10 Speaking the same language? Comparing judicial restraint at the ECtHR and the ECJ*

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1 Introduction

The main legal tools for navigating the relationship between the European Convention on Human Rights (ECHR, 'the Convention') and national law consist in the principle of subsidiarity and its doctrinal expression through the margin of appreciation.[1] The precise contours of the margin of appreciation, however, remain unclear and the confusion surrounding it is such that its status as a 'doctrine' has been called into question.[2] Many authors also complain that the European Court of Human Rights (ECtHR) does not distinguish between the theoretical basis and different constituent elements of the doctrine clearly enough in its jurisprudence and that this hampers its usefulness.[3] At the same time, the doctrine's significance is on the rise post-Brighton, as evidenced in Protocol 15 to the Convention, and in recent case law.[4] Despite its fuzzy contours, the doctrine has indeed become the most important expression of the idea that there are, and there should be,

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1 *Handyside* v. *United Kingdom* (1976) Series A no. 24, para. 48. See also for example Paul Mahoney, 'Judicial Activism and Judicial Restraint in the European Court of Human Rights: Two Sides of the Same Coin' (1990) 11 HRLJ 57, 78; Paolo G. Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law' (2003) 97 AJIL 38, 61–62; High Level Conference on the Future of the European Court of Human Rights Brighton Declaration, 19–20 April 2012, <www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf> accessed 12 November 2014, para. 11.

2 Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (Council of Europe Publishing, 2000) 32.

3 George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 OJLS 705, 706; Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2005) 16 EJIL 907, 910; Jan Kratochvíl, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights' (2011) 29 NQHR 324, 354; Greer (n. 2) 32.

4 Brighton Declaration (n. 1) paras 11–12; Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 24 June 2013) CETS No. 213 (inserting reference to the doctrine into the Preamble of the Convention).

some limits to how active a role the ECtHR takes vis-à-vis the democratic prerogatives of the Contracting Parties. The use to which it has been put in practice can certainly sometimes be criticised, but a margin of appreciation doctrine can, and should, be seen as a valid tool with an important role to play in the Convention system. Through its function of governing the scope and intensity of judicial scrutiny in a particular case it is often instrumental in defining where, in the final analysis, the universal minimum standard of protection lies.

The increased emphasis on fundamental human rights protection in the European Union can be said to have culminated in the incorporation of the Charter of Fundamental Rights of the European Union (EUCFR, 'the Charter') into the Treaty framework. Normative convergence between the EU and ECHR systems is clearly aimed for in Article 52(3) of the Charter, which stipulates that in so far as the Charter contains rights that correspond to those protected in the ECHR, their meaning and scope shall be the same.[5] Recently, however, the concern has been raised that since the coming into effect of the EUCFR, the ECJ case law on fundamental rights has become increasingly self-referential, with the effect that the Court is missing the opportunity of developing informed expertise in human rights adjudication through engaging with the more developed standards emanating from other human rights bodies.[6] A strand of the literature has also emphasised the autonomy of the EU legal system vis-à-vis international law, including the ECHR, and the ECJ's rejection of the Draft Agreement on EU accession to the ECHR system seems to lend some support to that perspective.[7] Pluralism as a characteristic of the EU legal order has also become a predominant narrative.[8] Nevertheless, if we apply Eeckhout's characterisation of the EU legal system in the field of fundamental human rights as an integrated system of norms, incorporating the EU, the Member States and the ECHR, we can approach the field from the perspective of a shared jurisdiction between courts in an integrated legal system as

5 See also Joint communication from Presidents Costa and Skouris, 24 January 2011 <http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf> accessed 11 April 2014, para. 1.

6 Gráinne de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator' (2013) 20 MJ 168, 184. See also Jörg Polakiewicz, 'EU Law and the ECHR: Will the European Union's Accession Square the Circle?' [2013] EHRLR 592, 596.

