European Union Law Working Papers

No. 24

Bridging the Gaps in Human Rights Protections: The Potential Impact of the European Union’s Accession to the European Convention on Human Rights

Grace Zhou

2017
European Union Law Working Papers

edited by Siegfried Fina and Roland Vogl

About the European Union Law Working Papers

The European Union Law Working Paper Series presents research on the law and policy of the European Union. The objective of the European Union Law Working Paper Series is to share “work in progress”. The authors of the papers are solely responsible for the content of their contributions and may use the citation standards of their home country. The working papers can be found at http://ttlf.stanford.edu.

The European Union Law Working Paper Series is a joint initiative of Stanford Law School and the University of Vienna School of Law’s LLM Program in European and International Business Law.

If you should have any questions regarding the European Union Law Working Paper Series, please contact Professor Dr. Siegfried Fina, Jean Monnet Professor of European Union Law, or Dr. Roland Vogl, Executive Director of the Stanford Program in Law, Science and Technology, at the

Stanford-Vienna Transatlantic Technology Law Forum
http://ttlf.stanford.edu

Stanford Law School
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610

University of Vienna School of Law
Department of Business Law
Schottenbastei 10-16
1010 Vienna, Austria
About the Author

Grace Zhou graduated with a JD from Stanford Law School in 2017 and a BA in Public Policy from Duke University in 2013. Grace has an interest in international and comparative law, particularly in studying institutions and democracy-building. At Stanford Law School, Grace served on the Editorial Board of the *Stanford Law Review* and as a Co-President of the International Law Society. She is currently clerking for Judge Sandra Lynch on the United States Court of Appeals for the First Circuit.

General Note about the Content

The opinions expressed in this student paper are those of the author and not necessarily those of the Transatlantic Technology Law Forum or any of its partner institutions, or the sponsors of this research project.

Suggested Citation

This European Union Law Working Paper should be cited as:

Copyright

© 2017 Grace Zhou
Abstract

Advocates of the European Union’s accession to the European Convention on Human Rights (ECHR) have argued that accession would eliminate the gaps in human rights protections in Europe. Nevertheless, the European Court of Justice (ECJ) recently ruled in Opinion 2/13 that the Draft Accession Agreement (DAA) is incompatible with EU law. Notwithstanding the current impasse, this paper evaluates the practical impact accession would have on the EU’s human rights regime. In particular, it examines the benefits and drawbacks of binding the EU as a supranational entity. I argue that accession will not render the European Court of Human Rights (ECtHR) the “Supreme Court” of the EU. Rather, it would inspire greater judicial dialogue between the ECtHR and the ECJ by (1) harmonizing human rights obligations across all EU secondary legislation and institutions, and (2) establishing an official mechanism for dialogue between the two courts.
Table of Contents

Introduction .................................................................................................................................................. 1

I. Conceptualizing the EU Human Rights Framework .................................................................................. 2
   A. Codified Rights .................................................................................................................................. 2
      1. National Courts Versus ECJ Jurisdiction ......................................................................................... 4
      2. ECJ Versus ECtHR Jurisdiction ...................................................................................................... 5
   B. “Common Law” Rights ..................................................................................................................... 6

II. Gaps in EU Human Rights Protections ................................................................................................... 9
   A. The ECJ Treats Human Rights as Public Policy Derogations ............................................................. 9
   B. The ECJ “Lags” Behind the ECtHR .................................................................................................. 11
   C. The ECJ Construes Rights More Narrowly Than the ECtHR ............................................................ 14

III. Making the Case for Accession ........................................................................................................... 19
    A. Will the ECtHR Become the EU’s Supreme Court? ......................................................................... 20
       1. Drawbacks to Accession ............................................................................................................... 20
       2. Procedural Protections .................................................................................................................. 21
       3. Doctrine of Equivalence .............................................................................................................. 22
    B. Harmonization and Advancement of Human Rights Protections .................................................... 24
       1. ECtHR Review of EU Institutions, Judgments, and Secondary Law .............................................. 25
       2. Impact on ECJ Judgments ............................................................................................................ 27
    C. Greater Judicial Dialogue Between ECJ and ECtHR .................................................................... 29
       1. Procedural Pathways ...................................................................................................................... 29
       2. Checks and Balances .................................................................................................................... 30
Introduction

On February 27, 2016, Croatia, Serbia, Macedonia, and Slovenia each announced a cap on the number of refugees it would accept from Syria, allowing only 580 persons to enter every day. Austria also announced a daily limit of 3,200 persons and 80 asylum claims.¹ These restrictions, in turn, placed a huge burden on Greece. Over 25,000 refugees flooding into the country. Five-thousand asylum seekers were crammed into the Idomeni Camp alone, where the conditions were reportedly “not fit for animals.”²

The European Union’s (EU) ongoing refugee crisis is the most salient example of how, despite the multiple sources of human rights protections in the EU—from national constitutions to the Universal Declaration of Human Rights (UDHR)—violations still persist. Given that the two highest human rights courts in Europe—the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ)—have adopted conflicting approaches to this crisis,³ refugees slip, literally, between the interstices of the two courts’ jurisdiction.

Advocates of the European Union’s accession to the European Convention on Human Rights (ECHR) have argued that accession would eliminate such gaps in human rights protections. Nevertheless, the ECJ recently ruled in Opinion 2/13 that the Draft Accession Agreement (DAA) is incompatible with EU law.


Notwithstanding the current impasse, this paper evaluates the practical impact accession would have on the EU’s human rights regime. In particular, it examines the benefits and drawbacks of binding the EU as a supranational entity. I argue that accession will not render the ECtHR the “Supreme Court” of the EU. Rather, it would inspire greater judicial dialogue between the ECtHR and the ECJ by (1) harmonizing human rights obligations across all EU secondary legislation and institutions, and (2) establishing an official mechanism for dialogue between the two courts.

This paper proceeds in three parts. Part I sets forth the existing human rights framework in the EU. Part II then explores why this framework is inadequate. Finally, Part III assesses what value accession would add, honing in on how accession would remedy current gaps in EU human rights protections.

I. Conceptualizing the EU Human Rights Framework

A. Codified Rights

There are multiple, often overlapping, layers of human rights protections in the European Union. At the base are each Member States’ national constitutions, which enshrine rights such as freedom of religion and assembly.⁴ EU institutions and Member States are also bound by the Charter of Fundamental Rights (CFR).⁵ Every Member State, in its national capacity, is a signatory of the European Convention on Human Rights (ECHR), which is enforced by the European Court

---

⁴ See, e.g., GRUNDGESETZ [GG] [GERMAN CONSTITUTION], arts. 6, 8, http://www.gesetze-im-internet.de/englisch_gg/index.html.

Finally, all Member States have an obligation under international law to uphold the International Covenant on Political and Civil Rights (ICCPR), the binding protocol of the Universal Declaration of Human Rights (UDHR).  

