EU Fundamental Rights and Judicial Reasoning: Towards a Theory of Human Rights Adjudication for the European Union

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The Court of Justice of the European Union faces a wide variety of human rights decisions. In common with national courts, it has to ensure that the actions of the European Union administration and legislature comply with human rights. [1] These human rights are found in the general principles of Community law, including, inter alia, those of the European Convention of Human Rights, in addition to the EU Charter of Fundamental Rights and Freedoms. [2] When doing so, the CJEU may find that it is judging not only the actions of the institutions of the European Union, but also actions of the administration and legislature of the Member States as they implement provisions of EU law, or act as agents of the EU administering EU law. In addition, the CJEU will adjudicate on actions of the Member States when they are acting within the sphere of European Union law. This can occur when Member States derogate from other provisions of EU law on the grounds of protecting human rights, or where Member States fail to implement European Union law provisions that either directly or indirectly protect human rights.

This diverse nature of the human rights jurisdiction of the CJEU poses unique problems for human rights adjudication in the EU. The Court is at one and the same time protecting human rights from abuse by its own measures and policing the activities of its Member States. Moreover, the lines between these roles are blurred. For the CJEU to provide a human-rights compatible interpretation of the provisions of a Directive, for example, not only restricts the actions of the EU legislature, but also limits the actions of Member States. In addition, when the CJEU takes on the role of policing the actions of Member States, it does so within the context of the ECHR, given that all Member States, and potentially soon the EU itself, [3] are signatories to the ECHR and the provisions of the ECHR are sources of general principles of Community law as well as being mirrored in the first Chapter of the Charter. Yet for the CJEU to perform the same function as the European Court of Human Rights would lead to replication of roles, as well as cause problems for the CJEU's assertion of the

[1] Article 263 TFEU.
[2] Article 6(1) and 6(3) TEU.
[3] Article 6(2) TEU. See also the Draft Accession Agreement at <http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1(2013)008rev2_EN.pdf > accessed 4 March 2016.

supremacy of directly effective EU law over national law which would appear to run contrary to the margin of appreciation granted by the ECtHR to its signatory States. [4]

This chapter aims to provide the groundwork for developing a theory of human rights adjudication for the CJEU, looking specifically at the complexities that arise when deciding cases that require control over actions of Member States. It builds on consensus found in the literature calling for the need for the CJEU to be sensitive to competing requirements of consensus and divergence in the protection of human rights, drawing on the constitutional pluralism underpinning the EU. [5] It will first explain the need for both uniformity and diversity in human rights protections in the EU. It will then explain how these needs can best be met through a dialogue theory of human rights adjudication, with Article 267 facilitating the provision of varying degrees of authority to determine rights-issues to either the CJEU or the national courts. The final section discusses the factors that should influence whether a rights-issue is more suited for resolution by the CJEU or national authorities, building on Weiler's theory and explaining its precise application through a series of examples drawn from recent case law.

1. United in Diversity

'United in Diversity' is the official motto of the EU and was adopted in the same year as the Charter. It recognises a tension at the heart of the EU, reflecting the twin values of unity and cultural diversity. This tension is also reflected in the protection of human rights in the EU, as illustrated by the Preamble to the Charter. The Preamble recognises that the:

> [u]nion is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. [6]

It also,

> contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States. [7]

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[4] See Sionaidh Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis ' (2006) CML Rev 619.

[5] See, for example, Janneke Gerards 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17 European Law Journal 80, Wil Waluchow, 'Constitutionalism in the European Union' in Julie Dickson and Pavlos Eleftheriadis (eds) *Philosophical Foundations of European Union Law* (OUP 2011) and Joseph Weiler 'Fundamental Rights and Fundamental Boundaries: Common Standards and Conflicting Values in the Protection of Human Rights in European Union Space' in Riva Kastoryano (ed) *An Identity for Europe, the Relevance of Multiculturalism in EU Construction* (Palgrave Macmillan 2009) 73.

[6] Charter of Fundamental Rights of the European Union, Preamble [2010] OJ C83/389.

In addition, the Charter recognises a further, more specific aim of the European Union;

> it seeks to promote balanced and sustainable development and ensures free movement of persons, goods, services and capital, and the freedom of establishment. [8]

These three quotations from the Preamble to the Charter provide a means through which to build a framework for human rights adjudication in the EU. The first two quotations illustrate a tension found in all legal systems which aim to protect human rights, although potentially exacerbated when applied to the EU. The third quotation is more specific to the situation of the EU.

1.1. Human Rights and Community Understandings

Whilst there may be agreement as to such universal and indivisible goods as 'human dignity, freedom, equality and solidarity' [9] it can be reasonable to disagree as to how these goods should be achieved in any particular society. [10] This reasonable disagreement can arise not only as to the content of these universal values as applied to specific situations, but also as to the institutions best suited to determining the content of these universal values. [11] This is best explained through the means of an example – I will use one of the issues that arose in *Mangold*, [12] regarding age discrimination. German law required that all contracts of employment of fixed duration needed to have an objective justification. However, there was exemption to this requirement for contracts of employment offered to those aged 52 or over. The issue arose as to whether this was contrary to the universal value of equality, specifically the extent to which this value would require that those aged 52 or over and those under this age should be treated the same for the purposes of employment law. For ease of reference, I will refer to questions such as the one arising in *Mangold* as 'rights-issues' – i.e. issues that require the determination of how a general human rights provision applies to a specific factual situation.

Even if all agree that equality is a universal human right that should be protected across the EU, it can be reasonable to disagree about whether equality extends to require equal treatment on the grounds of age. Even if there is agreement that the right to equality does include a right to equal treatment on the grounds of age, there may nevertheless be disagreement as to whether this extends to employment situations and there may also be disagreement about how best to achieve

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[7] ibid.
[8] ibid.
[9] Preamble to the Charter (n 6).
[10] See Weiler (n 5) 75-89 and Waluchow (n 5).
[11] See Jeremy Waldron, 'A Rights-based Critique of Constitutional Rights' (2013) 13 OJLS 18 and 'The Core of the Case Against Judicial Review' (2006) 115 Yale Law Journal 1346.
[12] Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981.

this goal. A legislative provision making it easier to grant fixed-term employment contracts to those aged 52 or over does discriminate on the grounds of age, but it may be argued that it does so in order to make it easier for employers to employ those aged 52 or over. As such, rather than being understood as a breach of the principle of equal treatment according to age, the legislation may arguably be understood as a means of remedying some of the inequalities felt by the elderly – that it is harder for them to find employment. Even if there is agreement as to the extension of the universal value of equality to include equal treatment according to age, and agreement that the legislation at issue in *Mangold* breached the right of equal treatment, there may still be reasonable disagreement as to how to ensure equal treatment. Should the law expand the requirement for an objective justification for a fixed-term contract to all employees, regardless of age, or should it remove this protection, making it just as easy to employ the young and the old?