7 See for example Paul Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Hart, 2013) 7–10. The Draft Accession Agreement, rejected by the ECJ in its opinion no 2/13, represented the vision of normative convergence, see Fifth Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, 'Final report to the CDDH', 47+1(2013) 008rev2 <www.coe.int/t/dlapil/cahdi/Source/Docs2013/47_1_2013_008rev2_EN.pdf> accessed 11 April 2014, Appendix I, Draft Accession Agreement, Preamble.

8 On constitutional pluralism in the EU see generally Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (Cambridge University Press, 2014) 219–222. See also Janneke Gerards, 'Pluralism, Deference and the Margin of Appreciation Doctrine' (2011) 17 ELJ 80.

opposed to conflict between jurisdictions.[9] On this understanding, the relationship of the respective courts is governed by the principle of '*limited and shared jurisdiction*', which entails that the jurisdiction of each court is mainly limited to its own legal system but, to the extent that the systems are normatively integrated, they share jurisdiction.[10]

Against this background, and as the EU ventures ever further into the sphere of fundamental rights protection, it is understandable that scholars in EU law are gradually beginning to bring the idea of Member States' margin of appreciation to bear upon the case law of the ECJ asking if, and to what extent, a 'margin of appreciation' doctrine is emerging in the EU context.[11] As the doctrine is the established method for exercising judicial restraint in the ECHR system, the EU Member States may also rightly ask whether comparable dynamics apply when the same or similar issues are considered through the lens of EU fundamental rights. The integrated nature of fundamental human rights in Europe and the idea of normative convergence, therefore, call for a clearer understanding of the dynamics of human rights adjudication across both systems. Given the importance of the margin of appreciation doctrine, which gives expression to the reality that most human rights are not absolute and allows nuanced application of human rights norms as appropriate to different local situations, a common understanding of the doctrine seems sorely needed.[12] It is, in a sense, a precondition for understanding normative coherence in human rights protection across Europe.

This contribution aims to facilitate the development of a common understanding of judicial restraint through exploring the question of if and how it is possible to compare its exercise across the two regimes. The focus, however, will not be on detailed comparative analysis of the factors that influence deference or the margin of appreciation at each court in particular types of cases, but on the constitutive elements of *how they approach* judicial restraint. Therefore, the distinction between systemic and normative elements of judicial restraint will be elaborated on for both systems and used as an analytical framework, producing two key findings. The first is that despite differences in presentation, there are some striking similarities in approaches to deference across both systems. The second is that the blending of systemic and normative elements of restraint is a somewhat

9 Piet Eeckhout, 'Human Rights and the Autonomy of EU Law: Pluralism or Integration?' (2013) 66 CLP 169.

10 Ibid. 184–85.

11 James A. Sweeney, 'A "Margin of Appreciation" in the Internal Market: Lessons from the European Court of Human Rights' (2007) 34 LIEI 27; Niamh Nic Shuibhne, 'Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law' (2009) 34 E.L. Rev. 230; Gerards (n. 8) 101; Nina-Louisa Arold Lorenz, Xavier Groussot and Gunnar Thor Petursson, *The European Human Rights Culture – A Paradox of Human Rights Protection in Europe?* (Martinus Nijhoff, 2013) 90; Massimo Fichera and Ester Herlin-Karnell, 'The Margin of Appreciation Test and Balancing in the Area of Freedom Security and Justice: A Proportionate Answer for a Europe of Rights?, (2013) 19 EPL 759. See also Chapter 8, this volume.

12 On a similar note, see Fichera and Herlin-Karnell (n. 11) 777.

problematic aspect of the case law of both courts and an area in which they should work towards providing more clarity.