---


human rights issues. Rather, the three court systems have voluntarily circumscribed their own jurisdiction.

1. National Courts Versus ECJ Jurisdiction

The ECJ only hears cases that implicate EU law and leaves the rest to be adjudicated by Member States’ national courts. Thus, the ECJ only has jurisdiction in three limited scenarios: (1) when a EU institution or Member State is implementing EU law; (2) when a national rule is derogating from EU law; or (3) when a specific substantive EU law is applicable to the case at hand. In cases involving national legislation, the ECJ has imposed additional safeguards to respect the sovereignty of national courts. For instance, the ECJ held in Cruciano Siragusa v. Regione that it did not have jurisdiction to adjudicate whether Italy’s landscape conservation decree was compatible with Article 17 of the CFR (right to property) and with the general principle of proportionality because “the objectives pursued by the EU legislation are not the same as those pursued by [the decree],” and the decree did not directly “implement provisions of EU law.”

Similarly, there is precedent among national courts to defer to the ECJ’s rulings, known as the Solange Principle. In Solange II, the German Constitutional Court (BVerfG) held that it would no longer review EU law “[s]o long as . . . the case law of the European Court, generally ensures an effective protection of fundamental rights” and is “similar to the protection of fundamental

---

8 STEINER & WOODS, EU LAW 131 (11th ed. 2012).
9 See Case C-206/13, Cruciano Siragusa v. Regione, Judgment of 6 Mar. 2014, para 25 (prescribing four additional factors for consideration: (1) whether the national legislation concerned is intended to fulfill an EU law obligation; (2) whether its objectives contain non-EU law objectives; (3) whether the national legislation concerned would be able to indirectly affect EU law; and (4) whether there are EU rules/laws that directly/indirectly affect the case at hand).
10 Id. at paras 16, 28, 30.
rights required unconditionally by the [German] Constitution.”\textsuperscript{11} Thus, Member States have entered into a “coordinate constitutionalism” with the EU in which they agree to defer to the decisions of the ECJ, “even if another decision would have been more consistent with the national constitution tradition.”\textsuperscript{12}

2. ECJ Versus ECtHR Jurisdiction

The European Court of Human Rights has also taken a very conciliatory position toward the EU. In \textit{Bosphorus Airways}, the ECtHR established a presumption that Member States do not depart from the Convention when implementing legal obligations flowing from their membership in the EU.\textsuperscript{13} This principle, known as the “doctrine of equivalence,” is rebuttable only if the applicant can show that the EU’s protections in the area at issue were “manifestly deficient”—an extremely high bar.\textsuperscript{14} The ECtHR further extended this principle of comity in \textit{Matthews v. United Kingdom}. There, the Court held that as long as the EU was not a party to the Convention, the ECtHR could not entertain challenges to EU secondary law.\textsuperscript{15}

The ECJ, however, has issued a series of rulings asserting its jurisdiction against the ECtHR. For instance, in \textit{Commission v. Ireland} (the Mox Plant Case), the ECJ ruled that Member States may not sue each other in other international tribunals (including the ECtHR) if the claim


\textsuperscript{13} \textit{Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi [Bosphorus Airways] v. Ireland}, 2005-VI Eur. Ct. H.R. 107. The doctrine of equivalence is subject to two narrow exceptions. First, it does not apply if the case has not passed through the ECJ. \textit{See} ECtHR, Michaud v. France, 2012-VI Eur. Ct. H.R. 89. Second, the doctrine does not apply when the Member State can exercise discretion in implementation. \textit{See} M.S.S. v. Belgium and Greece, supra note 3.

\textsuperscript{14} Hilmy, \textit{supra} note 5, at 204.

fell within the EU’s competences.\textsuperscript{16} The \textit{Mox Plant Case} involved a dispute between Ireland and the United Kingdom over a nuclear plant located on the coast of the Irish Sea. Ireland accused the UK of being negligent by failing to conduct an impact assessment and brought a claim to the International Tribunal for the Law of the Sea (ITLOS), which was established by the United Nations Convention on the Law of the Sea (UNCLOS). Because some areas addressed by UNCLOS also fell within the scope of EU law, the ECJ held that Ireland could not bring suit in ITLOS. To justify its decision, the ECJ invoked Article 10 of the Treaty Establishing the European Community (TEC),\textsuperscript{17} which imposes a duty of cooperation among Member States.

\textbf{B. “Common Law” Rights}

Written instruments are not the only source of human rights protections in the EU—the ECJ has also engaged in an incremental process of creating “common law” human rights protections. The ECJ first recognized the existence of “fundamental rights” in \textit{Stauder v. City of Ulm}.\textsuperscript{18} In that case, the petitioner challenged a German law which required recipients of EU welfare benefits to disclose their name and address. The ECJ struck down the law because it violated the “fundamental right” of “equality of treatment.”

Subsequently, the Court established a precedent for looking to Member States’ constitutions and traditions to “discover” general principles of EU law. For instance, when Germany alleged that an EU regulation contravened the German constitutional principle of proportionality, the ECJ artfully affirmed the supremacy of EU law while establishing

\textsuperscript{16} Case C-459-03, Commission v. Ireland (Mox Plant case), 2006 E.C.R. I-4635.
\textsuperscript{17} Now known as the Treaty on the Functioning of the European Union (TFEU).
\textsuperscript{18} Case 29/69, Stauder v. City of Ulm, 1969 E.C.R. 419.
proportionality as general principle.\textsuperscript{19} In \textit{Wachauf v. Germany}, the ECJ held that fundamental rights have the same status as other primary sources of EU law, and declared that Member States must respect fundamental rights when implementing Union regulations.\textsuperscript{20}

Even after the Charter of Fundamental Rights was drafted in 2000 to incorporate these general principles, and the Treaty of Lisbon gave them legal effect in 2009,\textsuperscript{21} the ECJ’s fundamental rights jurisprudence continued to evolve, resulting in a body of law that is reflective and responsive to its Member States’ values. Although the ECJ is not empowered to create law, it has nevertheless continued to be very creative in “discovering” fundamental rights. In \textit{Australian Mining & Smelting Europe Ltd. v. Commission}, for instance, the ECJ established attorney-client privilege as a new fundamental right. To justify its decision, the Court reasoned that attorney-client privilege is a “general principle” of law common to all Member States.\textsuperscript{22}

This process of “discovering” unwritten principles of EU law by comparative legal analysis, however, is not without limits. In a follow-up attorney-client privilege case, \textit{Akzo Nobel Chemicals and Akcros Chemicals v. Commission}, the ECJ declined to extend the right to communications with in-house counsel because there was no clear consensus among Member States on the matter.\textsuperscript{23} In so ruling, the Court solidified its comparative methodology: fundamental rights are those that exist across \textit{all} Member States.\textsuperscript{24}


\textsuperscript{21} \textit{See} KAREN DAVIES, UNDERSTANDING EUROPEAN LAW 66 (5th ed. 2013).


