Dialogue and Distrust: the Accession of the EU to the ECHR

I. Dialogue, contestation and uniformity

There is no doubt that the notion of dialogue has become a part of our legal vocabulary.[1] But – as true of many other fashionable concepts – it is used in all kinds of different ways which may obscure the reason we value dialogue in the first place. So I want to begin with some cautionary remarks.

Dialogue does not necessarily mean agreement, and some of the most important positive developments in the evolution of European law have been in cases when national constitutional courts did not agree with the European Court of Justice or did not agree with certain developments in the legal order of the European Union. For example: while one did not necessarily have to accept the concept of democracy that the German Constitutional Court developed in its Lisbon judgment,[2] it was very important that at least one constitutional organ explicitly raised the issue of the democratic nature of decision-making in the European Union.[3] So dialogue is important, but contestation sometimes generates important results.

Dialogue also does not necessarily mean uniformity: we do not all have to end up protecting fundamental human rights in our states in the same way. To me, it is totally understandable that different historical, social and political contexts can bring about different results, suitable for different societies. So we should disabuse ourselves of the notion that dialogue and harmony mean that every constitutional court will end up with the same position. The reason I mention this is because if there is now one common bit of vocabulary used in constitutionalism around the world it is the word proportionality.[4] There might be a

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[1] The Declaration on Article 6(2) of the Treaty on European Union, annexed to the Treaty of Lisbon [2007] OJ C 306/01, mentions the dialogue between the ECJ and ECtHR as a way of preserving specific features of EU law once the EU accedes to the European Convention on Human Rights. 'Dialogue' and similar metaphors have been used to describe the relationship between parliaments and courts in the domestic constitutional context (Jeremy Waldron, 'Some Models of Dialogue Between Judges and Legislators' (2004) 23 Supreme Court Law Review 2nd 7; Luc B. Tremblay, 'The Legitimacy of Judicial Review: The Limits of Dialogue Between Courts and Legislatures' (2005) 3 International Journal of Constitutional Law 617), but also to depict the exchanges between courts in transnational domain (Christopher McCrudden, 'Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20 Oxford Journal of Legal Studies 499; Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 Harvard International Law Journal 191; Vicki C. Jackson, 'Constitutional Comparisons: Convergence, Resistance, Engagement' 119 Harvard Law Review 109), including the relationship between the ECJ and other courts (see for example Takis Tridimas, 'The ECJ and the National Courts: Dialogue, Cooperation, and Instability' in Anthony Arnull and Damian Chalmers (eds), *The Oxford handbook of European Union law* (Oxford University Press 2015); and Anthony Arnull, 'Judicial Dialogue in the European Union' in Julie Dickson and Pavlos Eleftheriadis (eds), *Philosophical Foundations of European Union Law* (Oxford University Press 2012)).

[2] *Lisbon Judgment* (2009) 2 BvE 2/08. See Daniel Halberstam and Christoph Möllers, 'The German Constitutional Court Says "Ja zu Deutschland!"' (2009) 10 German Law Journal 1241.

[3] Joseph H.H. Weiler, 'Editorial: The "Lisbon Urteil" and the Fast Food Culture' (2009) 20 European Journal of International Law 505.

[4] Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Columbia Journal of Transnational Law 72.

tendency to think that if constitutional courts apply proportionality correctly then the result they reach must be the same. But at the heart of proportionality there is also a balancing of values that can vary from one court to another, and their decisions – albeit different – may have equal normative validity.[5]

If dialogue demands contestation and does not entail uniformity, there is often disagreement at its bottom. And we should not think that such disagreement could or should always be overcome. But contestation need not rest on dogmatism, and disagreement need not preclude openness. So I would like to explore the frontiers of dialogue, and draw attention to the legal and political sensibility that I think was needed – but was perhaps lacking – in the way the European Court of Justice (ECJ) dealt with the accession of the European Union to the European Convention of Human Rights (ECHR).