The contribution will start by briefly exploring the preliminary issue of the different purpose and structure of the two regimes (section 2), while also identifying key elements that are nevertheless comparable when it comes to fundamental human rights. Significantly, in section 2.2, it will also be explained how differing levels of harmonisation in EU law set a different context than under the ECHR, which is characterised by a broader mandate and less specific normative guidance. Against that background, in section 3, a much needed comparative disambiguation of the key factors governing the appropriateness and intensity of judicial intervention in both regimes will be provided. After giving an overview of the analytical framework, sections 3.2 and 3.3 are devoted to identifying and elaborating those normative and systemic elements that characterise judicial restraint across both systems, while section 3.4 discusses overlap between the two elements. In conclusion (section 4), it is argued that the findings show that the development of a common language is possible from ingredients that already exist in the case law of both courts. While the findings are not normative in the sense of advocating a particular approach to the further development (or undoing) of the trends identified, they certainly provide some intelligibility to this notoriously complex area and impetus for further study.

2 Comparing the ECHR and the EU fundamental rights regime

Comparing the ECHR and the EU fundamental rights regime is a complex endeavour. The two systems are similar in some respects, for example, by aiming to protect the same core rights,[13] but their purpose and structure differ considerably, which may have various consequences in practice.

2.1 Key features of the two systems

The ECHR system belongs to classical international law and is governed by its principles and theories. The Convention's influence, thus, springs from the Contracting Parties' obligation under international law, including that of their courts when interpreting domestic law, to perform treaty obligations in good faith,[14] and from the binding force of the judgments of the ECtHR for the parties to a case as stipulated in Article 46(1) ECHR. In addition, the Convention has been incorporated into the domestic law of all Council of Europe Member States,[15] which in dualist states was an important step towards securing the influence of the

13 The EUCFR protects further rights, including notably social and economic rights that are not included in the ECHR. The present analysis is for the most part based on provisions that are included in both systems.

14 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Article 26.

15 D. J. Harris *et al*., *Harris, O'Boyle & Warbrick Law of the European Convention on Human Rights* (Oxford University Press, 2009) 23.

Convention domestically. Unlike in EU law, however, there is no doctrine of direct effect or primacy of the Convention over national law.[16]

Within the framework of classical international law, the scope of obligations arising from the ECHR is nevertheless far-reaching, as the Contracting Parties 'shall secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention' (Article 1 ECHR). The jurisdiction of the ECtHR is equally wide, as Article 19 simply gives it the mandate to 'ensure the observance of the engagements undertaken by the High Contracting Parties', and a jurisdiction that extends to 'all matters concerning the interpretation and application of the Convention' (Article 32(1) ECHR). The ECtHR is also mandated to dispense 'individual' justice. In addition to the rare occasion of interstate cases, the Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be a victim of a violation of Convention rights (Article 34 ECHR). The only real limitation imposed by the Convention on the extensive mandate of the Court is, therefore, to be found in the admissibility criteria stipulated in Article 35 ECHR. Over and above the admissibility criteria, however, the text of the Convention does not impose limitations on the scope or content of the judicial review performed by the ECtHR. Once they are met, and given that a grievance occurs within the jurisdiction of a Contracting Party and can be linked to a protected Convention right (all of which fall to be interpreted by the Court), there will be no limitation on the scope or intensity of the Court's review except as the product of its own judicial restraint.

In contrast, the EU Treaties, including the Charter, have a profound influence on the legal systems of the Member States, going well beyond traditional international law. The system is described as *sui generis*[17] in order to distinguish its characteristics from both an international treaty and a constitutional system. The integration of the supranational and national level into a composite legal order may be captured by reference to the Member State obligation to implement EU law in the national legal orders, going beyond transposition also to include application and enforcement. Within the powers attributed to the institutions of the Union, EU rules, enacted pursuant to the procedures set out in the Treaties, have direct effect within the legal order and primacy over conflicting national legislation. The ECJ has a strong mandate to ensure that 'the law is observed' under the Treaties (Article 19(1) TEU). This includes its mandate to supervise Member State compliance with Treaty obligations[18] and (more importantly in practice) to give interpretative guidance to national courts in preliminary rulings proceedings.[19]

16 Gerards (n. 8) 102.

17 For example Allan Rosas and Lorna Armati, *EU Constitutional Law: An Introduction* (Hart, 2010) chs 2 and 5.

18 Article 258 TFEU.

19 Article 267 TFEU. The highest national courts are for their part under an obligation to refer questions under Article 267(3). Questions of the validity of EU secondary legislation (which may be brought in preliminary rulings proceedings) are always for the ECJ to decide (see also Article 263 TFEU relating to direct actions to contest the validity of secondary legislation).