\textsuperscript{23} Case C-550/07 P, Akzo Nobel Chemicals Ltd. & Akcros Chemicals Ltd. v. Commission, 2010 E.C.R. I-8367, para 8 (holding that during a raid for anticompetitive behavior, the UK authorities and Commission were permitted to seize the general manager’s handwritten meeting notes and emails to the coordinator of competition).

\textsuperscript{24} \textit{See} Wolfgang Weib, \textit{The EU Human Rights Regime Post Lisbon: Turning the CJEU into a Human Rights Court?}, in FUNDAMENTAL RIGHTS IN THE EU 70, 81 (Sonia Morano-Foadi & Lucy Vickers eds., 2015). The ECJ’s
Employing this “common law” approach, the ECJ has broadened human rights protections in some areas beyond what is codified in the CFR. In *Hoechst v. Commission*, for instance, the Court fashioned a new right when confronted with an issue of first impression: whether corporations enjoy the right to privacy on their business premises. In *Hoechst*, two publicly-held companies claimed that European Commission officers violated Article 8 of the ECHR, the right to respect for private and family life, when the officers raided their offices.\(^{25}\) Although the ECJ ruled against the Commission, the Court did not invoke Article 8 because not all Member States had extended the right to public spaces. Instead, the ECJ articulated a new right to “protection against arbitrary or disproportionate intervention on the public by public authorities.”\(^{26}\)

Even when the ECJ does not discover a new fundamental right, it often extends the bounds of a previously recognized right. In *Mangold v. Helm*, for instance, the applicants challenged a German law which permitted employers to terminate fixed-term contracts of workers greater than 52 years of age without justification.\(^{27}\) The ECJ struck down this policy, clarifying that Article 21 of the CFR, which embodies the principle of nondiscrimination, also prohibits discrimination on the basis of age.\(^{28}\)


\(^{26}\) See DAVIES, supra note 21, at 63, 131.

\(^{27}\) Case C-144/04, Mangold v. Helm, 2005 E.C.R. I-9981 .

\(^{28}\) Id. at para 6.
II. Gaps in EU Human Rights Protections

Because fundamental rights in the EU are treated as public policy reasons to derogate from EU treaty freedoms, not as a positive obligation to uphold human rights, the European Court of Justice (ECJ) often construes human rights protections “narrower” than the full scope of rights codified in the European Convention on Human Rights (ECHR), and by extension, the Charter of Fundamental Rights (CFR). This has led the ECJ human rights jurisprudence to “lag” behind that of the European Court of Human Rights (ECtHR) in some areas, such as LGBTQ rights. In other areas, such as refugee rights, the two courts directly clash, even though the Charter and the Convention are supposed to be given identical effect. As a result, human rights enforcement in the EU is often riddled and patchy, despite the multiple layers of protections that exist.

A. The ECJ Treats Human Rights as Public Policy Derogations

The ECJ has long espoused a “balancing” approach to human rights protections. For instance, in Schmidberger v. Austria, the Court weighed the freedom of expression and assembly against the free movement of goods. In that case, a German transport company sued Austria for damages under article 28 of the Treaty on the Functioning of the European Union (TFEU)—protecting the free movement of goods—because Austria sanctioned a political demonstration that blocked the Brenner motorway connecting northern Europe and Italy for over 30 hours. Austria, in turn, defended its decision to allow the protest by invoking articles 10 and 11 of the ECHR, which protect the freedom of expression and assembly. Faced with the direct clash of fundamental rights and EU treaty freedoms, the ECJ did not rule that human rights were paramount. Instead, it held that Austria was entitled to a “wide margin of discretion” in sanctioning the protest, and that it was “reasonably entitled” to do so because measures less-restrictive of intra-Community trade
Advocate General Jacobs argued that “where a Member State invokes the necessity to protect a given fundamental right, the normal proportionality test should be applied.”

The ECJ reaffirmed this balancing approach of fundamental rights and economic freedoms in *International Transport Workers’ Federation and Finnish Seaman’s Union v. Viking.* There, a shipping company decided to reflag one of its vessels to Estonia after learning that Estonian vessels paid considerably lower wages to their Estonian crew. Thereafter, the Finnish Seaman’s Union, who had signed a collective bargaining agreement with Viking, responded by encouraging all transport workers’ unions to boycott Viking. Viking sued the union on the basis that the strike violated its right to freedom of establishment in the EU. The Grand Chamber of the ECJ ruled that the right to take collective action, including the right to strike, was a fundamental right, and thus, “a legitimate interest, which in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty.” However, the Court refused to render a decision on the issue. Instead, the ECJ instructed the referring domestic court to decide the case by balancing the “free market objectives and ‘policy in the social sphere.’”

In at least one circumstance, the ECJ decided that circumscribing the application of fundamental rights was necessary. The Court ruled in *Melloni v. Ministerio Fiscal* that Spain’s

---

29 Case C-112/00, Schmidberger v. Austria, 2003 E.C.R. I-5694, para 82; see also Sabel & Gerstenberg, supra note 12, at 515-16.


32 Id. at para 45.

33 Sabel & Gerstenberg, supra note 12, at 533. As a result, many academics have criticized the decision, arguing that “the very fact that the [C]ourt insists on balancing between the social and the economic within the framework of proportionality means that the decision has put the ‘social’ on the back foot.” Id.
right to a fair trial did not apply to the defendant, Mr. Melloni, because it was broader than the CFR’s. In that case, Mr. Melloni, who was sentenced in abstentia in Italy, challenged the execution of his arrest warrant in Spain, because the Spanish Constitution guaranteed the right to challenge a conviction in abstentia.\(^{34}\) The ECJ, however, rejected his challenge because “the application of a more generous right to a fair trial . . . would undermine the primacy and effectiveness of EU law and therefore could not be allowed.”\(^{35}\) Thus, the ECJ’s interpretation serves as a “ceiling” for fair trial rights in the EU even though some of its Member States, such as Spain, offer greater protections.

