignty of the member states’ (Eckes, 2020:3). The EU legal order is in itself an autonomous legal order. This particular origin of the EU legal order still echoes in CJEU case law, as the court constantly perceives the necessity to reaffirm the autonomy of its own legal system. For any legal system, autonomy is a core principle, but it is especially significant for the CJEU due to its origin and nature. It is important also to remember that the EU does not have its own comprehensive enforcement mechanism and that compliance with EU law depends entirely on national authorities of member states, making it somewhat precarious. The principle of autonomy is to protect the legal system from potential interferences from national legal orders of the member states, but it is also applying to international law. However, this does not preclude international law from having effects within the EU legal order. It only means that such influence must be adapted through the EU internal rules (Eckes, 2020: 4), in other words, it must always respect the autonomy, effectiveness and primacy of EU law. The CJEU interpret the concept of autonomy ‘as an ability to exercise jurisdiction over a territory in a self-referential and formally independent manner’ (Eckes, 2020: 9). It almost seems that the CJEU treats the principle of autonomy as one compensating for the principle it lacks, the principle of sovereignty.

In matters of fundamental rights, before the Charter of Fundamental Rights was introduced into the European legal system, the CJEU often, if not always, relied on the ECtHR case law and Convention rights. After the Charter of Fundamental rights was introduced, the CJEU relied much less on Convention law. Since the Charter was given binding status, when a human right that correspond with a Convention right is involved, the CJEU tends to briefly mention the Convention and the ECtHR case law but then focuses its reasoning and legal arguments on the Charter. On one hand, it does make sense that the court relies on the Charter and other possibly existing EU instruments before referring to European Convention law for different reasons, among which reaffirmation of autonomy is one. This tendency is what is called as Charter centrism. However, this tendency does not always apply. There are some circumstances under which the CJEU makes exceptions and uses Convention law to legitimize the protection of fundamental rights, especially with particularly difficult cases. It is

necessary to take into consideration that legitimation of protection of fundamental rights at the EU level had to be build up from scratch. Given the existence of the European Court of Human Rights and the protection of fundamental rights by national constitutions, the prevailing opinion was that there was no need to introduce another legal text to protect fundamental rights in the EU. However, as the EU and its institutions have been growing in powers, pressure also arose at the national level to introduce a system of protection at the EU level. Initially, the Charter was not even a binding text; with the Lisbon Treaty, it acquired a new legal status. Article 6.1 of TEU establishes that the Charter has the same value of the Treaties. Therefore, the language here sends a clear message: it has the same value, but it is not a Treaty. Indeed, fundamental rights protection was also created ‘to protect EU law primacy from threats from national supreme courts’ (Tinière, 2023: 324), so also to ensure autonomy and effectiveness of EU law.

However, Charter centrism fades away when the Court needs ‘an interpretation of fundamental rights which is widely accepted enough to constitute a common ground in Europe’ (Tinière, 2023: 327). As it is established also in the Charter, Convention law constitutes the minimum common standard of protection. As underlined by Tinière, the ECHR helps legitimate CJEU protection of fundamental rights in three different ways (2023: 328). First, when the CJEU face a case which involves a right that has never been interpreted, the CJEU bases its arguments in the light of the European Convention ‘to establish a new or little-used rights interpretation’ (Tinière, 2023: 328). Secondly, the ECtHR offers new methodology and instruments that can be resourceful to the CJEU as a human rights court, such as the margin of appreciation doctrine and the principle of the Charter as a living instrument which must be interpreted in the light of present-day conditions. These instruments are useful to strike the right balance between different interests. Finally, during the rule of law crisis, European Convention law has been fundamental to reinforce the position of the CJEU and recall that it is also supported by the ECtHR (Tinière, 2023: 329). This reinforcement is particularly important when a fundamental right is challenged in a delicate political context as in the case of Poland and Hungary. It is possible to affirm the CJEU relies on Convention law when, ‘the quest for legitimacy makes it forget about autonomy or, to go a bit further, when the quest for legitimacy reinforces autonomy’ (Tinière, 2023: 329).