II. Opinion 2/13 and (the lack of) dialogue

Now I come to Opinion 2/13 of the European Court of Justice, which held that the draft agreement on the accession of the European Union to the European Convention of Human Rights is incompatible with European Union law.[6] The decision may prevent, for the foreseeable future, the possibility of the European Union's joining the European Convention of Human Rights. To be sure, this issue is not important for the protection of fundamental rights. While we can construct hypothetical cases and show that there is a lacuna or overlap of protection, we cannot really say that the fundamental rights are compromised because the European Union is not a member of the European Convention of Human Rights. Citizens and residents of the European Union do not have a deficit of

[5] For an approach to the use of foreign law in proportionality analysis that is at the same time sensitive to the contextual differences between constitutional systems, see Justice Aharon Barak's opinion in *United Mizrahi Bank Ltd. v Migdal Cooperative Village* CA 6821/93 (1995) paras 83-107.

[6] Opinion 2/13 of 18 December 2014, nyr <curia.europa.eu/juris/liste.jsf?num=C-2/13> accessed 7 September 2015. For an overview see 'Editorial Comments: The EU's Accession to the ECHR – a "NO" from the ECJ!' (2015) 52 Common Market Law Review 1, and Louise Halleskov Storgaard, 'EU Law Autonomy versus European Fundamental Rights Protection – On Opinion 2/13 on EU Accession to the ECHR' (2015) Human Rights Law Review, advance access. If you go on the Internet, pages, and pages, and pages are written about this. See, for example: Steve Peers, 'The CJEU and the EU's Accession to the ECHR: A Clear and Present Danger to Human Rights Protection' (*EU Law Analysis*, 18 December 2014) <eulawanalysis.blogspot.com.es/2014/12/the-cjeu-and-eus-accession-to-echr.html> accessed 7 September 2015; Tobias Lock, 'Oops! We did it again – the CJEU's Opinion on EU Accession to the ECHR' (*Verfassungsblog*, 18 December 2014) <www.verfassungsblog.de/en/oops-das-gutachten-des-eugh-zum-emrk-beitritt-der-eu> accessed 7 September 2015; Leonard F.M. Besselink, 'Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13' (*Verfassungsblog*, 23 December 2014) <www.verfassungsblog.de/acceding-echr-notwithstanding-court-justice-opinion-213/#.Ve2VXM7lfzI> accessed 7 September 2015; S. Douglas-Scott, 'Opinion 2/13 on EU Accession to the ECHR: a Christmas Bombshell From the European Court of Justice' (*UK Constitutional Law Association Blog*, 24 December 2014) <wp.me/p1cVqo-NO> accessed 7 September 2015; Martin Scheinin, 'CJEU Opinion 2/13 – Three Mitigating Circumstances' (*Verfassungsblog*, 26 December 2014) <www.verfassungsblog.de/en/cjeu-opinion-213-three-mitigating-circumstances/#.Ve2cDc7lfzI> accessed 7 September 2015; and the special section of *Verfassungsblog*, 'Union Meets Convention: How to Move on with Accession after CJEU Opinion 2/13' <www.verfassungsblog.de/en/category/focus/union-meets-convention-how-to-move-on-with-accession-after-cjeu-opinion-213-en-en-en-en-en/> accessed 7 September 2015, which arose as a reaction to one of the rare papers written in support of Opinion 2/13 (Daniel Halberstam, '"It's the Autonomy, Stupid!" A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' (2015) 16 German Law Journal 105).

judicial protection; they have a surfeit of judicial protection. They get protection from their national constitutional courts, the European Court of Justice, and the European Court of Human Rights.

But it is still very important that the European Union does join the European Convention of Human Rights. Human rights and constitutionalism are part of our political discourse and there is something awful and unacceptable that the EU demands that every new member state become a member of the European Convention of Human Rights while it is not a member itself. The reason we insist that new member states become members of the Convention is not only because of substantive protection, because very often they have good constitutions with very good constitutional courts, but because we like the idea, which is part of the spirit of the European Convention system, that there will be an outside control of the way we manage our businesses in our member states. The remarkable feature of the Convention is that every constitutional or high court accepts that at a certain point its state may find itself before the court in Strasbourg. It is a kind of European system of judicial checks and balances, and we think it is important. So what is very problematic about the outcome of the opinion of the European Court of Justice is not that in the real world some human rights will be compromised; rather, it is that the major political organ of the European Union – more and more constitutional – is not part of that system of protection.