**B. The ECJ “Lags” Behind the ECtHR**

Moreover, because of the ECJ’s purpose—to harmonize the interpretation and application of EU law across Member States—the Court arguably “lags” behind the ECtHR in ruling on controversial human rights issues.\(^{36}\)

For instance, the ECJ has adopted a “wait-and-see” approach when addressing gender and sexual-orientation based discrimination. The ECJ’s first foray into that area, *P. v. S. and Cornwall County Council*,\(^{37}\) which held that the “dismissal of a transsexual for a reason related to a gender reassignment” constituted sex discrimination, followed tentatively from the ECtHR’s ruling in *B. v. France*, which held that the refusal to allow a transgender individual to legally change her

---


gender from male to female violated the right to private life under article 8 of the ECHR.\(^{38}\) In fact, the Advocate General explicitly cited \textit{B. v. France} to encourage the ECJ to make a “courageous decision.”\(^{39}\) Similarly, in holding that a transsexual individual had the right to his different-sex partner’s pension benefits,\(^{40}\) the ECJ relied on the ECtHR’s ruling that transsexual individuals have a right to different-sex marriage.\(^{41}\)

When the ECtHR has not made a ruling on an issue, however, the ECJ has been hesitant to strike out on its own. The ECJ did not invalidate the differential treatment of same-sex partners in \textit{Lisa Grant v. South-West Trains Ltd.}\(^{42}\) or \textit{D. and Sweden v. Council},\(^{43}\) because at the time, the ECtHR had only spoken on discrimination against lesbian or gay individuals, not on the rights of same-sex couples.\(^{44}\) And when the ECJ finally did address the unequal treatment of same-sex couples in \textit{Maruko}, it purposefully crafted a very narrow holding: registered partners are entitled to the same survivor’s pensions as a spouses only in Member States that already have a law affording same-sex couples “comparable” survivor’s benefits. Member States that do not have such a law, however, are under no obligation to provide equal benefits.\(^{45}\)


\(^{41}\) \textit{See} Christine Goodwin v. The United Kingdom, 2002-VI Eur. Ct. H.R. 1 (upholding the right to legal recognition of under change under ECHR Article 8, and the right to different-sex marriage under article 12).

\(^{42}\) Case C-249/96, 1998 E.C.R. I-621 (holding that refusing employment benefits—rail passes—to same sex couples that were offered to unmarried, opposite-sex couples did not violate article 57’s prohibition against sex-discrimination).

\(^{43}\) Joined Cases C-122/9 P & C-125/99 P, 2001 E.C.R. I-4319 (holding that registered same-sex couple was not entitled to same household allowance as married different sex couples).

\(^{44}\) \textit{See} Wintemute, \textit{supra} note 36, at 183 (citing Case C-267/06, Maruko v. Versorgungsanstalt der deutschen Bühnen, 2008 E.C.R. I-1757).

\(^{45}\) \textit{See id.}
Two procedural mechanisms may explain why the ECJ is less able to situate itself at the forefront of human rights. First, it is much easier for individuals to gain access to the ECtHR because the Court only requires the exhaustion of domestic remedies before filing suit. On the other hand, the “strict standing requirements of article 263(4) [of the] TFEU preclude most cases brought by individuals” before the ECJ, and instead, require cases to be referred by a national court.46 Second, third-party NGOs or human rights experts cannot petition the ECJ to intervene in support of an applicant; rather, the ECJ requires the referring national court to grant such leave.47 As a result, even individuals who do manage to gain standing “are often on their own, apart from the lawyers they can afford to pay, or who are willing and able to handle the case for free.”48 ECtHR has taken the opposite approach by not only permitting third-party interventions, but also allowing supporting materials to be submitted in English or French. This, in turn, facilitates human rights advocacy by empowering organizations and lawyers to work on cases, even if they are not familiar with the language of the underlying case.

Thus, due to the substantive and procedural constraints faced by the ECJ, the Court’s human rights jurisprudence often lags behind that of its counterpart, the ECtHR.

46 Id. at 195.
47 National courts often deny such petitions to intervene. See id. at 196 n.71 (noting that Germany denied the International Lesbian, Gay Bisexual, Trans and Intersex Association (ILGA) from intervening in the Maruko case in support of the applicant).
48 Id. at 195.
C. The ECJ Construes Rights More Narrowly Than the ECtHR

Finally, even though article 52(3) of the CFR requires that the meaning and the scope of the Charter correspond to that of the ECHR, the ECJ sometimes embarks on “an autonomous approach in the interpretation of EU human rights,” resulting in direct clashes with the ECtHR.49

This shift in the ECJ’s interpretive methods was first reflected in Samba Diouf.50 There, the ECJ addressed the issue of whether effective judicial protection of asylum procedures required that preparatory procedural decisions be subject to judicial control separate from the final decision.51 Instead of looking to cases interpreting article 6 of the ECHR,52 the ECJ only referenced article 47 of the CFR, which also prescribes the right to a fair trial and effective remedy. The ECJ declared that once a fundamental right is “recognized by the EU, that fundamental right goes on acquire a content of its own.”53

The Court went even further in Akerberg Fransson.54 There, a Swedish fisherman allegedly committed fraud related to the value-added tax (VAT). Because VAT rules are harmonized across the EU, the Swedish government initiated both administrative and criminal penalties against the defendant. Thereafter, defendant challenged the government’s prosecution on double-jeopardy grounds. Even though ECtHR case law squarely supported the defendant’s claim under Protocol No. 7 of the ECHR, the ECJ ruled that Article 50 of the Charter did not preclude the successive imposition of administrative and criminal penalties for the same act so long as both were not

49 Weib, supra note 24, at 87.
51 Id.
52 See ECHR art. 6 (prescribing the elements of a right to a fair trial).
54 Case C-617/10, Aklargaren v. Akerberg Fransson, 2013 O.J. (C 114) 7-8.
criminal in nature. The Court disregarded the ECtHR’s holding because “the existence of national reservations of the Member States regarding article 4 of Protocol No. 7” demonstrated that the “right was not fully incorporated into national law.”\textsuperscript{55} Thus, the case seemed to signal that where its own case law exists, the ECJ weighs ECHR standards less.\textsuperscript{56}

Clashes between ECJ and ECtHR rulings often result in lesser protections for those subject to the ECJ’s jurisdiction. For instance, the ECtHR and ECJ have issued opposite rulings on asylum protections for refugees, with the ECtHR holding countries to a higher standard.

In \textit{M.S.S. v. Belgium and Greece}, the ECtHR found that both Belgium and Greece violated article 3 of the ECHR, which prohibits torture.\textsuperscript{57} The case involved an Afghan national who fled to Greece and subsequently traveled to Belgium, where he applied for asylum. Under Dublin II’s First State of Arrival Rule, Belgium transferred the applicant back to Greece, against his wishes, so that his asylum claim could be processed there. At the time, NGO reports showed that Greek detention centers were burdened by severe overcrowding, poor sanitation, and rampant physical violence by guards.\textsuperscript{58} The ECtHR thus found Greece in violation of its article 3 obligations due to the inhumane treatment the applicant faced while in detention. It further held that Belgium was

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{55} Weib, \textit{supra} note 24, at 83.
\item \textsuperscript{56} See \textit{id.} Even when the ECJ does defer to the ECtHR, it tends to be focused on the text of the ECHR, and not on the ECtHR’s underlying case law. For instance, in \textit{Otis}, the ECJ held that because article 47 of the Charter affords the same protection as article 6(1) of the ECHR, “[i]t is necessary therefore, to refer only to Article 47.” Case C-199/11, 2012 O.J. (C 9) 14, para 47 (emphasis added). However, the scope of the right to a fair trial in the Charter and Convention are actually misaligned. See Micallef v. Malta, 50 Eur. Ct. H.R. 37, para 32 (2010) (noting that “[u]nlike article 6 of the Convention, [Article 47] of the Charter does not confine this right to disputes relating to “civil rights and obligations” or to “any criminal charge”).
\item \textsuperscript{57} M.S.S. v. Belgium and Greece, 2011-I Eur. Ct. H.R. 255.
\end{itemize}
\end{footnotesize}
also in violation of article 3 because it “knew or ought to have known” that the applicant would be subject to inhumane treatment in Greece.\(^{59}\)