As well as the possibility of the existence of reasonable disagreement concerning the content of rights, there may be reasonable disagreement as to the institution best-suited to authoritatively resolve rights-issues. [13] Is it better for the legislature or the courts to determine whether the right of equality is breached when it is easier to offer fixed-term employment contracts for those aged 52 or over? It is not the aim of this chapter to contribute to the extensive debate on this issue. However, attention will be drawn to similarities between theories arguing for a stronger role of the judiciary and those arguing for a stronger role of the legislature. Arguments in favour of either institution point to its better institutional ability or constitutional authority to determine rights-issues. Such evaluations focus on the extent to which either institution is better able to understand general human rights provisions and previous decisions determining rights-issues so as to better resolve a specific rights-issue. For example, those arguing for a stronger role of the judiciary point to the similarities between legal reasoning and moral reasoning used to determine the content of universal moral principles.[14] In addition, the judiciary, particularly in common law jurisdictions, draw on previous decisions applying universal moral principles to rights-issues in the community to which their legal decisions apply. Although the judiciary in civil law jurisdictions may not be bound by the rules of precedent and may reason in a different manner, nevertheless there is the same reference to rights as understood in their particular community. Previous applications of human rights in a specific community provide a means through which to determine new rights-issues.[15] In a similar manner, arguments as to the constitutional suitability of the judiciary to

[13] See Waldron (n 11).
[14] See, for example, TRS Allan, 'In Defence of the Common Law Constitution: Unwritten Rights as Fundamental Law' (2009) 22 CLJ 187 and *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2001). For an application of this approach to EU human rights law, see Waluchow (n 5).
[15] See, for example, Robert Alexy *A Theory of Constitutional Rights* (J Rivers trs OUP 2002).

authoritatively determine rights-issues rely on the independence of the judiciary. This independence means that courts are better suited to resolve rights-issues between individual citizens and the State and the series of resolutions of these disputes forms part of the critical morality of a particular community.[16] Courts are best suited to resolving rights-issues not merely because of their understanding of universal human rights, but because of their further specific understanding of human rights within a particular community.[17] There is the fear that the legislature will be too swayed by majority opinion or expediency as to fail to pay sufficient attention to universal human rights or long-standing resolutions as to specific applications of human rights in a particular community.

On the other hand, those advocating a stronger role for the legislature argue that the legislature is better-placed to resolve human rights issues as legislatures are better able to reflect the wide views in society as to how a rights-issue should be resolved. Legislatures can consult widely and balance a wide-range of interests. It is their democratic credentials that make the legislature a more legitimate means of authoritatively resolving human rights issues. As democratically accountable they are a more legitimate means of ensuring that solutions to rights-issues reflect community consensus. If courts are regarded as less suited to resolving rights-issues it is because their focus on general human rights principles, and on the interests of the specific parties before them, may mean that courts fail to pay attention to the broader wishes of the electorate, or fail to understand the impact a decision may have on those not before the court.[18]

Although common to any legal system protecting human rights, these issues are exacerbated in the EU. First, the EU consists of at least 29 human rights communities – a human rights community for each Member State in addition to a separate human rights community for the EU – not to mention the further possibility of separate human rights communities within each Member State consisting of separate nations, separate legal systems or where there are strong regional interests.[19] The existence of such divergence may appear to suggest that there is little hope of consensus across the different Member States, leading to the possible conclusion that there is no separate EU human rights culture. Although there may be great divergence between the different Member States, there could nevertheless be greater convergence across the EU. It is possible that there can be agreement as to the outcome to specific rights-issues due to areas of overlapping convergence, or where different human rights communities would agree on the outcome even if

[16] See Allan, *Constitutional Justice* (n 14).
[17] See TRS Allan, *The Sovereignty of Law: Freedom, the Constitution and the Common Law* (OUP 2013).
[18] See Waldron (n 11) and Adam Tomkins *Our Republican Constitution* (Hart 2005), ch 1.
[19] See, for example, *Re P and others* [2008] UKHL 38, [121]-[122](Lady Hale) with regard to the possibility of a separate human rights culture in Northern Ireland.

they were not to agree on the way in which this outcome is to be reached.[20] For example, it could be that all the Member States agree that the differential treatment of fixed-term contracts of employment for those aged 52 and over does not breach the right of equality, but this could be because: some communities do not think that the right to equality extends to protecting the right to equal treatment of the elderly; other human rights communities may believe that the right to equality does include a right of equal treatment for the elderly, but that it does not extend to employment situations; others may argue that the right extends to the elderly and to employment situations, but that it is justified generally to help the elderly return to work and others may believe that it is justified only as a means to tackle extremely disparately high unemployment rates for the elderly.

The second way in which this issue is exacerbated for the EU is the disparity between Member States as to the means through which human rights are protected. The 28Member States divide into civil and common law legal systems, as well as between those systems with a constitutional protection of human rights and those with no constitutional protection of human rights. Even amongst legal systems with a constitutional protection of rights there exist differences as to how the rights are protected in these legal systems. These differences reflect different constitutional histories of the Member States, as well as different assessments as to the relative role of the legislature and the courts in the protection of human rights. [21] These differences may give rise to procedural issues which may make it more difficult for some Member States to protect human rights to the extent required by the European Union.

In addition, further problems are caused by the pluralistic nature of the European Union. Not only does each Member State have its own means of protecting human rights, but each legal system, of the Member States and the European Union, asserts the authority to determine for itself the best means through which to protect human rights.[22] These determinations, once made, become part of the community-specific applications of universal human rights. This situation is best understood as a form of constitutional pluralism, similar to the more general argument made regarding the nature of the European Union more generally; where each Member State and the European Union asserts the authority to determine the way in which EU law and national law inter-relate. [23] In *Mangold*, [24] for example, there is not only a difference of opinion between the EU and

[20] See Waluchow (n 5) for an application of this argument to the EU.
[21] See Tim Koopmans *Courts and Political Institutions: A Comparative View* (CUP 2003).
[22] Gerards (n 5) 82-5.
[23] This chapter is neutral as to whether the EU is legally pluralist. Such arguments turn on the complexities surrounding the definition of a legal system and the definition of 'law'. Although it will be argued here that both the EU and the Member States will and should refer to universal human rights when determining the