The Treaties, in their entirety, place considerable limitations on the scope of judicial intervention. The systemic limitations placed on direct review of Member State measures in preliminary rulings proceedings is perhaps the most relevant for our purposes.[20]

The Communities, later Union, did originally not enjoy any attributed powers in relation to fundamental human rights protection. The gradual strengthening of protection, consolidated in the incorporation of the Charter into primary law, has gone hand in hand with an ever broader mandate for the ECJ to guarantee fundamental human rights protection in the Union in all matters that fall within the scope of Union law.[21] Treaty changes have also increased EU legislative competence to protect fundamental human rights.[22] Further, since the Charter was proclaimed, all secondary legislation aims to comply with it[23] and an increasing number of secondary legislation implement particular Charter provisions.

The normative integration of the EU fundamental human rights regime and the national systems, *inter alia* through reference to the foundation of these norms in the 'common constitutional traditions' of the Member States, may in fact lead to 'very little "autonomy"' for each system.[24] The Europeanisation of these common traditions may however be a cause for concern for the Member States in relation to their formal constitutional competences and their 'fundamental boundaries'.[25]

20 National courts apply EU law, as active agents in the enforcement of EU law, or, on a more pluralist reading, as partners in the judicial dialogue. Direct access of individuals to the ECJ is limited and the route for 'individual justice' in the EU therefore continues to be channelled through the national courts. It is an established (if criticised) characteristic of EU law that in direct action cases pursuant to Article 263 TFEU, where (privileged) parties seek annulment of acts of the EU institutions, access of individuals to bring cases directly before the ECJ is limited to narrow situations where they can show direct and individual concern. The Lisbon Treaty amendments of Article 263 TFEU are unlikely to considerably widen direct access of individuals to the ECJ, unless in circumstances where no remedy is available before the national courts, see Paul Craig and Gráinne de Búrca, *EU Law, Text, Cases, and Materials* (Oxford University Press, 2011) 510. See also, critically, Steven Greer and Andrew Williams, 'Human Rights in the Council of Europe and the EU: Towards "Individual", "Constitutional" or "Institutional" Justice?' (2009) 15 ELJ 462, 475.

21 Originally based on the Court's general mandate and the declared respect for fundamental human rights, see now Article 6 TEU, in addition to functional requirements related to establishing supremacy of EU law.

22 Elise Muir, 'The Fundamental Rights Implications of EU Legislation: Some Constitutional Challenges' (2014) 51 CML Rev 219.

23 See for example Communication from the Commission, 'Compliance with the Charter of Fundamental Rights in Commission legislative proposals' (COM (2005) 172 final).

24 Eeckhout (n. 9) 175.

25 Weiler's idea of 'fundamental boundaries' was presented as a metaphor for the principle of enumerated powers or limited competences in a federal state, guaranteeing the autonomy and self-determination of communities against the federal entity, see J. H. H. Weiler, *The Constitution of Europe* (Cambridge University Press, 1999) 103–104. See also Nic Shuibhne (n. 11) 243 and Armin von Bogdandy and Stephan Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty' (2011) 48 CML Rev 1417.