The Opinion is even more important in another sense, which transcends the question of the Protocol of Accession's compatibility with EU law: it is the most elaborate expression of the ECJ's view on the nature of the Union and of European integration. This may have potentially far-reaching ramifications for a whole range of issues which may come before the Court, important as a particularly authoritative voice, among others, in defining our self-understanding of who we are, who and what we aspire to be, what are the means by which we mean to realize those aspirations and, not least, which of these aspirations we wish to achieve through constitutionally binding means (with the concomitant empowerment of Courts and judges) and which we would rather leave to the political, social and moral orders of our national societies and European society. Opinion 2/13 raises acute questions as regards the "Masters of the Treaty" issue, shades of which were already raised in Opinion 1/91, where there were indications of the ECJ's willingness to assert certain fundamental principles of the European constitutional order which could, in principle, be even impervious to procedurally unassailable Treaty (constitutional) amendment.[7]

A "soft way" to read this decision (and Opinion 1/91) would be to say that Article 6 is not to be interpreted as an invitation to adhere to the ECHR in a way which does violence to other no less fundamental constitutional provisions of the same Treaty. Otherwise, we would implicitly be assigning to Article 6 a hierarchically superior value than to other competing Articles and constitutional principles of the Union legal order. Could we say that it should be assigned such normative super-value simply because it was incorporated later? If

[7] Opinion 1/91 [1991] ECR I-6079. See also Opinion 2/94 [1996] ECR I-1759, where the ECJ concluded that, given the important constitutional implications of accession and the lack of explicit competence of the EU to accede to the European Convention on Human Rights, it could only be achieved by way of a Treaty amendment (paras 23-36). See more on this in Juliane Kokott and Frank Hoffmeister, 'Opinion 2/94, Accession of the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms' (1996) 90 The American Journal of International Law 664.

a Treaty Amendment violated, without stating an explicit intention to do so, one of the provisions of the Charter, would we wish the ECJ simply to give it effect?

If the "soft way" is indeed the correct interpretative key to Opinion 2/13, this would, however, mean that in a possible amendment of Article 6 – trying to clear the way for this or another Protocol – there should be an explicit expression of the intention to override competing constitutional principles of the EU legal order in a manner reminiscent of the Canadian and UK arrangements for their internal Bills of Rights.[8] Such an approach would acknowledge that the ultimate Pouvoir Constituent in the Union are the Member States and their peoples speaking through the Treaty amendment procedure, but it would also ensure that they do not, inadvertently, stumble into a Treaty (constitutional) amendment with consequences of a gravity not understood or foreseen at the time of Amendment.

It is clear from Opinion 2/13 that their position was not that any contradiction between the Protocol and any provision of the Treaty would have led them to such a dramatic decision but only those incompatibilities which threatened some of the most fundamental characteristics of the Union's constitutional order. This is a most respectable position to adopt. We have seen the same approach in the decision of the French Conseil Constitutionnel, when in examining the compatibility of the Maastricht Treaty with the French legal order it asserted without much fanfare or subsequent cries of woe, that a Treaty which would molest the essential republican nature of France would be inacceptable.[9] It is also not dissimilar to the position of the German Constitutional Court in the Lisbon Decision already mentioned, where it held that preserving the democratic character of the Federal Republic was a line that could not be traduced.[10]

The ECJ was not, thus, inventing a simplistic hierarchy between two Articles in the Treaty and assigning Article 6 an inferior position, but identifying an essential, ontological, constitutional identity of the Union derived from the very constitutional economy of the Treaty, which would, according to its view, be violated by the proposed Protocol and which, in its view, the Masters of the Treaty (Member States and their Peoples) did not intend to compromise in Article 6. On this reading, the ECJ had not only a right but even a duty to render the Opinion it did, and the shrill critiques are misguided and misplaced. Indeed, if the "soft view" is the correct way to understand the ECJ, then its Opinion is to be welcomed because – always assuming that we agree with the substance of its analysis of the EU order – should the Pouvoir Constituent press ahead with the project of accession to the ECHR without any substantive corrections to the Protocol, by, for example, amending Article 6 in the "Canadian" manner indicated above, then the Member States and their peoples should be aware of the consequences for the legal order of the Union which many have come to cherish. The logic of this reading of the Opinion, however, also means that the ECJ – in the face of such an amended Article 6 or any other expression of a will of the Pouvoir Constituent to press ahead with accession – should yield without any expression of normative misgivings.

[8] Section 33 of the Canadian Charter of Rights and Freedoms (1982); Section 4 of the UK Human Rights Act (1998).
[9] Decision 92-308 DC of 9 April 1992.
[10] *Lisbon Judgment* (2009) 2 BvE 2/08.