Germany regarding whether allowing fixed term contracts of employment without an objective justification for those aged 52 or over is contrary to equality, but there is also a further dispute as to who should resolve this issue – the legislature or the courts of either Germany or the European Union. The requirement of equal treatment on the grounds of age as regards employment law is found in Article 6 of Directive 2000/78 and non-discrimination on the grounds of age was also recognised as a general principle of Community law in *Mangold*.[25] The Directive recognised that discrimination could be justified, inter alia, on the grounds of employment policy. The CJEU concluded that the German legislation was contrary to the general principles of Community law. Germany did not only disagree with the CJEU as to whether the legislation could be justified in order to help further the employment of those aged 52 or over, but in addition further disagreement arose as to whether it was the role of the CJEU or of the German courts to authoritatively resolve that rights issue. There was particular criticism of the way in which the CJEU in *Mangold* discovered the general principle of Community law, granting this horizontal direct effect, and expanded the determination of when a Member State was acting with the scope of Community law so as to include legislation enacted by the Member State during the period of implementation of a Directive where such legislation could undermine the fundamental aims of the Directive. [26]

1.2. Human Rights and Fundamental Rights

All human rights communities draw on general principles of human rights when determining rights-issues. They will also draw on other fundamental values specific to their community, particularly when determining restrictions that can be placed on human rights. These values may differ from community to community. The specific difference for the EU lies in the more limited range of principles upon which it can draw and the greater importance of these principles. Article 5 TEU establishes the principle of conferral. The EU has a limited range of competences and can only act within the sphere of its competences as established by the Treaties. Moreover, the EU was established to achieve specific aims. This is reflected in the Preamble to the Charter, recognising the aims of the Union to achieve the internal market, focusing on the freedom of movement of persons, capital, goods and services, as well as establishing freedom of establishment. The CJEU refers to these as fundamental rights. The EU also plays a large role in promoting competition. This is also

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content of human rights, the chapter is neutral as to whether these universal principles of human rights are best understood as *legal* sources or *legal* principles.

[24] Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981

[25] id*.,* para 75.

[26] See the *Honeywell* of the German Constitutional Court, BVerfG 6 July 2010, 2 BvR 2661/06, NJW 2010, 3422-30.

reflected in the rights and principles protected in the Charter. The first, fourth and fifth chapters of the Charter contain human rights, civil and political rights and justice - rights common to most legal or constitutional protections of human rights. The third and fourth chapters go further, including broader equality rights in chapter three and rights of solidarity in chapter four of the Charter. These are more reflective of the specific aims of the EU. Although the competences of the EU have expanded following the Lisbon Treaty, it is still the case that earlier specific definitions of human rights will influence current interpretations of the CJEU. This may create further differences between the resolution of rights-issues by Member States and by the CJEU, with those of the CJEU focusing more on the specific aims of the EU.

This tension can be illustrated in particular in areas where human rights appear to clash with the fundamental freedoms – for example in *Viking Line*.[27] Viking Line ran a ferry service between Finland and Estonia. Its ferry service was running at a loss in the face of competition from Estonian ferry services, which could operate more cheaply due to lower labour costs. Viking Line wished to re-register its vessel under an Estonian flag, allowing it to employ cheaper labour. The International Transport Union had a general policy against 'flags of convenience' which would be transgressed by registering a Finnish owned vessel under an Estonian flag. Its members went on strike in response to the decision of Viking Line to re-register its vessel. Viking Line argued that this strike contravened EU law – specifically the free movement of workers [28] and the freedom to provide services.[29] The CJEU concluded that the right to strike was a general principle of Community law that could be balanced against the fundamental freedoms of the free movement of workers and the free movement of services. Although the CJEU in this case concluded that it was for the domestic court to determine whether, on the facts, the strike was a disproportionate restriction on the right to strike, it provided detailed legal guidelines as to the answer to this rights-issue.

The case is widely criticised for appearing to favour market freedoms over the right to strike.[30] This may be partly explained by the way in which these cases reach the CJEU. Cases involving conflicts between the fundamental freedoms and human rights arise before the Court when the human right is raised as a justification for a restriction on the fundamental freedoms. This provides what appears to be an odd proportionality balance – the measures protecting the human right have to restrict the fundamental freedom to as small an extent as possible to protect the

[27] Case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti* [2007] ECR I-10779.
[28] Article 45 TFEU.
[29] Article 56 TFEU
[30] Alicia Hinarejos, 'Laval and Viking: The Right to Collective Action versus EU Fundamental Freedoms' (2008) 8 Human Rights Law Review 714, ACL Davies, 'One Step Forward Two Steps Back? The *Viking Line* and *Laval* Cases in the ECJ' (2008) 37 Industrial Law Journal 126.

human right whereas we would normally expect to see the opposite balance. In addition, the case also illustrates how human rights would be interpreted differently given the different aims of the EU and the Member States. The EU is focused more specifically on the achievement of the free movement of workers and services. Moreover, its focus is on the impact of human rights across the EU as a whole, not merely as regards the rights of workers in one Member State. These differences can lead to widely divergent solutions to rights-issues.

2. Human Rights Adjudication

The previous section discussed the difficulties that arise when devising a theory of human rights adjudication for the EU. These complexities arise from pluralism and its application to human rights. The EU consists of at least 29 different human rights cultures, each of which will have developed its own specification of human rights. This, in and of itself, need not mean that the EU will find it difficult, if not impossible, to decide rights-issues in a manner that can be agreed upon by all 29 different human rights cultures. Despite their differences, broad areas of agreement can be found where different human rights cultures overlap – as illustrated by the enactment of the Charter itself. In addition, it is possible to find greater agreement as to the resolutions of rights-issues. Different human rights cultures may reach the same outcome to rights-issues through different means, reflecting their different specifications of human rights. Nevertheless, it may be the case that there is greater disagreement in the EU. Constitutional pluralism gives rise not only to disagreement over the content of rights, but also as to which institution should determine rights-issues, with both the EU and the Member States institutions claiming the authority to determine the content of human rights. Moreover, as the specification of human rights in particular communities often serves as a means of defining or reinforcing the particular values of that community, there may be more instances of tension between the Member States and the EU than one would expect when we take into account the relative consensus over human rights. This is exacerbated further by the differences between the Member States, with longer histories and wider aims and purposes than the EU, whose more specific aims often means that it places greater emphasis on the fundamental freedoms than the Member States. This section will examine general concepts that are used in human rights adjudication that may be used to help resolve these tensions: dialogue, deference and the margin of appreciation. This section will first analyse the general suitability of these tools before examining their specific applicability to EU law.

2.1. Deference, Dialogue and the Margin of Appreciation

'Deference', 'dialogue' and the 'margin of appreciation' are often used inter-changeably to refer to situations where a court modifies the way in which it adjudicates on contestable rights-issues – i.e. situations where it is reasonable to disagree about the resolution of a particular rights-issue. However, despite their similarities, they are deployed to resolve divergent situations and do so in subtly different ways. Deference is commonly used as a means through which the court grants greater decision-making power to the legislature or executive to resolve a contestable rights-issue. The degree of deference owed by the judiciary is determined by the relative institutional and constitutional competence of the legislature, executive and the judiciary to resolve a rights- issue. The margin of appreciation is used when contestability questions whether a human rights issue should be resolved by a supranational or international institution, or by a State that is a member of this supranational or international organisation. The more contestable the rights-issue, the greater is the margin of appreciation granted to the State.