Reflecting Member States' reservations about the risk of centralisation through a binding fundamental human rights instrument at the supranational level,[26] Article 51 EUCFR explicitly pledges to preserve *formally* the 'fundamental boundaries' of the Member States through addressing them only when they 'are implementing Union law' and stating that the Charter 'does not extend the field of application of Union law'. This is, as the literature attests to, the line with which the current case law is preoccupied.[27] Case law to date indicates that while the ECJ interprets Article 51(1) EUCFR broadly so that 'implementing EU law' is equated to the 'scope of EU law' for the purposes of the Charter (including also derogations from Treaty obligations),[28] the Court has nonetheless consistently resisted attempts to extend the field of application of Union law through Charter provisions, thereby drawing formal boundaries between its jurisdiction, in matters within the scope of EU law, and the jurisdiction of national courts in matters that fall outside the scope of EU law.[29]

Accommodating different standards within a limited and shared jurisdiction also takes place with reference to Articles 52(4) and 53 EUCFR, whose provisions similarly reflect respect for the fundamental boundaries of the Member States.[30] Further, the reference to respect for national identities in Article 4(2) TEU can be expected to be invoked as an additional argument and in the context of balancing under proportionality.[31]

Judicial restraint, in the broad meaning applied in this contribution, creates scope for the national authorities to regulate their communities without interference from an international or supranational court. From that perspective the complexity of the integrated EU system of multilevel governance is the first apparent hurdle to

26 Sara Iglesias Sánchez, 'The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights' (2012) 49 CML Rev 1565, 1583; and Gráinne de Búrca, 'The Drafting of the EU Charter of Fundamental Rights' (2000) 25 E.L. Rev. 331.

27 Daniel Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights protection in Europe' (2013) 50 CML Rev 1267, 1272.

28 The ECJ has in this way rejected any narrowing of established pre-Charter case law, in which situations were considered to fall within scope of EU law when national measures implement EU law, derogate from EU law obligations or display otherwise a sufficient link to EU law, see also Sarmiento (n. 27) 1277 and Iglesias Sánchez (n. 26) 1589. As regards derogations situations, see in particular Case C-390/12 *Pfleger* (Judgment 30 April 2014), paras 35–36.

29 Iglesias Sánchez (n. 26) 1588–1589.

30 Article 52(4) stipulates that 'in so far as [the] Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions' and Article 53 requires that the Charter shall not be interpreted 'as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application' by *inter alia* Member States' constitutions or the ECHR.

31 See further Chapter 8, section 4.2, this volume. See also Von Bogdandy and Schill (n. 25) 1441; Nik de Boer, 'Addressing Rights Divergences under the Charter: *Melloni*' (2013) 50 CML Rev 1083, 1097 (note). For a doctrine tailored to Article 4(2) TEU, see Arold Lorenz, Groussot and Petursson (n. 11) 93–101.

hamper a comparative analysis, both from an institutional and a substantive point of view. At the same time, it may well be that it is this very characteristic that calls for a clearer comparative understanding of judicial restraint as a tool to facilitate the nuanced application of human rights norms as appropriate to different situations.

2.2 To what extent is a margin of appreciation appropriate?

The doctrine of the margin of appreciation has evolved in the jurisprudence of the ECtHR as a tool to calibrate the appropriateness or intensity of judicial intervention when questions of human rights violations arise in the national context. The doctrine, therefore, is intended to provide a 'buffer' between the promise of a protective layer of universal human rights on one hand and respect for local democratic processes and legitimate diversity in terms of values and culture on the other.[32] Being the offspring of the ECHR system and its specific characteristics,[33] it is conceived as a consequence of the 'subsidiary nature of the international machinery for collective enforcement established by the Convention'.[34] Another characteristic of the system is the fact that the Convention provides a common minimum baseline of protection with reference to rights that are formulated as abstract principles. There is not much in the way of specification of what these rights actually mean in concrete terms in the language of the Convention itself. This provides special impetus for the Court's interpretative approaches, which have been characterised as those of a 'moral reading' of the Convention as a living instrument,[35] as well as the development of a doctrine of judicial self-restraint as a necessary correlative.