Having gone through the principle of mutual trust and autonomy makes it a little easier to understand the point of view of the CJEU in Opinion 2/13, even though it does not justify it, especially its harsh response and tone. Mutual trust should not be prioritized at the expense of fundamental rights, and the principle of autonomy cannot be upheld against any possible change in the EU legal system that could even ameliorate the protection of fundamental right in the EU. Autonomy is indeed at the core at the functioning of the EU legal system; however, ways must be found to make it coexist with some

level of trust in the Convention law system. Trust should not only be applied inward but also outward, the EU project is a very good example of regional integration, but it cannot close itself from external influences. However, it seems very difficult that the CJEU would change its approach towards these principles, hence, different ways forward need to be found.

## **V. Judicial dialogue as a way forward**

In the third chapter was demonstrated that accession under the conditions requested by the CJEU is not desirable for the protection of human rights. In addition, it's hard to imagine that the CJEU would change its position and become more flexible about its most important principles: mutual trust, autonomy, primacy, and effectiveness of the European legal order. Accession would require a strong partnership between the two courts, that seems too far from the reality. Forcing this partnership would likely increase the CJEU's institutional resistance due to the perceived loss of autonomy, resulting in a power struggle rather than a collaborative effort to protect fundamental rights. The question that automatically arise is, now what is a way forward? The accession of the EU to the European Convention is one modality of institutionalised arrangement. In this final chapter, I would like to suggest that there might be a different way forward, that does not aim to resolve all the issues regarding accession but could constitute one step forward and towards accession.

One possible solution might involve judicial dialogue, which as defined by Mac-Gregor, is 'the practice of domestic and international courts using the reasoning of other courts to construct a better interpretation of a legal norm contained in a constitution or treaty' (2017, 91). There isn't a specific form of judicial dialogue; in fact, it can occur through many different practices, such as cross-citations and cross-references, judicial conferences and seminars, and transnational judicial networks. These types of interactions could happen both vertically, between higher and lower courts and horizontally, between courts at the same level of authority. The constant factor in judicial dialogue is the exchange of ideas, principles, doctrines and legal instruments. Judicial dialogue requires judges to conduct comparative analysis of the law, to study how different legal systems solve particular legal issues. It brings new perspectives and theories to the table; it is a mechanism for reaching knowledge (Torres, 2009: 103). One of the key characteristics of judicial dialogue is that it is a form of dialogue, a channel of communication that does not impose or coerce but suggest new and different approaches. This means that there is always a "reciprocal deference" among its participants during the interaction, as well as mutual respect for the differences among courts, acknowledging the specificity of each legal system (Mac-Gregor, 2017: 91). Through judicial dialogue is not only possible to achieve greater coherence in the system of protection of human rights but also more effective protection. Through

the dialogue, the judiciary, can make a decision with knowledge of the jurisprudence rendered on a specific matter developed by a tribunal that has previously solved similar cases involving human rights law (Mac-Gregor, 2017: 97). Therefore, it is possible to produce better judgments, by ‘allowing the decision to rest on better grounds by taking into consideration the interpretation that other judges have rendered in similar cases’ (Mac-Gregor, 2017: 97). Through flexibility, judicial dialogue is a way for international courts to learn from each other and support each other. Indeed, from a strategic point of view, judicial dialogue could potentially increase the legitimacy of a court and its judgments. This could be helpful to courts and judges for different reasons. In situations of particularly difficult case that could create tensions in the political and/or social dimension, to cite a foreign judicial decision could add authority to the court, by showing that also others have come to a similar conclusion in similar cases (Qoraboyev, 2022: 64). This is particularly true for international courts, such as the ECtHR and the CJEU, which constantly need to reaffirm their legitimacy. Judicial dialogue is fundamental in our globalized world, it interconnects international courts, and potentially allows individuals to take advantage of the development and progress of the protection of human rights system at the international level. This practice is even more necessary in the area of human rights protection, as fundamental rights are protected at different levels (national and international) and by distinct legal systems (different international courts, such as the CJEU and the ECtHR). It is necessary to have a common denominator in order to minimize fragmentation and enhance coordination. Indeed, judicial dialogue help ‘to ensure coherent implementation of international human rights norms across different jurisdictions’ (Qoraboyev, 2022: 63).