Dialogue can be used both when determining the relative authority of the legislature or the judiciary to resolve rights-issues and also when assessing the scope of decision-making power granted to a particular human rights community. This is because dialogue can occur both between different institutions in a particular human rights community and between different institutions in different human rights communities. When applied within a particular human rights community, dialogue, *stricto sensu*, refers to a constitutional protection of rights designed to provide the legislature with a means of responding to human rights decisions made by the court.[31] Dialogue can also be used to resolve potential human rights conflicts between two human rights communities. This can occur where the decisions of the court in one human rights community refers to the resolution of similar rights-issues in a different human rights community. [32]

Despite their similarities, deference, dialogue and the margin of appreciation differ in the way in which they modify human rights adjudication to take account of pluralism and contestability. However, it can be hard to discern these differences in practice, particularly given the myriad of interpretations of deference. Deference is best understood as a form of judicial restraint. The judiciary exercise deference when they refrain from exercising a power, or exercise a power to a lesser degree. This may occur either through a modification of the standard of review exercised by

[31] Stephen Gardbaum *The New Commonwealth Model of Constitutionalism: Theory and Practice* (CUP 2013).
[32] See, for example, the dialogue taking place between the English courts and the European Court of Human Rights in *R v Horncastle* [2009] UKSC 14, [2010] 2 AC 373 and *Al-Khawaja and Tahery v United Kingdom* [2011] ECHR 2127.

the court, or through a change to the evidential burden placed on one of the parties, or through giving weight to the opinion of the public body. It can best be explained through means of an example. I will use the issue that arose in *Omega*, where Germany restricted the use of laser tag equipment imported into Germany from the UK.[33] The laser tag equipment consisted of replica guns that fired laser beams at targets. *Omega* wished to use this equipment to allow individuals to fire guns at other individuals wearing the targets. The Bonn authorities banned this use of the equipment, concluding that to allow individuals to 'play at killing' other humans, was contrary to the protection of human dignity.

The CJEU needed to determine whether the ban on this use of the equipment was a proportionate restriction on the free movement of services[34] in order to protect human dignity. If the court were to exercise deference, it would refrain from scrutinising the proportionality of this restriction as stringently as it might otherwise do. This could be achieved, first, by modifying the test of proportionality, for example by concluding that the restriction on the free movement of services would only be disproportionate if it were manifestly disproportionate. A further means of exercising deference would be to give weight to the assessment of the German court as to whether the restriction was proportionate. Although the CJEU would still assess for itself whether the restriction was proportionate, when doing so the court would give weight to the assessment of the German court. This may mean, for example, that the CJEU would be more likely to reach the conclusion that the decision was proportionate, unless there were overwhelming reasons to reach the opposite conclusion. A similar method of exercising deference is where the court changes evidential burdens. Were the CJEU to exercise deference in this manner, it would require less evidence from the German courts to show that the restriction placed on the free movement of services was proportionate in order to protect human dignity.

Dialogue can help remove potential conflicts between interpretations of rights, enabling courts to reach common conclusions on rights-issues through referring to court decisions in different jurisdictions. Deference can be also used as a means of determining the relative authority of the different courts to decide issues. This occurs when one court gives weight to the opinion of the other court. For example, in *Omega* the CJEU could have exercised dialogue by considering the reasons provided by the German court as to why the restriction on the free movement of services was proportionate in order to protect human dignity, giving weight to the conclusions of the German court and therefore requiring stronger justifications to overturn the conclusion of that court.

[33] Case C-36/02 *Omega Spielhallen – und Autmatenaufstellungs – GMbH v Oberburgermeisterin der Bunderstadt Bonn* [2004] ECR I-9609.
[34] Article 56 TFEU.

The margin of appreciation is used mostly by the European Court of Human Rights. Rather than giving weight, changing evidential burdens or modifying the test of proportionality, the ECtHR grants a wider discretionary area of judgment to the signatory State when determining the content of a Convention right. If the CJEU were to apply the margin of appreciation in *Omega*, the court would recognise that human dignity could require a restriction on the free movement of services as regards the playing of certain laser tag games in Germany even if such restrictions were not required to protect human dignity in other Member States. To allow this margin of appreciation in EU law the CJEU would have to define the free movement of services in such a manner as to allow for a range of possible restrictions, recognising Germany's restriction on certain laser tag games as a proportionate restriction on the free movement of services despite the fact that this restriction would not be required to protect human dignity in other Member States.

2.2. Suitability for European Union law

Although each of the tools listed above may provide a means of resolving some of the tensions caused in human rights adjudication in the EU, not all of them are suitable. Understood conceptually, only dialogue would appear suitable for EU law. Since the seminal case of *Van Gend en Loos,*[35] the CJEU has asserted the supremacy of directly effective EU law. This differs from the ECtHR where no assertion is made as to the supremacy of the Convention. In addition, the EU was established to achieve particular aims, which often requires a uniform application of EU law. It is hard to achieve the fundamental freedoms and to promote fair and equal competition amongst markets across the EU if the Member States can determine for themselves how these provisions apply. How can EU law be supreme and override national law if leeway is granted to the Member States as to the content of that law?

Deference would also appear to be unsuited to the EU. Deference requires judicial restraint – where courts decide not to exercise a particular power out of respect for the institutional or constitutional role of the legislature. This can be hard to reconcile with the role of the CJEU. Article 256 TFEU clearly establishes the jurisdiction of the General Court and the Court of Justice to decide these issues. Given this authority, why should the CJEU refrain from exercising its powers granted to it in order to achieve the objectives of the European Union? In addition, the style of judgment of the CJEU would appear to detract from the use of deference as a legal tool. The Court provides one judgment in a declaratory style, setting out the relevant legal provisions and explaining their application to the case before the court. There is less emphasis placed on providing reasons for the

[35] Case C-26/62 *Algemene Transport-en Expeditie Onderneming van Gend en Loos NV v Nederlandse Belastingadministratie* [1963] ECR 1.

conclusions reached, making it harder to explain how the court has refrained from exercising its judicial powers in a particular situation.

Deference is suitable for the EU if we understand deference as a modification of the standard of review, as advocated by Gerards.[36] This may occur either through modifying the test of proportionality, or modifying the stringency with which proportionality is applied. However, to refer to this form of modification of the standard of review as 'deference' may give rise to confusion, as others may understand this as a refusal of the CJEU to exercise its powers, or to modify its standard of review according to external, non-legal factors.[37] Yet for the CJEU to use non-legal factors would be anathema to its role as 'la bouche de la loi', as understood in many of the civil legal systems of the Member States belonging to the EU. In addition, its application may be hard to achieve in cases where the CJEU is adjudicating on derogations from EU law, with its long-established legal principle of applying a stringent form of the proportionality test, requiring that any measure derogating from the fundamental freedoms is the least restrictive means of obtaining its legitimate aim.