In *N.S. and Others*, a case with nearly identical facts, the ECJ came to the opposite conclusion.\(^{60}\) There, the applicant was also an Afghan national who sought asylum in the United Kingdom but was transferred back to Greece, his first state of entry. He alleged that the UK violated article 4 of the Charter for exposing him to inhumane treatment by sending him back to Greece. Unlike the ECtHR, the ECJ ruled that a Member State only violates article 4 if it is aware of “systemic deficiencies” in the asylum procedure or reception conditions of the receiving State, and that the applicant failed to make such a showing. The ECJ adopted a lower standard of liability because it wanted to preserve the principle of mutual trust among Member States and to maintain unity in the Common European Asylum System.\(^{61}\)

Another area where the two courts’ case law clash is with respect to the legality and scope of “dawn raids”—“a cornerstone of the European Commission’s . . . investigatory practices, particularly in relation to cartels” and other anti-competitive behavior.\(^{62}\)

In the predecessor to these business privacy cases, *Hochez v. Commission*, the ECJ held that article 8 of the ECHR could not be extended to preclude searches of businesses premises

\(^{59}\) *Id.*


because the article was only “concerned with the development of man’s personal freedom.”

However, three years later, in *Niemietz v. Federal Republic of Germany*, the ECtHR held the opposite: “to interpret the words ‘private life’ and ‘home’ as including certain professional or business activities or premises would be consonant with the essential object and purpose of article 8, namely to protect the individual against arbitrary interference by the public authorities.”

As a result, current ECJ and ECtHR case law on dawn raids diverge, with the ECtHR appearing to require stricter procedural protections. For example, the ECtHR held in *Delta Pekárny A.S. v. Czech Republic* that the Czech Competition Authority’s raid of a bakery violated article 8 of the ECHR because the raid was not judicially sanctioned ex ante or challengeable in an independent proceeding ex post. Some antitrust practitioners have interpreted this decision as requiring judicial approval for dawn raids, and predicted that the ECJ might follow suit. However, the ECJ squarely rejected such an article 8 (article 7 of the CFR) challenge in *Deutsche Bahn & Others v. Commission*. There, the Commission looked for materials outside of the scope of its warrant during a dawn raid, and used these documents to justify two subsequent raids. Although the latter raids were not judicially sanctioned, the ECJ held that this was immaterial because “under the EU system, an adequate level of protection . . . is ensured by the ex post judicial review that can be carried out by EU courts.”

---


66 *See, e.g.*, *Delta Pekárny Client Alert, supra* note 62 (“While it is not an overstatement to conclude that the ex post judicial review that currently exists at the European Union level . . . has to date not raised any serious obstacles to the European Union’s investigative powers, the *Delta Pekárny* Ruling suggests that those days might be numbered, at least to the extent that some European regulators continue to authorize their own inspections without the prior approval of national courts.”).

67 Case C-583/13 P. Deutsche Bahn & Others v. Commission, 2014 O.J. (C 24) 9, para 40. Rather, the ECJ found that the Commission had violated Regulation No. 1/2003 because during the first raid, it had “us[ed] an inspection to
Moreover, the ECtHR seems to be more restrictive about the permissible scope of dawn raids. The Court requires adequate safeguards to ensure that seized documents do not contain material covered by attorney-client privilege or material unrelated to the alleged conduct at issue. If an applicant alleges that documents were impermissibly taken, the Court’s holding in Vinci Construction requires that a judge “examine in detail the documents in question” and “order their return where appropriate.”68 The ECJ, however, permits the Commission much broader leeway. Although the Court prohibits “fishing,” it held in the Nexans case that the Commission was permitted to seize any document as long as it might be reasonably related to anticompetitive behavior within the EU.69 Practitioners have taken the decision to suggest that the Commission is “not required to define precisely the relevant market, to set out the exact legal nature of the presumed infringements, or to indicate the period during which [the infringements underlying the inspection] were committed.”70

* * *

In sum, the current EU human rights framework is riddled with gaps, despite the multiple layers of protections, both codified and common law. This is because the ECJ is not a human rights court, and thus, must always balance fundamental rights against treaty freedoms. The ECtHR, on the other hand, is already situated at the forefront of human rights in Europe.

---

look for documents which concerned another, unrelated matter” instead of amending the original warrant or applying for a second one. Id. at para 79.


70 See Hall, supra note 62, at 2.
Therefore, accession may be necessary to bridge the growing gaps in fundamental rights across Member States and between the two courts in Luxembourg and Strasbourg.

III. Making the Case for Accession

On December 18, 2014, the European Court of Justice (ECJ) held in Opinion 2/13, that the Draft Accession Agreement (DAA) setting forth the mechanics of the EU’s accession to the European Convention on Human Rights (ECHR) was incompatible with EU law. Nevertheless, accession is far from dead.

Article 6(2) of the Treaty on European Union (TEU) explicitly commands that “[t]he Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.” Given accession’s turbulent history—rife with starts and stops spanning nearly six decades—it is highly likely that the EU will give accession another try. Time is of the essence, however, as Opinion 2/13 marks a critical turning point in the relationship between the ECJ and the European Court of Human Rights (ECtHR). Once characterized by comity, their relationship has since considerably soured. Thus, from an institutional standpoint, accession is necessary to restore cooperation between the ECJ and ECtHR.

---

72 For an overview of the ECJ’s reasoning, see generally Eeckhout, supra note 61 (summarizing the ECJ’s qualms with the DAA).
73 Consolidated Version of the Treaty on European Union art. 6(2), 2010 O.J. (C 83) 1 [hereinafter TEU].
75 Compare supra notes 12-15 and accompanying text (analyzing comity between the two courts pre-Opinion 2/13), with Eeckhout, supra note 61, at 990 (arguing that “[a]fter Opinion 2/13,” the relationship between the ECtHR and the ECJ is “unlikely to return to the golden years” as the ECJ will continue to “travel further along the path of developing its own, autonomous system of human rights protection,” and the ECtHR will see the opinion as a “rejection” of its “core judicial function”).
Below, I present another reason the EU should reconsider the DAA: accession will significantly advance human rights protections in the EU. I will first assess the validity of the ECJ’s critique of accession, before arguing that the benefits—(1) harmonization of human rights obligations, and (2) increased judicial dialogue between the ECJ and ECtHR—outweigh the ECJ’s concerns.