Comparing these aspects between systems we see prima facie two important differences. First, as a result of the *sui generis* integrated legal system, a large part of enforcement of EU law obligations takes place through judicial dialogue, which is formally cooperative, or integrated, rather than subsidiary. This integrated discourse is built into the preliminary rulings mechanism, where the national court is expected, and sometimes obliged, to refer questions of interpretation of EU law to the ECJ, before deciding the case. As opposed to the ECtHR's review of a

32 See for example P. Mahoney, 'Marvellous Richness of Diversity or Invidious Cultural Relativism?' (1998) 19 HRLJ 1.

33 The historical lineage of the margin of appreciation doctrine, however, can be traced back to doctrines of administrative discretion in national law, see for example Yutaka Arai-Takahashi, 'The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg's Variable Geometry', in Andreas Føllesdal, Birgit Peters and Geir Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Cambridge University Press, 2013) 64–65.

34 *Case relating to certain aspects of the laws on the use of languages in education in Belgium* v. *Belgium* (1968) Series A no. 6, pt IA, para. 4. See also *Handyside* v. *the United Kingdom* (1976) Series A no. 24, para. 48.

35 George Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21 EJIL 509, 512. See also Jean-Paul Costa, 'On the Legitimacy of the European Court of Human Rights' Judgments' (2011) 7 EuConst 173, 177; George Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy', in Føllesdal, Peters and Ulfstein (eds) (n. 33) 106, 124–125.

national court's final decision, the review of the ECJ is indirect and takes the form of guidance to the national court. However, as Tridimas suggests, the systemic context of the preliminary rulings proceedings has not always prevented 'outcome' cases where the ECJ gives guidance so specific that it can be equated with the full review (interpretation *and* application/balancing) otherwise more characteristic of the ECtHR.[36] Despite the ECJ's formally leaving it to the Member State authorities to balance conflicting interests, it may in a rather detailed fashion require them to apply national law in a way that does not lead to conflict with fundamental human rights.[37] The question is then to what extent a doctrine of judicial restraint may be used to mediate the shared jurisdiction between ECJ and national courts within this context of integrated discourse (see section 3.3).

Second, the EU increasingly provides for more than a minimum baseline of human rights protection, below which Member States may not fall. Instead, through positive harmonisation of Member State standards a certain uniform level of protection is established, which provides at the same time the floor and ceiling of human rights protection in the relevant field. The Court's decision in *Melloni* elucidates the differences between the EU and the ECHR in this respect.[38] Here, the ECJ refused to interpret Article 53 EUCFR as giving a Member State *general authorisation* to apply its own constitutional standard of protection of fundamental rights, when that standard is higher than that protected by harmonised rules which comply with the Charter, if such interpretation undermines the *primacy* of EU law over national law.[39] Quite clearly, then, there is not much scope for deference in situations of this kind. Nevertheless, parallels can be drawn between the systems. In all circumstances, the Charter forms the baseline of protection, when a situation comes within the scope of EU law.[40] As both *Melloni* and *Åkerberg Fransson* make clear, the possibility of applying national norms under Article 53 EUCFR in the sphere of remaining competences of Member States is subject to the condition that '*the level of protection provided for by the Charter*, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are *not thereby*

36 Takis Tridimas, 'Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction' (2011) 9 ICON 737, 739. For an example of detailed guidance, see Case C-368/95 *Familiapress* [1997] ECR I-3689.

37 See for example Case C-145/09 *Tsakouridis* [2010] ECR I-11979 and C-356/11 and 357/11 *O and S* v. *Maahanmuuttovirasto* (Judgment 6 December 2012).

38 Case C-399/11 *Stefano Melloni* v. *Ministerio Fiscal* (Judgment 26 February 2013). This well-known case concerned rules relating to the European arrest warrant, harmonised by Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 [2009] OJ L 81/24. The question raised was whether a refusal to execute such a warrant was possible after conviction in absentia.