Dialogue does not appear to be incompatible with EU law. It complements the CJEU's assertion of the supremacy of directly effective EU law and the desire of uniformity as it has no requirement of judicial restraint. It merely requires that the CJEU hear the arguments of the national courts regarding the application of human rights, weighing up their reasoning when determining the content of the general principle of Union law or the Charter provision applying to a particular rights-issue. In addition, dialogue is not incompatible with the role of the judiciary in the EU or its declaratory style of judgment. Dialogue is also suited to constitutional pluralism. Constitutional pluralism occurs as both the CJEU and the national courts assert the final authority to determine the way in which EU law and national law inter-relate. Dialogue does not require that either court relinquish this assertion of authority. It provides a means by which to alleviate tensions that may arise when two institutions assert authority to determine the same issue by encouraging respectful consideration of the decisions of each institution by the other. This respect is generated both from reasons as to the relative suitability of each institution to decide a particular human rights issue as well as the resolution of a particular rights-issue or the specification of a particular human right in different communities.[38]

[36] Gerards (n 5) 82-85.
[37] TRS Allan 'Human Rights and Judicial Review: A Critique of "Due Deference"' [2006] CLJ 671.
[38] See Miguel Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in N Walker (ed) *Sovereignty in Transition* (Hart 2003) 510, Jan Komárek 'European Constitutionalism and the European Arrest Warrant: In Search of the Limits of "Contrapunctual Principles"' (2007) 44 Common Market Law Review 9.

However, although dialogue is the most suitable concept for application to EU human rights adjudication, it is also the most difficult to apply, especially when it is deployed as a means of granting different degrees of decision-making authority to different institutions. Dialogue refers merely to interaction between institutions. Here, it refers to interaction between national courts and the CJEU, with both listening to and respecting the decisions of other. This provides no means of determining how courts should interact. Nor does this provide an account of the relative authority that should be given to either the national courts or to the CJEU to resolve human rights issues. If dialogue merely requires interaction, without resolution, then it also becomes unsuitable for EU law – a lack of resolution is not compatible with the CJEU's claim of the supremacy of EU law or of the need for uniformity. The next section will examine the mechanisms that can be used to facilitate dialogue and the factors that should influence its application in EU law.

2.3. Mechanisms of EU law

Dialogue needs a mechanism through which to facilitate granting the requisite relative authority to decide rights-issues. The CJEU may receive arguments as to how a national authority has decided a particular rights-issue and may decide to use this reasoning in its judgment. However, when doing so, the CJEU will still decide the rights-issue for itself. The decisions of the national authorities merely provide information that may or may not influence the decision of the CJEU. The national courts use the preliminary reference procedure found in Article 267 TFEU to refer issues to the CJEU. When responding to a request for a preliminary reference, the CJEU determines the issue of EU law. Its conclusion is then returned to the national courts who determine how to apply EU law to the facts before the court. This would appear to provide no ability to grant authority to national courts to resolve rights-issues arising in EU law. If rights-issues are matters of law, then it is for the CJEU to determine the rights-issue. However, flexibility exists as the CJEU can provide more or less detailed legal definitions of human rights. The greater the detail provided in a legal definition, the smaller the decision-making power left to the national courts when applying this legal definition to the facts and vice-versa.

This mechanism can best be explained through examples. When assessing whether a Member State has properly implemented EU law, the CJEU will be required to interpret the relevant provision of EU law. In *Carpenter*, for example, the rights-issue arose as to whether deporting Mrs Carpenter would be contrary to the right to family life enjoyed by Mr and Mrs Carpenter and their children.[39] The issue arose as a matter of EU law as Mr Carpenter exercised the right to provide

[39] Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279.

services under EU law, by selling advertising space in magazines to clients in the UK and other EU countries, often travelling to other EU countries. The CJEU interpreted the right to provide services in a manner compatible with the right to family life found in article 8 ECHR. It concluded that the right to provide services had been breached because of the infringement of the right to family life that would occur were Mrs Carpenter to be deported to the Philippines. The CJEU was able to reach this conclusion as the legal definition of the right to provide services, interpreted in line to the right of family life, prohibited Mrs Carpenter's deportation. By providing this detailed definition, the CJEU authoritatively resolved the rights-issue. However, if the Court had provided a less specific definition of the right, it could have given more decision-making authority to the national court. For example, the CJEU could have concluded that the right to provide services, interpreted in line with Article 8 ECHR, would only be breached if deporting a spouse would inevitably lead to the collapse of the family, or if it would mean that an individual would be prevented from effectively exercising his EU right to provide services. To define the EU right in this manner would give more relative decision-making authority to the national authorities when applying the law to the facts.

In a similar manner, the CJEU can modify its application of proportionality, providing broader or narrower legal definitions when applying human rights when Member States derogate from EU fundamental freedoms law. When applying proportionality in these cases, the CJEU has to determine whether the Member State is pursuing a legitimate aim, whether the measures it adopts are suited to achieving this aim and whether the measure taken provides the least restriction of the fundamental freedom in question. All of these are legal issues to be determined by the CJEU. However, the CJEU can determine these issues with greater or less detail. The more detailed their definitions, the greater the relative decision-making authority of the CJEU and the less power is given to the national authorities to determine this rights-issue.

This can be illustrated through a comparison of the role of the CJEU in the *Viking Line* [40] and *Laval* cases.[41] Both cases concerned a conflict between the right to strike and a fundamental freedom. In *Viking Line* the conflict was between the right to strike and the right to freedom of establishment and in *Laval* with the freedom to provide services. Greater express authority was given to the national courts to determine the balance between the fundamental freedom and the human right in *Viking Line,* where the CJEU stressed that it was for the national court to determine whether the restriction on freedom of establishment was pursuing a legitimate aim,[42] that the strike

[40] *Viking* (n 27).
[41] Case C-341/05 *Laval un Partneri Ltd v Svenskabyggnadsarbetareförbundet* [2007] ECR I-11767.
[42] *Viking* (n 27) para 80.

was suited to pursuing this aim[43] and that the strike did not go beyond what was necessary to achieve this aim.[44] However, although the CJEU made it clear that it was for the national court to determine whether, on the facts, the strike action was a proportionate restriction, the Court nevertheless provided clear guidelines. In particular, the CJEU made it clear that the national court had to establish whether there was a serious threat to national jobs in order to justify the strike.[45] Moreover, the national court had to determine whether the Union policy really was to strike for any form of re-flagging of ships and not merely where this would threaten national jobs. If that were the case, then the strike would be a disproportionate restriction on the freedom of establishment.[46] By defining the legitimate interest more specifically – as strike action designed to protect the rights of national workers facing a serious threat to their jobs – the CJEU narrowed down the circumstances under which the action of the unions would be justified. This gives less discretion to the national courts when applying the law to the facts, in practice giving the CJEU more decision-making power over the rights-issue than the national courts.