A. Will the ECtHR Become the EU’s Supreme Court?

Despite the doomsday predictions the ECJ made in Opinion 2/13, it is very unlikely that accession would corrode the EU’s sovereignty or render the ECtHR its Supreme Court. Rather, the procedural safeguards in the DAA and the doctrine of equivalence would preserve (and perhaps even improve) the comity between the ECJ and the ECtHR.

1. Drawbacks to Accession

Opinion 2/13 raises two fundamental concerns. First, the ECJ is afraid that accession will allow the ECtHR to infringe on its sovereignty by adjudicating issues of EU law.\(^{76}\) Second, the ECJ is worried about the impact accession will have on the division of powers between the EU and its Member States.\(^ {77}\) In the status quo, the EU is a supranational entity. After accession, the EU may be forced to defend suit against one of its Member States or be joined as a co-respondent before the ECtHR, thus subverting (or at the very least, levelling) its relative position of power. In

\(^{76}\) See Eeckhout, supra note 61, at 973 (quoting Opinion 2/13, ¶¶ 201-03) (arguing accession contravenes Article 344 of the CFR “[b]ecause the ECHR will form an integral part of EU law, [and] ‘where EU law is at issue, the Court of Justice has exclusive jurisdiction in any dispute between the Member States and between those Member States and the EU regarding compliance with the ECHR’”).

\(^{77}\) See id. at 980.
sum, the ECJ fears the DAA’s allocation of jurisdiction and competences will render the ECtHR the “supreme” court, or effectively, the EU’s Supreme Court.

2. Procedural Protections

However, an examination of the procedural safeguards contained in the DAA and the ECtHR’s jurisprudence demonstrates that the ECJ’s qualms are inflated.

First, two procedural mechanisms within the DAA itself greatly reduce the likelihood that the ECtHR will be interpret EU law. (1) Article 3 of the DAA provides that the EU may enter a case as a co-respondent. This allows the EU to strategically intervene in cases that implicate its directives or regulations. 78 Given that the co-respondent mechanism requires parties to enter into a “friendly agreement” and present a unified position before the ECtHR, the EU can use this opportunity to offer its interpretation of EU law or to mount a defense based on EU treaty freedoms. 79 (2) If the “ECJ has not yet assessed the compatibility” of the directive/regulation with “the rights at issue,” article 3(6) of the DAA further provides that “sufficient time shall be afforded for the ECJ to make such an assessment, and thereafter for the parties to make observations to the Court.” 80 Known as the prior involvement mechanism, this provision (which the EU itself lobbied

78 Note however, that the co-respondent mechanism is only available in cases where a Member State is implementing secondary EU law, and that the EU also risks being held liable by entering the case. Moreover, the EU needs the Member State’s consent to join as a co-respondent. See FISNIK KORENICA, THE EU ACCESSION TO THE ECHR 182, 197 (2015). Obtaining consent should not be difficult, however, because a Member State only stands to gain the opportunity to pass off liability to the EU.

79 Id. at 194.

80 Id. at 324 (quoting DAA art. 3(6)).
for), essentially permits the ECJ to always make the first pass at adjudicating whether EU secondary law is compatible with the Charter and the Convention.\textsuperscript{81}

Moreover, Member States are unlikely to challenge the EU’s supremacy by bringing suit against each other in the ECtHR, even if article 33 of the Convention permits an inter-party mechanism. As a preliminary matter, Protocol 8(3) of the DAA declares that nothing in the DAA shall affect the Treaty on the Functioning of the European Union’s (TFEU’s) prohibition on Member States submitting a “dispute concerning the interpretation or application of the Treaties” to external tribunals.\textsuperscript{82} Thus, the plain language of the DAA itself seems to operate as a carve-out to article 33. Second, Member States are bound by the ECJ’s judgment in the \textit{Mox Plant Case}. Thus, regardless of the correct interpretation of the DAA, Member States are not permitted to sue in a forum outside of the ECJ if the case falls within the EU’s competences.\textsuperscript{83}

3. Doctrine of Equivalence

Finally, there is an open question as to whether the ECtHR would continue to apply the doctrine of equivalence after accession.\textsuperscript{84} If the ECtHR decides that its \textit{Bosphorus} jurisprudence is still in effect, then Opinion 2/13 is especially unwarranted because the Court will continue to be

\textsuperscript{81} Taken together, the co-respondent and prior involvement mechanism are intended to give the EU’s position great (if not, dispositive) weight. Of course, the ECtHR could disagree with the EU’s position, or choose to ignore the ECJ’s findings, but it is highly unlikely to only do so, out of comity.

\textsuperscript{82} KORENICA, supra note 78, at 247 (quoting Consolidated Version of the Treaty on the Functioning of the European Union art. 344, 2008 O.J. (C 115) 47 [hereinafter TFEU]).

\textsuperscript{83} See supra notes 16-17 and accompanying text.

hands-off in cases involving EU secondary law, unless the applicant can show that the EU manifesto\-\ly violated the Convention.85

After accession, there is still good reason for the ECtHR to maintain this deference for ECJ rulings on matters of EU law. Although some academics have argued that accession would effectively overrule Bosphorus because there is no equivalent comity for other contracting parties,86 the other procedural safeguards in the DAA demonstrate that the EU, a supranational entity, enjoys a sui generis position vis-à-vis its Member States. Moreover, that the ECtHR adopted the doctrine of equivalence in the first place because it felt “international cooperation” between the ECJ and ECtHR was “an interest worth protecting in itself,” is further support for the longevity of Bosphorus.87

At the very least, the ECtHR could apply a modified form of Bosphorus. For instance, the ECtHR could employ the same “margin of appreciation” it affords Member States’ policy judgments.88 Although this does not rise to the same level of deference as the doctrine of equivalence, which prescribes a presumption of validity, giving the EU a “margin of appreciation,” would make an appreciable difference in cases where the EU is balancing fundamental rights against treaty freedoms.89 This would also insulate the ECtHR from any criticism that it is unfairly elevating the EU above other contracting parties.

85 For a discussion on Bosphorus and its impact, see supra notes 12-15 and accompanying text.
86 See Grousset, Lock & Pech, supra note 74, at 3.
87 Hilmy, supra note 5, at 203.
88 See, e.g., Sabel, supra note 12, at 520 (explaining the Court’s decision in Vo v. France, which held that States are given a “margin of appreciation” to define when life begins because the Convention is a living instrument and there is no current consensus).
89 See Part II.A, supra, for examples of such cases.
The ECtHR might also consider invoking the doctrine of equivalence at a later stage in the proceedings. Currently, the presumption triggers when the Court determines that the matter at hand flows from a Member State’s obligations under the EU. If the ECtHR would like to afford the EU less deference, it could limit the presumption to instances where (1) the EU is party to the case as a respondent or co-respondent, and (2) where the EU explicitly invokes ECJ case law as a defense. This “Bosphorus-once-removed” presumption ensures that the ECtHR never directly overrules the ECJ, and incentivizes the EU to subject itself to the ECtHR’s jurisdiction.90

Thus, the drawbacks of accession will likely be minimal because the substantive and procedural safeguards in the DAA, longstanding ECtHR case law, and the dictates of comity will safeguard against any wanton infringement of the ECJ’s jurisdiction and the EU’s competence.