There is also a possible "hard view" of the Opinion of the ECJ whereby certain principles of the EU constitutional order are given by the Court a status equivalent to the so-called "eternity clauses" famously found in the German Constitution, among other places.[11] This would mean that certain features of the EU have become impervious to Treaty Amendment, at least of the piecemeal type. This was a possible reading of Opinion 1/91 and somewhat less so in Opinion 2/13, but – in any event – this would be an unfortunate position and I do not think the ECJ would wish its decision to be read in this way. Such an entrenchment would be difficult, if not impossible, to explain and justify by reference to the constitutional and political history of the Union and sound constitutional theory. Its far-reaching nature would require at minimum an explicit expression by the Pouvoir Constituent. To hold otherwise would, among other things, seriously undermine the legitimacy of the ECJ, not least in the eyes of its most important interlocutors, its Member State Brethren and Sisterhood.

Now, for decades since the late 1970s when the Commission first proposed that the European Union, or as it was then, Community, would join the Convention, the European Court of Justice has been accused of hostility to that idea.[12] The suspicion has been that they have been hostile to it because they insist on having the final say on everything that happens within the European Union. They are uncomfortable, and you see it reflected in their discussions about the accession treaty. This attitude is visible in their deliberations on the possibility that requests for advisory opinions of the European Court of Human Rights (ECtHR) on the interpretation of rights could circumvent the preliminary ruling procedure,[13] in their concerns about the prospect that Member States and the EU could bring their disputes to the ECtHR within the *ratione materiae* scope of EU law,[14] in their complaint about the ECtHR's ultimate control over the co-respondent mechanism,[15] in their analysis of the procedure for prior involvement which did not explicitly exclude the opportunity for the ECtHR to rule on whether the ECJ has already decided on the same question,[16] and in their objection that the ECtHR could review Common Foreign and Security Policy matters which the ECJ itself cannot review.[17] The question is how can constitutional courts in our member states live comfortably with similar arrangements? When the individual gets to Strasbourg, exhaustion of local remedies does not in all situations mean that the case has already reached the constitutional court of a country; nobody is going to the barricades because of this. So when this decision was handed down immediately a lot of people said that they would find a

[11] Ulrich K. Preuss, "The Implications of 'Eternity Clauses': The German Experience" (2011) 44 Israel Law Review 429.

[12] Commission Memorandum of 4 April 1979 on the accession of the European communities to the Convention for the protection of human rights and fundamental freedoms COM (79) 210 final, 2 May 1979, Bulletin of the European Communities, Supplement 2/79; Kim Economides and Joseph H.H. Weiler, "Accession of The Communities to the European Convention on Human Rights: Commission Memorandum" (1979) 42 The Modern Law Review 683. On the history of ECJ's approach to other international human rights courts in the context of autonomy of EU law, see Gráinne De Búrca, "The Road Not Taken: The European Union as a Global Human Rights Actor" (2011) 105 American Journal of International Law 649, 676-680.

[13] Opinion 2/13, paras 196-200.

[14] Ibid paras 201-13.

[15] Ibid paras 222-35.

[16] Ibid paras 236-48.

[17] Ibid paras 254-56.

reason why the European Union could not join because they did not want to accept the authority of Strasbourg.[18]

I am not sure that I am convinced by that thesis. Whatever the merits of such reductionist, extra-legal, explanations, they cannot constitute a substitute for serious engagement with the reasoning of the ECJ. In any event, they are of limited normative value. The fact that an executioner might gleefully and for improper reasons swing the ax does not, in and of itself, signal that the punishment was not legally sound. An elaborately reasoned decision which boasts of work by some of the finest legal minds in Europe deserves huge respect, the most careful consideration, and even presumption of veracity. A presumption, however, is just that – a presumption. The importance of the Opinion is such that the interpretative community of European law would be shirking its duty if it did not subject the Opinion to the most exacting critical scrutiny.

We must also notice that in this Opinion, the court was substantively doing what it was required to do, because Article 6 and Protocol No. 8 in Lisbon explicitly say that the Union should join the European Convention of Human Rights but not in a way that will affect the competencies of the Union itself. [19] Now, we can argue whether the judges did a good job, but they would also be betraying their duty if they did not look at it in a serious way. It is one of the longest decisions they have ever written and – uncharacteristically – it is a very reasoned opinion. So I would take with more than one grain of salt the thesis that Opinion 2/13 is just a camouflage in order not to join Strasbourg because they do not want to have the authority of the ECtHR.