Even less decision-making authority was given to the national authorities in *Laval*, where the CJEU determined as a matter of law that the strike action and blockading of a Latvian building firm who had posted workers to Sweden, but who did not comply with the agreed terms as to wage payments made in a collective bargaining agreement between the Unions and Swedish building firms, was contrary to the freedom to provide services. Again, this occurred because of the more specific definition given of the legitimate aim that could be pursued by the strike. The CJEU concluded that the strike and the blockades would only serve a legitimate objective were the action designed to ensure that posted workers received the same minimum wage as provided to Swedish workers. However, as there was no minimum wage in Sweden, wages being determined by a series of collective bargaining agreements between unions and different work sectors, it was impossible to determine if the building firm, in refusing to accept the terms of the Unions, was refusing to provide the Swedish minimum wage to its workers.[47] This led to the conclusion that the strike was not pursuing a legitimate objective.

The *Omega* case provides an example of how the CJEU can provide greater decision-making authority to the national court.[48] The CJEU recognised that individual Member States were not required to adopt a uniform conception of a particular human right in order to justify a restriction on

[43] id*.,* paras 81-82.
[44] id., paras 84-85.
[45] id., paras 81-82.
[46] id., para 88.
[47] *id*., paras 106-111.
[48] *Omega* (n 33).

the free movement of services,[49] and concluded that the measure was a proportionate restriction as it was limited to what was necessary to protect the human right of dignity as understood in German law. The conclusion may have been different had the CJEU determined its own common conception of human dignity that was different from that found in Germany, particularly if the CJEU concluded that laser tag games where individuals could shoot at other individuals wearing targets did not contravene this common understanding of human dignity.

3. Application to EU human rights decisions

The EU may take a range of human rights decisions. The specific problems discussed in this chapter arise when there is the potential for a clash between the human rights communities found in the EU and those found in the different Member States. The human rights provisions of EU law can apply in three situations – where the Member State acts as an agent of the European Union, where the Member State implements European Union law and when the Member State derogates from European Union law using human rights as a justification for this derogation. When proposing a theory of adjudication for human rights law in the European Union, Weiler argued that greater discretion should be given to the Member States when they were derogating from European Union law than when they were either implementing European Union law or acting as an agent of the EU.[50] Weiler's theory also relied on the extent to which the law of the EU and of the Member State was compatible with the ECHR. He concluded that, when the Member State acted as an agent of the EU, or was implementing EU law, three possible scenarios ensued. First, it could be the case that the action of the Member State, or its implementation of EU law was contrary to the ECHR. In this scenario, both the national court and the CJEU should ensure that, to the extent that this was possible in each legal system, the incompatible provision was struck down. In the second scenario, the measure complies with the ECHR and with European Union law human rights protections, but did not comply with stricter national standards of human rights protections. Weiler argued in this scenario that the national court should, where possible, strike down the national measure and the EU should allow this. In the third scenario, the national measure complies with the ECHR and with national law, but does not comply with the more stringent standards of EU human rights protections. In this scenario, Weiler concluded that the CJEU should strike the measure down.[51]

Weiler's thesis applies differently when applied to national measures protecting human rights that derogate from EU law, particularly the law relating to the protection of the fundamental

[49] id., para 37.
[50] Weiler (n 5).
[51] id., 96-99.

freedoms. Again, Weiler considered three possible scenarios, the first being where the national law was contrary to the ECHR where Weiler argued that both the national court and the CJEU should be able to strike the measure down, so far as this was possible to achieve in national law. In the second scenario, where the measure complied with the ECHR and EU human rights standards, but where the national law provided a higher protection of human rights, Weiler argued that the national court should strike down the national measure that contravened higher national human rights protections. In the third scenario, where the national measure complied with national law and the ECHR but not with EU law, Weiler argued that the EU should grant a wider margin of appreciation for national law.[52]

The thesis proposed in this chapter is broadly similar to that of Weiler, but recognises the wider range of scenarios in which EU human rights law may apply to Member States that have been developed by the CJEU in the years following Weiler's contribution. This is particularly true when Member States are implementing or derogating from EU law. In addition, Weiler's approach to human rights adjudication focuses on the interaction between EU and national human rights protections. The thesis proposed in this chapter also takes account of the extent to which either the human rights assessment of the Member State or of the EU is the result of democratic deliberation. The argument proposed here would reach the same conclusion as Weiler when the Member State acts as an agent of the EU – i.e. that the national court should ensure that the measures of the Member State used when acting as an agent of the EU should comply with the standards of the ECHR and of the EU but that the national courts should be free to strike down a measure that does not comply with national standards of human rights protections where these are higher standards than that of the European Union. However, it proposes different solutions to the situation where the Member State is implementing or derogating from EU law.

3.1. Additional factors

Weiler's examples of human rights adjudication depends, first, on an assessment as to whether the CJEU or the national courts protect human rights to a greater or lesser extent than the ECHR and, second, on granting greater decision making authority to the Member States when they are derogating from EU law than in circumstances when they are acting as agents of the EU or are implementing EU law. This chapter will propose two additional factors. First, there is a need to determine the relative importance of the interest protected by EU law and the need for uniformity to achieve this aim and the relative importance of the human right protected by the Member State.

[52] ibid.

The greater the importance of the EU fundamental freedom or the human right the greater the authority that should be given to the EU or the Member State respectively.

Second, there is a need to assess the extent to which there has been democratic as well as judicial input into the resolution of a specific rights-issue. We have been discussing conflicts between EU law and national law protecting human rights in the abstract. Some of these conflicts arise where there has been democratically made legislation from the EU that has taken account of the different human rights provisions across the Member States and aimed to find a way of reaching a resolution on a rights-issue for the European Union. Where this is the case, there is an argument in favour of greater relative authority for the EU as opposed to the Member States. In a similar manner, where there is legislation in the Member States which conflicts with EU law, where the legislation aims to resolve specific rights-issues or provide a community-specific definition of a human right, greater authority should be given to the Member States to decide this issue.

As with Weiler's thesis, these factors also need to take into account the extent to which the national law and the EU law comply with the ECHR. Both the national and the EU authorities should ensure that their law complies with the ECHR. Both should also be able to go beyond the requirements of the ECHR. Where difficulties arise is where both the national law and the EU law comply with the ECHR but nevertheless differ. In these circumstances, relative authority of the national courts or the CJEU should be determined according to the relative importance of the human right/EU fundamental interest and the extent to which the rights-issue has been democratically resolved. All of these provisions are guidelines and different cases will have a different combination of factors which may pull in opposite directions. They may also apply differently when applied to instances of derogation from EU law and when implementing EU law.