39 *Melloni* ibid. paras 57–59. The national court asked, first, whether the contested rule was compatible with Articles 47 and 48 of the Charter. The ECJ interpreted the provisions of the Charter in line with ECtHR case law, finding that the right of an accused to appear at a trial was not absolute and could be waived, if done unequivocally, subject to minimum safeguards and not contrary to important public interests (ibid. paras 49–50).

40 See also Chapter 8, section 3, this volume.

compromised'.[41] Different but equally Charter-compliant solutions are thus not ruled out (any more than different choices in national legislation that falls within the scope of the fundamental freedoms),[42] except where harmonised rules, based on particular Treaty provisions limit Member States' discretion in implementation or take priority over national legislation.

Level of harmonisation, carefully crafted through the EU legislative process in terms of form and content alike, therefore governs the extent to which a margin is left for the Member States (i.e. 'the margin for the margin') and additionally steers the Court in its interpretation.[43] There remains nevertheless a normative space for the ECJ in assessing the compatibility of secondary EU legislation with primary law, general principles and the Charter. This applies in instances where secondary legislation implements fundamental human rights norms, or Charter provisions, and where secondary legislation takes Charter rights into account.

3 Towards a common language?

As has been explained, similarities can increasingly be discerned between the EU and ECHR legal systems with respect to directly requiring states to secure fundamental human rights to everyone within their jurisdiction, and when it comes to mediating 'European' rights and legitimate diversity. In the following, we aim to establish the key factors relevant to the appropriateness and intensity of judicial intervention in both regimes. The framework constructed can help to identify when similar approaches apply and, thus, facilitate a clearer understanding of judicial restraint across both systems.

3.1 The distinction between the systemic and the normative

In 2006, George Letsas elucidated his two concepts of the margin of appreciation where the former is 'structural' and relates to the Court's formal status as an international tribunal but the latter is 'substantive' and relates to the limitable character of Convention rights, or their 'non-absoluteness'.[44] Other authors have also endeavoured to explain the different key functions of the doctrine, but there is no clarity or consensus in academic commentary on the precise contours of each

41 *Melloni* (n. 38) para. 60 and C-617/10 *Åklageren* v. *Hans Åkerberg Fransson* (Judgment 26 February 2013), para. 29 (emphasis added).

42 This issue has been discussed extensively, see in particular the literature referred to above (n. 11).

43 Similarly, see Thomas Horsley, 'Reflections on the Role of the Court of Justice as the "Motor" of European Integration: *Legal* Limits to Judicial Lawmaking' (2013) 50 CML Rev 947. Across policy areas falling within the scope of EU law, from the internal market to policy areas as diverse as consumer protection, environmental protection, immigration and asylum, detailed harmonised rules have been enacted, see for example Case C-578/08 *Chakroun* v. *Minister van Buitenlandse Zaken* [2010] ECR I-1839 relating to Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12 (Family Reunification Directive).

44 Letsas (n. 3) 706 and 714.

of the dual conceptions of the doctrine. This is, perhaps, not surprising as it remains true that the ECtHR itself does not distinguish clearly between two functions or types of margin. Broadly speaking, however, all attempts at elaborating different conceptions of the ECtHR's margin of appreciation doctrine seek clarity through forging some kind of a linkage with the different rationales that support its different elements. These different rationales may overlap in the case law, but can in essence be divided into a systemic or structural one relating to the division of tasks between the national and international levels and a normative or substantive one that relates to the interpretative process of determining the content of rights and legitimate variety in how they are implemented and protected at national level.[45] Following Dean Spielmann's characterisation of the two functions of the doctrine, we will in the following refer to 'systemic' and 'normative' elements to describe these different types of judicial restraint.[46]