Some scholars have expressed some concerns around this practice. There is a worry that the flexibility of this practice could create incentives to instrumentalise and manipulate the law (Mac-Gregor, 2017: 98). As Mac-Gregor points out, the misuse of law could occur at many levels, and not just with the use of law coming from different jurisdictions. Additionally, if there is a bad use of law, it indicates that there is a deeper issue - a flawed judiciary - which would result in bad judgments being made. However, the misuse of law does not depend on judicial dialogue. Another objection to judicial dialogue ‘claims that courts, as political actors, act strategically’, therefore, dialogue as way to reach a common understanding cannot develop between supranational courts (Torres, 2009: 130). Torres does not deny that courts can act as political actors trying to promote their own agendas and interests (2009: 131). Indeed, through their judgements, judges might try to promote their policy preferences and interests, such as promoting “judicial power”, “independence, influence, and authority” vis-à-vis other courts (Torres, 2009: 131); this could be the case between the CJEU and ECtHR. However, by adopting a different perspective, it is possible to identify other judicial interests (Torres, 2009: 132). Torres presents us with the example from Kornhauser, which perceives the judicial system as a team,

in which all members share a common goal: “to maximize the expected number of correct answers” (Torres, 2009: 132). Under this perspective, courts do not perceive themselves as competitors and consequently do not feel the need to act strategically; instead, they perceive each other as team players and are therefore incentivized to collaborate and coordinate towards their common goal. Thus, the CJEU and ECtHR could be seen as players on the same team pursuing the goal of ensuring human rights protection.

As mentioned in the previous chapters, the CJEU and ECtHR, due to their natural interconnectedness of their respective system of protection of fundamental rights, have developed a special relationship, described as a “gradual rapprochement” (Frese and Olsen, 2019: 420). This interaction took shape through a particular practice of judicial dialogue: cross-citations and cross-references. Before the Charter was introduced in the EU legal system, Convention rights constituted general principles of EU law. Inevitably, the Convention and the ECtHR influenced the CJEU and served as a source of inspiration for the latter, with the ECtHR being recognized as an experienced court in the protection of human rights. In 2002, the CJEU affirmed that it “applies the Convention as if its provisions formed an integral part of Community law” and in 2006 stated that it applies “ECHR standards diligently and conscientiously” (Spielmann, 2017: 6). From the numerous citations of the Convention rights and ECtHR case law, it is demonstrated that the CJEU routinely relied on the ECtHR’s jurisprudence and its interpretation and application of rights. The former often built its standard of protection directly from the ECtHR case law and used its jurisprudence to strengthen its arguments. In some cases, the CJEU went so far as to amend its own case law in response to judgments adopted by the ECtHR (Glas and Krommendijk, 2017: 569). Therefore, the Luxembourg court not only referenced to the Strasbourg Court but also followed its reasoning (Glas and Krommendijk, 2017: 569). As stated in the third chapter, after the Charter of Fundamental Rights was introduced in the European system, it was possible to identify a tendency towards Charter-centrism. Logically, the CJEU preferred to rely on its own legal instrument to resolve cases on matter of fundamental rights. Nonetheless, the jurisprudence of the ECtHR, as well as Convention rights, remain useful references to the CJEU. Indeed, cross citation and cross references are still present in difficult cases or when the CJEU has to interpret for the first time a fundamental right.

However, this interaction is not one sided; both courts mutually influence each other. In the case of the ECtHR, citations and references to the CJEU are unsurprisingly not as frequent. This is because the ECtHR is already a well-established human rights court, while the CJEU as other functions apart from dealing with human rights cases. The CJEU’s jurisprudence is strongly interconnected with the specificities of EU law, which are applicable within the particular context of the EU legal system.

The ECtHR relies on the CJEU case law to demonstrate that there is a consensus at the European level, ‘which could justify either a reversal of case law or an evolutionary interpretation of a right guaranteed by the Convention’ (Spielmann, 2017: 7). On the other hand, when the Charter entered in the EU legal system, the ECtHR started to refer more frequently to the CJEU case law (Spielmann, 2017: 11). For the former, ‘referring to EU law offered a basis to show contemporary consensus and modernise the interpretation of the Convention’, as the Convention is an instrument to be interpreted in accordance with present conditions (Spielmann, 2017: 11). Additionally, it’s important to consider that the Charter is a relatively new legal text; the Convention entered into force in 1953, while the Charter was drafted in 2000. Hence, it might bring new insights to the ECtHR. Indeed, the Charter could be of inspiration to the ECHR, as in some provision the former offer a higher level of protection than the ECHR (Glas and Krommendijk, 2017: 577). On the other hand, as mentioned in the third chapter, the ECtHR, through its jurisprudence and specialization in protection of human rights, is able to exert pressure on the CJEU when the latter tends to prioritize the autonomy, primacy and effectiveness of the EU legal order over fundamental rights, especially when dealing with cases that involve the principle of mutual trust.