B. Harmonization and Advancement of Human Rights Protections

On the other hand, the benefits of accession are substantial. As established in Part II, there are many “gaps” in human rights protections across Member States and EU institutions. Once the ECHR becomes binding on the EU, the ECtHR will be legally empowered to fill these gaps by bringing everyone up to the same standard: the rights espoused by the Convention, as interpreted by the ECtHR. Even if the ECtHR chooses not to directly overrule the EU out of deference or comity, the mere existence of the ECtHR’s powers may lead the ECJ to voluntarily bring its jurisprudence in line with the ECtHR’s in areas where it is falling behind.

---

90 The “margin of appreciation” and “Bosphorus-once-removed” levels of deference are my own theoretical creations. The ECtHR has never issued an opinion on this topic, nor does the DAA directly address this issue. Nevertheless, both are supported by the ECtHR’s underlying logic in Bosphorus and in Vo.
1. ECtHR Review of EU Institutions, Judgments, and Secondary Law

The most significant impact of the EU’s accession to the ECHR is that the Convention will become binding on the EU and all of its institutions, including the ECJ. Notwithstanding the doctrine of equivalence, the ECtHR will thus be legally empowered to review the decisions of the ECJ, the actions of EU institutions, and the compatibility of EU secondary law with the ECHR. This, in turn, will help fill gaps in current human rights protections in three ways.

First, accession will eliminate any direct conflicts between ECtHR and ECJ case law where the ECJ reading of the right is narrower.\(^\text{91}\) For instance, in the case of refugee rights, if the EU had acceded to the Convention, then the ECtHR’s holding in *M.S.S. v. Greece and Belgium* would have effectively preempted the ECJ’s holding in *N.S. and Others*.\(^\text{92}\) Had the ECJ refused to apply the standard in *M.S.S. v. Greece and Belgium*, the applicants in *N.S. and Others* could have then filed their claim with the ECtHR, placing the Strasbourg Court in the difficult position of having to directly invalidate an ECJ judgment.

Second, accession will subject all EU secondary law to scrutiny by the ECtHR. This is a significant improvement from the status quo because EU secondary law is not only off-limits to the ECtHR,\(^\text{93}\) it is even shielded, in many instances, from ECJ review by strict standing requirements. An individual who wishes to challenge the validity of an EU regulation or directive must first pass the individual concern test by proving that she is harmed in a way that is

\(^{91}\) Even though all ECtHR judgments would be controlling authority for the ECJ, cases where the ECJ reads rights more broadly than the ECtHR are unlikely to be affected. This is because the ECtHR is foreclosed from reviewing such cases as a practical matter because affording more rights is not a violation of the Convention. Thus, the binding nature of the ECHR will only work to elevate human rights protections in the EU, operating as a floor, not as a ceiling.

\(^{92}\) For a discussion of these cases, see Part II.C, *supra*.

“differentiated from all others affected by it.” Given this high bar, most individuals must resort to challenging the national implementing legislation instead, in national court, and hope that the domestic court will make a reference to the ECJ about the validity of the EU law.

The potential for ECtHR scrutiny of EU secondary law will substantially advance human rights protections in two ways. (1) It will ensure that going forward, all EU legislation better complies with the Convention. Currently, the Commission goes through a “Fundamental Rights Checklist” when drafting secondary law to ensure that each regulation/directive has minimal negative impact on fundamental rights, and that any infringement is strictly necessary and proportional. Once the EU accedes to the ECHR, the Commission can conduct a similar inquiry for rights under the Convention. (2) Although the ECJ hears many human rights cases every year, the main vehicle for advancing human rights in the EU is secondary legislation. For instance, after the unpopular N.S. and Others ruling, the Commission reformed many of the directives undergirding the Common European Asylum System, such as prescribing more stringent regulations of reception conditions and asylum procedures. Post-accession, it might even be

---

94 KORENICA, supra note 78, at 300.
96 See generally, e.g., EU AGENCY FOR FUND. RIGHTS, FUNDAMENTAL RIGHTS REPORT (2016) (analyzing the human rights challenges the EU faced in 2016 and the directives it adopted to remedy these issues, ranging from equal employment to racism and xenophobia).
possible to challenge these EU secondary laws for failing to adequately secure the rights in the Convention or for fomenting human rights abuses.\textsuperscript{98}

Finally, the actions of EU institutions will be directly challengeable in the ECtHR.\textsuperscript{99} In the status quo, the conduct of these institutions is even more insulated from review than EU secondary law because only affected individuals that satisfy the ECJ’s standing requirements can bring suit.\textsuperscript{100} Thus, ECtHR oversight would help curb human rights violations by giving victims an avenue for redress. This is of particular relevance in context of the continuing refugee crisis in Europe because the EU’s on-the-ground staff may be turning a blind eye to abuses. For instance, even though the EU recently established a European Border and Coast Guard Agency, Frontex, to help “manage migration more effectively,”\textsuperscript{101} news sources reveal that human rights violations still abound.\textsuperscript{102} If any of these abuses are occurring with the tacit knowledge or aid of Frontex, individuals will likely be able to bring suit against the agency itself.

2. Impact on ECJ Judgments

Even if the ECtHR refrains from taking a very activist role post-accession, their concurrent jurisdiction over EU law-related rights violations may spur the ECJ to (1) relax standing

\textsuperscript{98} For instance, international human rights organizations are accusing the EU’s “hotspot” policy of increasing violations against refugees. See, e.g., Patrick Kinglsey and Stephanie Kirchgaessner, \textit{EU Policy Lead to Abuse of Migrants in Italy, Claims Amnesty}, THE GUARDIAN, Nov. 2, 2016, http://bit.ly/2feFTvh (“The hotspot approach, designed in Brussels and executed in Italy, has increased, not decreased, the pressure on frontline states. It is resulting in appalling violations of the rights of desperately vulnerable people for which the Italian authorities bear a direct responsibility and Europe’s leaders a political one.”).


\textsuperscript{100} National Courts do not have jurisdiction to adjudicate the validity of EU institutional actions. See Part I.A.1, \textit{supra}.


requirements in order to permit more individual suits, and (2) to issue bolder judgments on controversial issues instead of waiting for the ECtHR to take the lead, thereby accelerating the advancement of human rights in the EU.