3.2. Derogations from EU law

The extent to which the CJEU should grant greater or lesser authority to the instances where Member State derogate from provisions of European Union law in order to protect human rights are normally regarded as examples of a conflict between EU law and the human rights protections found in one particular Member State. For example, to return to *Omega*, the conflict appears to be between the human rights provisions found in Germany, including its stronger protection of human dignity, and the free movement of services and goods protected in European Union law. However, as

Niamh Nic Shuibhne argues, this characterisation is false.[53] The dispute is best understood as a conflict between different human rights provisions across the different Member States in the EU which arises before the CJEU in the context of derogation from the free movement provisions of EU law. The issue arose in *Omega* [54] not because there was a conflict between EU law and national law, but because there were divergent human rights provisions between different Member States, giving rise to contradictory answers to the same rights-issue. Although the conception of human dignity would enable the playing of laser tag games in the UK where individuals shot at others wearing targets with their laser guns, the conception of human dignity as understood in Germany would not permit the playing of this type of laser tag game. It is important to draw this distinction between different forms of human rights cases where EU law applies when a MS derogates from the provisions of EU law. There is a greater justification for granting a wider margin of appreciation in cases best understood as arising from contradictory conceptions of human rights found across the EU than there is from cases involving a clear conflict between EU law and national human rights protections.

An appreciation of this distinction, in addition to the factors discussed in the previous section, helps to provide a partial explanation of the different approaches of the CJEU in the cases of *Schmidberger,*[55] *Omega,*[56] *Viking Line*[57] and *Laval.*[58] The CJEU granted the largest amount of decision-making authority to the national courts in the *Schmidberger* case, which concerned the assessment of whether the Austrian government had breached the free movement of goods when it gave permission for a protest to take place which would have closed the Brenner motorway pass during a bank holiday. First, the CJEU adopted a different approach to proportionality in this case, recognising the non-absolute nature of both the protection of freedom of expression and of the free movement of goods. The CJEU concluded that, in order to ensure the right balance here, the 'interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between these interests'.[59] The CJEU also expressly recognised that there should be a wide margin of appreciation granted to Austria when it performed this balance.[60]

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[53] Niamh Nic Shuibhne 'Margins of appreciation: national values, fundamental rights and EC free movement law' (2009) EL Rev 230.
[54] *Omega* (n 33).
[55] C112/00 *Eugen Schmidberger Internationale Transporte und Planzüge v Austria* [2003] ECR I-5659.
[56] *Omega* (n 33).
[57] *Viking* (n 27).
[58] ibid.
[59] Omega (n 33) para 81.
[60] id., para 82.

This wide margin of appreciation is understandable given that here EU law was expanding to control a positive as opposed to a negative obligation placed upon Austria. EU law was not determining whether Austria had itself acted so as to restrict the free movement of goods directly, but rather was determining whether Austria's control of a peaceful protest had enabled others to restrict the free movement of goods. There was also clear evidence here of the Austrian government consulting widely when balancing the different interests. The CJEU modified the standard of review through defining the rights in such a manner as to grant a greater discretionary area of judgment to Austria whilst determining for itself whether, as a matter of law, the protest would breach the free movement of goods. Having determined that the protest was not directly aimed at restricting the free movement of goods and also recognising that Austria had taken measures to restrict the impact of the protest on the free movement of goods, the CJEU could conclude as a matter of law that the restriction on the free movement of goods was justified and within the wide margin of discretion granted to Austria.

Greater relative authority was also granted to the national authorities in *Omega*. First, *Omega* is best understood not as a conflict between human rights protections and a fundamental freedom but as a conflict between different conceptions of human rights in the different Member States. These differing conceptions of human rights in the EU and Germany gave different conclusions to a particular rights-issue – whether laser tag games involving firing at targets placed on other humans contravened the right of human dignity. This in turn raises an issue as to the free movement of services and goods to be determined by the CJEU. Second, the conception of human dignity found in the German constitution is of fundamental importance to Germany. Human dignity grounds other conceptions of human rights and is regarded as a defining feature of the German Constitution. The CJEU granted greater decision-making authority to Germany here indirectly as opposed to directly, by modifying the content of the right to free movement of services. The measure only prohibited the use of laser tag equipment where individuals fired on others and did not extend to other laser tag games. Therefore the German measure was restricted to what was necessary to protect the German conception of human dignity and the CJEU could declare the measure compatible with EU law due to the way in which the CJEU defined the human right and the free movement of services.

This broader element of discretion given to the Member States appears to contrast with the conclusions reached in *Viking Line* and *Laval* where the CJEU appeared to grant far less decision making authority to the national authorities. This may appear particularly problematic given that both *Viking Line* and *Laval* are best understood as exemplifying conflicts between differing

conceptions of socio-economic rights across the Member States. Sweden and Finland's protection of workers differed from those of Latvia and Estonia. However, we can perhaps get a better understanding of why lesser discretion was offered to the national authorities in this area. First, both cases involved an important aspect of EU law at a time when there was perhaps a greater need for uniformity. *Viking Line* concerned freedom of establishment and *Laval* the freedom to provide services, both of which form key elements of EU policy. In addition, both concerned the difficult situation that arises when new Member States join the EU, particularly when these Member States have cheaper wages and so the protection of the fundamental freedoms could lead to fears of job losses and a potential lowering of the protection of socio-economic rights in the more affluent Member States who have been in the EU longer. In these situations, there can be a greater need for the EU to find a uniform solution to ensure the smooth operation of the EU.

Second, the conflict between the national provisions and EU law was more direct, making it harder to see the restriction as serving a legitimate purpose or as not going beyond what was necessary to achieve this legitimate purpose. The industrial action in *Viking Line*, for example, appeared to derive from a policy of the union that required protests against any form of re-flagging of ships, regardless of whether this re-flagging would give rise to a serious threat to employment. In *Laval* the unions were protesting against the building firm's refusal to adopt the same working conditions for its posted workers as those prevailing in the host Member State, regardless of whether this met the minimum level of protection of workers in the host Member State or went beyond the minimum requirements.

Third, in *Laval* the decision took place against the backdrop of the Posted Workers Directive,[61]which represented a democratic, legislative solution by the EU in response to the issues that arise from differing protections of social and economic rights and the problems that arise when workers from a country with fewer protections and lower wages are posted to countries with greater protection and higher wages. The Directive aimed to ensure that each Member State provided the same minimal level of protection of certain key rights – including a minimum wage protection - to both its own workers and posted workers from other Member States. Had the protests in *Laval* focused on this minimal protection then it may have been possible for the CJEU to conclude that the strike and blockading was a legitimate response, or to allow the Swedish courts to assess whether the strike and blockading where a proportionate response. However, as this was not the case, the Unions had not matched the legitimate aim as legally defined by the CJEU. The democratic resolution of a complex EU issue where there is a need for certainty and uniformity to

[61] Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [1997] OJ L81/1.

achieve a key EU objective may explain why less relative authority was granted to the national authorities.