This interaction between courts can, in some circumstances, work as a system of checks and balances, especially the ECtHR acting as a counterbalance to the CJEU. In other words, it’s reasonable to say that the Strasbourg court helps the Luxembourg court to strike a balance between fundamental rights and the primacy, effectiveness and autonomy of EU law.

In addition to cross reference and cross citations, the judges of both courts can interact at bilateral meetings organized alternately in Luxembourg and Strasbourg once or twice a year (Glas and Krommendijk, 2017: 570). These informal meetings are for discussing common issues, exchange of perspectives, and find possible common solutions. Other interactions include invitations to give speeches and conferences of joint interests (Glas and Krommendijk, 2017: 570).

Through these forms of interactions, facilitated by their jurisprudence and dialogue between their judges, the two distinct but interconnected legal systems enhance cooperation and coordination. This mutual support contributes to the improvement of both courts as judicial bodies. Still, this profitable interaction could end at any time, since it is not based on a duty to cooperate but merely on comity (Lock, 2009: 281). After the harsh Opinion 2/13, there was a general concern that this interaction could suffer a backlash. Fortunately, the two courts took the measures necessary to avoid an open conflict. Currently, they continue to rely on each other, and present a united front in the face of the rule of law crisis in Europe. It’s unlikely that these courts would interrupt interactions, as it brings many benefits to both systems. Still, to ensure a constant open channel of communication between

the two legal system and to bring the approaches of the two courts on the protection of human right closer together, it might be useful to find a way to institutionalise judicial dialogue. Institutionalization would ensure that the two courts continue to listen, defer, show respect, and prevent conflicts. An institutionalised framework for judicial dialogue could serve as a forum where judges meet, discuss, and dialogue about similar issues, exploring potential common solutions and sharing insights and best practices to enhance their respective jurisprudence on matter of fundamental rights. ‘By coming together, they might come up with new possibilities and solutions. The exchange of arguments expressing distinct views furthers innovation’ (Torres, 2009: 114). As already mentioned above, judges already convene at bilateral meetings, so it would be about making this practice mandatory for both systems, requiring judges from both courts to meet at least once a year. This framework could also serve as an established forum for events, conferences, and seminars, involving not only judges but also researchers and academics in relevant fields of human rights protection. It could organise joint research initiatives focusing on comparative studies and best practices in the protection of human rights, as well as workshops where judges analyse and discuss landmark cases from each other’s jurisdiction. Establishing a framework would also help to protect the main objective of such dialogue, which is to enhance and promote the protection of human rights and prevent it from becoming a platform solely for debating which system is superior or engaging in a power play between the two judicial bodies (Karska and Karski, 2019: 394). The advantage of judicial dialogue is that it is not an imposition of one judicial system on another but a space for understanding how the two distinct legal systems functions. It would bring closer the two different legal system of protection and gradually make the two courts incorporate each other approaches to certain common problems. This approach mitigates the CJEU’s need to be overprotective about autonomy, primacy and effectiveness of EU law. Moreover, judicial dialogue fosters an environment of trust between the two courts. This cultivated trust could lead to a future convergence where accession becomes a natural progression. In addition, this institutionalised cooperation would enhance coordination between the two system which would minimise the fragmentation in the system of protection. It would be possible to manage and solve potential conflicts between the two systems, as this framework could also serve as a forum where potential conflicts can be brought, discussed and ideally resolved. By providing a structured environment for dialogue, the framework would allow judges from both courts to address and mediate disputes or differing interpretations of law before they escalate. Dialogue is actually driven by the potential for conflict, but disagreement isn’t necessarily negative or an obstacle (Torres, 2009: 111). On the contrary, it can be productive in the sense of a ‘creative force, showing gaps, moving discussion and results in good direction’ (Torres, 2009: 111). Indeed, the objective is not to eliminate conflict but to learn how to manage it creatively, to learn to compromise and accommodate,