Let us thus take for granted that they were doing their job in good faith, that they were doing it competently, and that the various problems they raised are real problems in the fit between the accession treaty to the ECHR and the constitutional order of the European Union. And yet the result is – for political reasons – that this has maybe shut the door to the European Union accession, which is not a good outcome. Could there be a way for judges not to compromise themselves on the principles of European law, which in their view are incompatible with the accession treaty, but not to shut the door to accession? I think there was a way to do that. Although the deed is now done, it should be considered for the future, because the procedure of asking an opinion of the court for a draft treaty has already in the past raised problems.[20]

Let me first underline that it is not only the European Union treaty that says that accession cannot compromise or affect the competences of the European Union and the powers of institutions. It is the draft agreement on accession itself that accepts that. It does so in both article 1(3) and appendix 5 paragraph 22, which presents the official interpretation of how to

[18] This is an impression about the sentiment shared by many commentators. See, for example, blog entries cited in note 8 above.

[19] Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

[20] For example, in the aforementioned Opinion 1/91 [1991] I-6079, where the court dealt with the draft agreement on the creation of the European Economic Area. See more in Barbara Brandtner, "The 'Drama' of the EEA: Comments on Opinions 1/91 and 1/92" (1992) 3 European Journal of International Law 300.

read the agreement.[21] So – going back to the theme of dialogue – there was a formal legal understanding on the part of the member states of the Council of Europe that the accession would be conditioned on its not affecting the competences and powers of the European Union and its institutions. And there was a way for the ECJ to adopt a similar approach without compromising the message it wanted to deliver.

This is how the ECJ might have squared the circle: it could have written a conditional opinion. It could have said the agreement is compatible with the constitutional order of the European Union provided that it is interpreted in a specific way, and every condition of incompatibility that they set out would be constructed as a way to interpret various provisions of the agreement. The European Union would then go on in its act of ratification and append that accession with a statement of "this is how we understand it." And then it would be up to other member states to object and say "no, no, no we cannot accept this interpretation." Then there could be a negotiation initiated by the other side. The way it reads now, the European Court simply and essentially says, "it is incompatible, go back to the negotiating table." This opposite approach would have been a lot more constructive and would not have slammed the door quite in the way that it has been slammed. The way things stand now we are just back to the status *quo ante*.

Much comment has been made on the difference between the overall framing of the answer by the Advocate General and the Court.[22] To simplify, the Advocate General framed her Opinion in a more ECHR-friendly way – a kind of positive "So Lange" approach: the Protocol is OK provided some corrections are introduced. The *dispositif* of the Court is more categorical in its rejection. It points out the incompatibilities, and it would logically follow that if these were corrected the Protocol would become compatible. The readers of the Opinion cannot but wonder why the Court did not, then, follow the positive "So Lange" framing of the Advocate General? Questions of substance aside, it is the difference in framing between the two which gives the impression of a more negative, recalcitrant and categorical Court which might lead some to conclude that the real import of the Opinion is not to provide a roadmap for amending the Protocol, but to point to a deeper constitutional incompatibility between the ECHR and the EU legal orders.

But in political terms there is, in fact, not much to choose between the Opinion of the Advocate General and the Court. The idea that the negotiating team of the Union would now return to its partners in the Council of Europe and seek to renegotiate the Protocol in the light of the Opinion of the Court – and there are noises from the Commission that this may be their intention – seems as a Herculean if not Sisyphean task. What interest would the other Members have to restart this lengthy process? What credibility would the Union negotiating team have? What guarantees could they give that the ECJ would not strike down this or that feature of a newly negotiated Protocol? Both Advocate General and the Court should have opted for a different framing, which might not have altogether avoided the

[21] Draft revised agreement of 5 April 2013 on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, 47+1(2013)008rev2.

[22] The Advocate General Kokott's opinion could be read as an invitation to deliver this kind of qualified approval. View of Advocate General Kokott delivered on 13 June 2014, Opinion procedure 2/13 <http://curia.europa.eu/juris/document/document.jsf?text=&docid=160929&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=840412> accessed 9 September 2015.

problems but may well have facilitated a follow-up strategy and placed both the Court and the Union in a far more comfortable position.