3.3. Implementation of European Union Law

Human rights provisions of the EU can apply when Member States implement EU law, particularly when they are implementing Directives, but where the implementation of EU law goes beyond EU human rights provisions. Here, greater authority should be given to the national authorities to determine the rights-issue. Directives are meant to provide discretion to the Member States as to how their provisions are to be implemented in order to ensure that the aims and objectives of the Directive are met. National legislatures are also more able to take account of the local situation, ensuring that the aims of the Directive are met in a manner that complies with their substantiations of human rights. The same need for greater relative authority of the national authorities may also arise when Member States are implementing Treaty provisions or regulations that are interpreted widely in order to comply with human rights, in particular when this broader interpretation is applied to an issue that is not within the legislative competence of the European Union – as for example arose in *Carpenter* where a human-rights compatible interpretation of the right to free movement of services would require a different answer to a specific rights-issue than that found through an application of English immigration law.[62] However, this does not mean that there is no or little role for the EU here. There is still the need to ensure the uniformity of EU law according to at least a minimal standard of human rights, as well as aiming to ensure that the law of the Member State complies with the ECHR. This may explain the outcome in *Carpenter* itself.

Three further factors may argue for more authority to be given to the European Union. First, it could be the case that a rights-issue arises before the CJEU because the Member State has failed to implement EU law, but nevertheless has acted within the sphere of EU law. The failure of the Member State to implement EU law may justify the CJEU taking a stronger role in policing the protection of human rights, particularly when the State has failed to implement EU law that aims to provide a minimum protection of a human right across the EU. Second, there can be good arguments in favour of granting more authority to the EU when the specific human rights issue has been resolved at an EU level by a democratic process and where there is a pressing need for a uniform solution to this human rights issue. Third, there are good reasons for granting greater relative authority to decide a human rights issue to the EU when the solution of the CJEU derives

[62] *Carpenter* (n 39).

from a process of dialogue between the CJEU and the national courts to help resolve a particular human rights issue.

These concerns may explain why, in some cases, the CJEU is less willing to grant leeway to the Member State to provide a stronger protection of human rights – for example the recent case of *Melloni*.[63] The case concerned the issuing of a European Arrest Warrant to Melloni, who was residing in Spain, to return to Italy where he had been convicted of a criminal offence *in absentia*. Melloni argue that to exercise the European Arrest Warrant would be contrary to his rights of defence guaranteed under the Spanish Constitution, which would require that the arrest only be executed if there was a guarantee of a re-trial in Italy where Melloni was present to provide a defence. The Spanish Constitutional Court referred three questions to the CJEU, regarding the interpretation of the provisions of the Framework Directive implementing the European Arrest Warrant, whether the Framework Directive was contrary to human rights and whether Article 53 of the Charter permitted Spain to apply a higher standard of human rights than that found in EU law.

The CJEU concluded that the Framework Directive required compliance with a European Arrest Warrant, even when this arrest was made against an individual who had been tried in absentia, if nevertheless the criteria of the Framework Directive had been met. Article 4 of the original Framework Directive, enacted in 2002 [64] did enable the execution of an arrest warrant, when an individual had been tried in absentia, to be made subject to a guarantee that the individual would be re-tried and would be present at this re-trial. However, this had been replaced in 2009 by new provisions which provided a detailed account of the circumstances in which an arrest warrant was to be executed when a person was tried in absentia, including the circumstances that had occurred in Melloni's case – where the individual was aware of the trial, had instructed lawyers to provide his defence and these lawyers had attended the trial on the individual's behalf and provided a defence.[65] As such, the Framework Directive required that the arrest warrant be executed, even without the guarantee of a re-trial.[66] Moreover, the CJEU concluded that the provisions of the 2009 Framework Directive were compatible with the ECHR and with EU principles of human rights and that Article 53 of the Charter may enable Member States to provide stronger human rights protections than those found in EU law when implementing EU law, but that this only applied

[63] Case C-399/11 *Stefano Melloni v Ministerio Fiscal* [2013] QB 1067.
[64] Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1.
[65] Framework Decision 2009/299/JHA amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial [2009] OJ L81/24.
[66] *Melloni* (n 63) paras 35-46.

subject to the supremacy of EU law. Therefore it would not enable a national legislature or court to fail to comply with a specific provision of a Framework Directive in order to provide a stronger protection of human rights.

In *Melloni* the CJEU took a strong line on the supremacy of EU law in the face of a conflict with national constitutional provisions, contrary to other case law where the CJEU appears to be more willing to encourage dialogue between itself and national courts, being more facilitative of constitutional pluralism as opposed to appearing to assert its own authority over that of the national courts. However, when we look more closely at the context of the case we can begin to understand why the CJEU may have granted less relative decision making authority to the national authorities here. First, the CJEU makes frequent reference to the need for judicial co-operation and uniformity of application of the European Arrest Warrant if this measure is to achieve its purpose.[67] Second, the detailed list of criteria established in the 2009 Amendment to the 2002 Framework Directive was designed specifically to respond to difficulties that arose with the original 2002 solution. The 2002 Directive relied on the need for guarantees between Member States as to the possibility of a retrial. This solution was unsatisfactory, particularly as it led to uncertainty as to the assessment of whether this guarantee was sufficient to ensure the protection of the rights of defence. Each national court could assess this guarantee and determine whether it satisfied their constitutional protections. As such, the legislation in 2009 aimed to provide a detailed list of criteria, to which the different Member States had contributed and agreed, to ensure an improvement in legal certainty, judicial co-operation, mutual trust amongst the judiciary and to ensure a good protection of the rights of defence drawing on the problems faced in earlier case law and the constitutional protections found in different Member States. [68] These two factors provide reasons for granting less authority to national authorities than would usually be granted when they implement provisions of EU law.

4. Conclusion

The divergent human rights cultures of the EU and its Member States, combined with the complexities of constitutional pluralism within the EU, require a unique approach to human rights adjudication by the CJEU. The chapter advocates a theory of human rights adjudication based upon inter-institutional dialogue, where the CJEU provides more or less precise legal definitions of complex terms to grant smaller or larger amounts of authority to national courts to determine rights-issues. Any theory needs to take account of the relative importance of the need for uniformity

[67] *Melloni* (n 63) paras 43-44, 51 and 62-63.
[68] id., paras 65-71 of the Opinion of AG Bot and paras 44 and 62 of the judgment.

and diversity in human rights protections across the EU. This is by no means clear. It will vary across the different areas of EU law and according to the specific factual background of the particular rights-issue determined by the court. The chapter does not provide a conclusive account of a theory of human rights adjudication for the CJEU. It does however suggest factors that should influence the development of a more detailed theory whose criteria will themselves change as the EU evolves.