and to reach interpretative outcomes (Torres, 2009: 111). This practice challenge judges to adopt new perspectives, different practices and reasoning, making it easier for both the CJEU and the ECtHR to take them into consideration in their reasoning and judgments. Institutionalising judicial dialogue would also be beneficial for transparency and accountability. Meetings among judges as well as seminars and conferences, could be documented and published. By making these records accessible to the public, it would be possible to understand how decisions are made, the reasoning behind them and how the two judicial functions together. This would enhance legitimacy of the two systems and bring them closer to the citizen. Transparency would logically enhance accountability. By making the discussions and interactions between the two courts more visible, it would be easier for academics, the public and institutions to scrutinize and evaluate effectiveness and fairness of the judicial process. In addition, requiring judges to explain their reasoning and judgements would make them pay particular attention to their justification, ‘which might dilute self-interested claims and advance impartiality’ (Torres, 2009: 114).

Moreover, within a pluralist framework, such as that of human rights protection, judicial dialogue could benefit the building of a common identity (Torres, 2009: 111). This applies not only within the community of the European Union, but also on a larger scale that includes also all the Contracting Parties to the ECHR. It would create a common understanding of human rights interpretation.

All in all, the institutionalisation of judicial dialogue between the CJEU and ECtHR would enhance the process of convergence of the two systems, fostering trust and collaboration. The differences among the two systems would no longer represent insurmountable obstacles in the process of accession and potential conflicts would have a space for being solved. Consequently accession, would be the natural next step in the relationship between the CJEU and ECtHR.

## **VI. Conclusions**

Through this analysis we have seen how the relationship between the Court of Justice of the European Union and the European Court of Human Rights has evolved over time and how it was impacted by the harsh Opinion 2/13 of the CJEU. To avoid entering a path of no return, the two courts did everything to avoid conflict. However, they did not find a solution for accession, which, according to article 6 of the TUE, is mandatory. Negotiations were resumed in 2020, but due to the new challenges that the EU had to face -the pandemic, the rule of law crisis and Russia’s invasion of Ukraine - accession lost priority on the European agenda.

However, given the strong and defensive approach of the CJEU in its Opinion, it was reasonable to question whether accession would still be a desirable option for the protection of human rights within

the two different legal systems. It was possible to demonstrate that if negotiations were to be resumed with the objective of accommodating the CJEU requests, the result would be less desirable and more costly in terms of protection of human rights. Through an analysis of the nature and the specificity of the EU legal system, it was easier to understand (though not to justify or accept) the approach and the perspective of the CJEU on accession. Mutual trust and autonomy are its most important principles yet potentially fragile. This does not imply that these principles can obstruct potential beneficial changes in the European system of human rights protection; a balance must be found. Still, this won't happen any time soon. It's a hard and slow process, and it doesn't seem that the CJEU is willing to change its approach towards accession. Accession requires partnership, but this kind of collaboration cannot be forced; otherwise, the relationship between the two courts could turn into a power struggle. A way forward must be found, as the quality of protection of human rights is at stake and accession is mandatory, so it must happen in the future. In the final chapter, it is suggested that the next step forward might be found in judicial dialogue. The two courts have already been practicing different forms of judicial dialogue over the years, which has brought benefits to both systems. Therefore, it is suggested to institutionalise judicial dialogue in order to create a framework for the courts and their judges to organise meetings, conferences, seminars, and a space to solve potential conflicts. The key would be to render mandatory judicial meetings at least once a year, in order to ensure a constant open channel of communication. This would ensure that the two courts continue to listen, influence and improve each other through dialogue. This framework would serve the purpose of bringing the two courts closer, bridging their differences, and proceeding towards a gradual process of convergence. In this way, in the future, negotiation of accession would be easier to resolve and reach an agreement. Accession would represent the next step in this evolving relationship between the CJEU and ECtHR. In the process, it will always be fundamental to keep in mind the objective of this relationship, which is to enhance the protection of human rights.

Finally, on a global scale, this project of collaboration and partnership could be an example for other international courts, providing a way to minimise fragmentation in the international system and create a common denominator for the protection of human rights.

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