In the Opinion, the ECJ rightly gives much weight to the importance of mutual trust among the legal orders of the Member States; and yet, there is an unmistaken underlying display of mistrust by the European Court towards both national courts and even the ECHR, a mistrust that pushed it to insist on ex ante guarantees, with legal provisions writ in stone, so that any number of possible dangers to the integrity of the Union legal order – some more real, some rather remote – could never take place. It does not seem to believe that, through this Opinion and other vehicles, it could generate an understanding, at least in relation to some of the issues, about dangers and lines which should not be crossed, and that it could achieve the results through this method and then worry about possible transgressions of corrections ex post. The Court could have simply explained, especially when the issues concern Member State courts and Member State legal orders, that the correct interpretation of the Protocol requires certain discipline in its actuation and operation by the national legal orders and that the Protocol is compatible on those understandings. It would then fall on other stakeholders to challenge this interpretation. This would be a much better position than the existing one wherein full-fledged negotiations seem to be required.

The proposal might be contentious, so I want to underline two things. The first is that *acquis constitutionnel* cannot and should not be called into question. It used to be said 30 years ago that the problem of protecting fundamental rights in the legal order of the European Union is that different member states sometimes have different levels of protection. If the European Union measure does not meet the highest level of protection of any member state, then how could it be accepted by the constitutional court of that state? And then in a series of decisions the European Court of Justice – I think wisely – explained and said "we have our own autonomous legal system."[23] The best case to illustrate this is the *Hauer* decision, which concerned the prohibition of starting new vineyards in a certain year because of the economic situation.[24] The plaintiff, Mrs. Hauer, said, "this violates my right to private property." The European Court explains that if this were a regulation of the German government and it went before the Bundesverfassungsgericht, that court could reach the conclusion that it violates the right to private property in Germany. But it also explains that this does not mean that we have to reach the same result in the circumstances and conditions of the European Union.[25] Because not only may the economic circumstances be different, but the very way we balance private property against collective good in Europe might be different than the way it is done in Germany. National constitutional courts must accept that when the European Court of Justice reviews the constitutionality of a European Union measure for human rights, it might reach an outcome that is different from the outcome of a similar measure that came before the domestic constitutional court in a domestic situation; so the whole saga of *Solange I* and *Solange II* is history.[26]

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[23] I deal with this issue at length in "Fundamental Rights and Fundamental Boundaries: On the Conflict of Standards and Values in the Protection of Human Rights in the European Legal Space" in Joseph H.H. Weiler, *The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration* (Cambridge University Press 1999).

[24] Case 44/79 *Liselotte Hauer v Land Rheinland-Pfalz* [1979] ECR 3727.

[25] Ibid para 14.

[26] *Internationale Handelsgesellschaft von Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (1974) 37 BVerfGE 271; [1974] CMLR 540, and *Re Wűnsche Handelsgesellschaft* (1986) 73 BVerfGE 339; [1987] CMLR 225.

The second problem I would like to underline is, in my view, more complicated. What if the measure that comes before the European Court of Justice violates the European Convention on Human Rights? Take for example the *Melloni* case.[27] A member state issues an arrest warrant in absentia. And in another member state they say even though it is a European Arrest Warrant we do not recognize it because in our country to arrest somebody in absentia violates fundamental human rights. Now let us say – as was the case in *Melloni* – that the European Court of Justice looks at this and says, in one sentence, that the European directive which allows an arrest warrant in absentia does not violate the European Convention on Human Rights according to the case law of Strasbourg.[28] Now the matter comes before a national judge. My intuition is that when the European Court of Justice is articulating the sound of human rights of the European Union, the national constitutional court would defer to it. But when it comes to the European Convention on Human Rights, things might be different. Even if according to European Union standards there is no violation of human rights, the European Convention on Human Rights is the safety net below which nobody is allowed to go, not even the European Union. Must the national judge accept the authority of the European Court of Justice in Luxemburg when it comes to interpretation of the European Convention on Human Rights? There is no easy answer to this.