This is because the best way for the ECJ to “stake out” its jurisdiction is to beat the ECtHR to adjudicating cases. Given that Bosphorus is likely to survive in some form, it behooves the ECJ to relax its standing requirements so that individual applicants can directly file in its jurisdiction instead of petitioning the ECtHR after exhausting domestic remedies. Moreover, the ECJ is much more likely to rule in the applicant’s favor on controversial issues such as LGBT rights if it knows that applicants can refile at the ECtHR. Again, although it is unlikely that the ECtHR would actually overrule the ECJ for reasons of comity, the mere prospect may sufficiently incentivize the ECJ to calibrate its holding based on how it thinks the ECtHR would rule, rather than waiting for an analogous case in the ECtHR to actually arise.

Minimizing the lag between ECJ and ECtHR case law on controversial issues is especially important because the variation in human rights protections across Member States cannot be adequately addressed by the ECtHR due to docket constraints.\textsuperscript{103} And in the status quo, the ECJ has taken to crafting extremely narrow holdings out of respect for the differences among Member States’ laws.\textsuperscript{104} Thus, accession may prove precisely the carrot-and-stick approach needed to galvanize the ECJ into placing itself at the forefront of human rights in the EU.

\textsuperscript{103} See Wintemute, supra note 36, at 198 tbl.3 (noting that a current case can take up to five years to resolve); see also EUR. CT. OF HUMAN RIGHTS, FAQ: EUROPEAN COURT OF HUMAN RIGHTS: THE ECHR IN 50 QUESTIONS 11 (2014) (noting that the Court is a “victim of its own success” and receives more than 50,000 applications per year).

\textsuperscript{104} See, e.g., supra note 45 and accompanying text (describing the ECJ’s narrow holdings in same-sex partnership benefits cases).
C. Greater Judicial Dialogue Between ECJ and ECtHR

The substantive benefits of accession greatly outweigh the theoretical infringement of the ECJ’s jurisdiction, especially when the threat of infringement exists in the status quo. The ECHR currently contains a mechanism, Protocol 16, that allows the ECtHR to review issues arising from EU law when “the highest courts and tribunals of the Member States” request the ECtHR to “give advisory opinions on questions of principle.”105 Moreover, the ECtHR can also overrule the ECJ in the status quo. For instance, the ECtHR has selectively refused to apply the doctrine of equivalence when Member States exercise discretion in implementing EU legislation.106

Thus, the EU is better off acceding to the Convention, instead of guarding against the ECtHR, so that it can jointly shape the development of fundamental rights. Accession not only provides for greater judicial dialogue between the two courts, but it also institutionalizes a system of checks and balances that will better preserve EU competence in the long run.

1. Procedural Pathways

Once the EU accedes to the Convention, it can officially dialogue with the ECtHR through two procedural pathways: the co-respondent mechanism and the prior involvement mechanism.107 In addition, the ECJ may be able to take advantage of Protocol 16 itself to refer questions to the ECtHR before it decides a similar case. These institutionalized channels of communication are


106 See Eeckhout, supra note 61, at 970-71. An example of the ECtHR declining to apply the doctrine of equivalence is M.S.S. v. Belgium and Greece. There, the ECtHR held Belgium liable for violating article 3, even though Belgium was attempting to comply with the EU’s Dublin II regulations. See 2011-I Eur. Ct. H.R. 255.

107 For a more in-depth discussion of both mechanisms, see Part III.A.2, supra.
superior to the ad-hoc dialogue that the ECJ and ECtHR currently engage in through their written opinions.

Given that the ECtHR can already reach to adjudicate issues arising from the implementation of EU regulations/directives, it is better that the EU step in to defend its laws instead of relying on its Member States to do so.¹⁰⁸ For instance, had the M.S.S. case been adjudicated after accession, the EU would have been able to join Belgium and Greece as a co-respondent and invoke the principle of mutual trust as a defense. Although this may not have changed the outcome of the case, it would have enabled the ECtHR and ECJ to dialogue about the role of mutual trust in the EU and its compatibility with the Convention. This is preferable to what actually happened: the ECtHR handed down an adverse judgment against Belgium, creating a direct conflict between the two Courts and a hole in human rights protections for refugees.

2. Checks and Balances

Moreover, accession will legitimize a system of checks and balances between the two courts. On one hand, the Convention will give ECtHR the formal right to examine all challenges based on the Convention, including those arising from EU law or institutions. On the other hand, the EU can insist on some form of deference through the doctrine of equivalence. In extreme cases, it may even wish to invoke the ECJ’s ruling in Kadi and Al Barakaat International Foundation v. Council and Commission, which held that “[a]n international agreement cannot affect the...

¹⁰⁸ Eeckhout, supra note 61, at 970-71 (noting that Member States are less likely to mount an adequate defense of general principles of EU law before the ECtHR).
allocation of powers fixed by the treaties . . . or the autonomy of the Community legal system,” when it wishes to disregard a ECtHR decision.

Checks and Balances Between the ECJ and ECtHR

- Doctrine of Equivalence - Kadi
- Final jurisdiction over all challenges invoking the Convention

**Figure 2.** Rather than conceptualizing a hierarchy between the ECJ and the ECtHR, it is more apt to think of the two courts as coordinate bodies with equivalent checks and balances. Pursuant to the Convention, the ECtHR can overrule the ECJ, and the ECJ, may, pursuant to its own jurisprudence, e.g., Kadi, disregard an international agreement it disagrees with when it affects the autonomy of the EU legal system.

Having a formalized system of checks and balances (see Figure 2), will force the two courts to be more intentional about their engagement, instead of fighting one-off skirmishes, like the one in *N.S. and Others*. In fact, after accession, every time the ECtHR disagrees with the ECJ, it will be directly overruling the ECJ; similarly, if the ECJ chooses to disregard the ECtHR’s jurisprudence, it will be asserting the supremacy of EU law over that of the Convention. It is highly unlikely that the ECJ or ECtHR will employ these “nuclear” options very often. Rather, these checks and balances will likely lead to greater judicial dialogue and compromise. And when the “nuclear” options are deployed, they will also be to the benefit of advancing human rights protections or guarding against egregious infringements of the EU’s sovereignty.

---

*Case C-415/05 P, E.C.R. I-6351 (2008) (holding that Kadi could challenge an EU regulation that was directly copy-and-pasted from a U.N. Security Council Resolution).*

31
Conclusion

The literature on the EU’s accession to the ECtHR predominantly focuses on its theoretical effects on the EU’s jurisdiction and supremacy. I take a more pragmatic view. Accession is needed to fill gaps in the EU’s current human rights framework caused by divergences between the ECJ and ECtHR case law and to facilitate dialogue between the two courts. Given that there is little hope otherwise of the ECtHR and ECJ’s jurisprudence convalescing after Opinion 2/13, accession is necessary to institutionalize checks and balances between the two courts, instead of allowing them to clash in a jurisdictional no-man’s-land. After accession, the ECtHR and ECJ will naturally develop new principles of comity and learn to coexist as coordinate human rights courts in Europe. It is time to analyze accession from the point of human rights advancement, and not of jurisdiction. After sixty-years, it is time for the EU to finally take the plunge and accede to the European Convention on Human Rights.