When it comes to interpreting European Union law it is not only the jurisdiction of the European Court of Justice that matters, because we can also defer to its expertise. But when it comes to interpreting the European Convention on Human Rights, the European Court of Justice has no more expertise than a constitutional court. In fact, it might have less expertise. And neither is this just a matter of expertise. The member state is bound by the Convention in parallel and independently of the membership in the European Union. And I quote from the European Court of Justice itself, which said in the *Åkerberg* case, the same day as *Melloni* that: "the ECHR … does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law. Consequently, European Union law does not govern the relations between the ECHR and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law."[29] I would also add: and a rule of the European Union. Why would a national court slavishly accept the holding of the European Court of Justice in Luxembourg that a measure does not violate the European Convention on Human Rights if that national court thinks that it does violate the convention and that the ECJ misinterpreted the case law of the Convention? If the national court were to accept what the European Court of Justice does, then the country would find itself in violation of the European Convention on Human Rights. Now the tragic – or the tragicomic – thing is that had the European Court of Justice not shut the door on accession, these kinds of problems would have actually been resolved. But, since we are back to the *status quo ante*, this is a really delicate issue to which I do not think there is a simple answer.

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[27] Case C-399/11 *Stefano Melloni v Ministerio Fiscal*, judgment of 26 February 2013, nyr <curia.europa.eu/juris/documents.jsf?num=C-399/11> accessed 9 September 2015.
[28] Ibid para 50.
[29] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, judgment of 26 February 2013, nyr, para 44 <curia.europa.eu/juris/liste.jsf?num=C-617/10> accessed 9 September 2015.

III. Conclusion

I would like to finish by saying something more general about dialogue. How can the dialogue between national courts in general – and constitutional courts in particular – with the European Court of Justice be improved? I think that both types of court are not doing the best job. The European Court of Justice decisions are very apodictic. They are not narrative, they are not explanatory, there are no dissenting opinions, they are not dialogical. Sometimes the most delicate issues – balancing values, human rights, legal order – get resolved in 37 words where the German Constitutional Court or the Italian Constitutional Court or the Spanish Constitutional Court would spend three pages. That is not good for dialogue. If you are going to make very important decisions and expect them to be followed and to be understood, then you need to learn to explain yourself better. You have to understand the concerns of national courts. And then when you decide, it is part of a dialogue.

Why do I say that constitutional courts do less than an optimal job? First of all, they do not refer a lot. You know, it took 50 years for the German constitutional court to make its first preliminary reference. But even when they do refer, they could be more dialogical: explain their concerns in a much deeper way and even suggest how they think the treaty ought to be interpreted. And if the preliminary reference is dialogical, then the preliminary ruling can be equally dialogical. It is an invitation to the European Court of Justice for dialogue. But sometimes the preliminary reference is as apodictic as the preliminary ruling is apodictic. So there is talk about dialogue when judges meet together in conferences, but when they actually sit as judges it is a kind of entente cordiale. And we all know what the entente cordiale needs.

Shrnutí:
Joseph Weiler: Dialog a nedůvěra - přístup Evropské unie k Evropské úmluvě o lidských právech

Příspěvek prof. Weilera se zabývá justičním dialogem mezi Soudním dvorem Evropské unie (dále jen „SD EU“) a ústavními soudy členských států Evropské unie (dále jen „EU“) v kontextu nedávno vydaného posudku SD EU 2/13 k návrhu smlouvy o přistoupení EU k Úmluvě o ochraně lidských práv a základních svobod (dále jen „Úmluva“). V úvodu svého příspěvku se autor zabývá samotným pojmem „dialog“, který podle jeho názoru automaticky neimplikuje souhlas či uniformitu. Naopak nezbytnou součástí dialogu je také nesouhlas, který je často hybatelem pozitivního vývoje. Na tomto základě autor zkoumá hranice justičního dialogu, přičemž především akcentuje nezbytnost právní i politické vnímavosti jeho aktérů. Nesprávné vedení justičního dialogu pak demonstruje právě na posudku SD EU 2/13. Způsob, jakým SD EU přistoupil k přezkumu smlouvy o přistoupení EU k Úmluvě, podle jeho názoru výše zmíněnou vnímavost postrádá. Kategorický závěr SD EU o neslučitelnosti smlouvy o přistoupení s unijním právem totiž – alespoň na dohlednou dobu - „zabouchl dveře“ možnému přistoupení EU k Úmluvě. V závěru

svého příspěvku pak autor formuluje doporučení stran toho, jak mohou obě strany dialogu, tj. SD EU i ústavní soudy členských států EU, přispět k jeho zlepšení.