In the ECHR context, systemic elements of judicial restraint have been decisively linked to the principle of subsidiarity.[47] As subsidiarity is more commonly viewed as a structural principle which governs how authority (competence) is allocated within a political or legal system, than a normative one, which governs how authority is used once within the sphere of competence, it has only to a lesser extent been referred to in the context of explaining the normative elasticity of Convention norms.[48] Similarly, in the EU context, the doctrinal debate has been focussed on the function of the subsidiarity principle as it is set out in Article 5(3) TEU, as limiting the exercise of EU institutions of their legislative powers.[49] However, applying the principle of subsidiarity to the ECJ as an 'institutional actor', bringing it to bear beyond the EU legislature to the Court's own interpretative function, Horsley has drawn a similar distinction between the systemic and the normative in the EU context.[50] With reference *inter alia* to the division in Article 5(3) and 5(4) TEU between subsidiarity and proportionality, he argues that subsidiarity should guide the ECJ in its interpretation of EU law in areas of shared competences with the Member States, but only in so far as relates to the systemic question of 'whether or not there is a need to exercise competence at

45 R. St. J. Macdonald, 'The Margin of Appreciation', in R. St. J. Macdonald, F. Matscher and H. Petzold (eds), *The European System for the Protection of Human Rights* (Martinus Nijhoff, 1993) 84–85; Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Kluwer, 1996) 195–196; Shany (n. 3) 909–910.

46 Dean Spielmann, 'Whither the Margin of Appreciation' (2014) 67 CLP 49.

47 For example Letsas (n. 3) 721–722; Arai-Takahashi (n. 33) 90.

48 But see Carozza (n. 1) 61–63; Chapter 11, this volume and Letsas (n. 3) 722.

49 Thomas Horsley, 'Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?' (2012) 50 JCMS 267, 267.

50 Horsley (n. 49) referring to Gráinne de Búrca, 'The Principle of Subsidiarity and the Court of Justice as an Institutional Actor' (1998) 36 J. Com. Mar. St. 217. On subsidiarity as a broad principle in the EU legal order, see also Theodor Schilling, 'A New Dimension of Subsidiarity: Subsidiarity as a Rule and a Principle, (1994) Y.B. Eur. L. 255 and George A. Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States' (1994) 94 Colum. L. Rev. 332.

Union level'.[51] As regards the subsequent normative question on the nature of the Court's intervention within that competence, he argues that proportionality is more appropriate as the governing principle.[52] This, again, corresponds to how the normative element of the margin of appreciation doctrine is often seen as almost 'the other side of' the principle of proportionality at the ECtHR.[53]

Using these (emerging) distinctions between systemic and normative elements of judicial restraint as a basis for an analytical framework, we will now turn to a comparative analysis of how they appear in each system. It should be noted, however, that the existing literature is relied upon only to the extent that it is beginning to bring this fundamental distinction to light in different contexts. The details of different author's approaches are, therefore, not part and parcel of our framework. Horsley, for example, chooses single market provisions (fundamental freedoms) as the empirical example to test his normative suggestions relating to the ECJ's self-imposed regard for the principle of subsidiarity. His conclusions have only partial relevance in respect of fundamental human rights.[54] Similarly, while relying on the basic idea of two kinds of margins of appreciation under the ECHR, we will not be relying on the details of any authors' characterisation of how to understand the difference between them. Instead, our framework is simply intended to capture the basic idea that there is to some extent a difference in kind between different approaches to judicial restraint and that this is related to different (systemic and normative) underlying rationales, and to facilitate comparison between systems.[55]

3.2 Systemic restraint

Systemic elements of restraint under the ECHR reflect the formal *division of competences* between the national and international levels. The rationale lies in the special character of the international enforcement system and focuses on institutional or jurisdictional competences as governing factors for the appropriateness of judicial intervention at Strasbourg.[56] This use of the margin of appreciation doctrine (hereinafter 'the systemic margin of appreciation') is, therefore, in a sense of a

51 Horsley (n. 49) 281. Compare however Muir (n. 22) 243, who cautions that the principle of subsidiarity in the Court's work in matters of fundamental rights relates to a different understanding of the principle than that formulated in Article 5(3) TEU and that this understanding is inspired by a broader understanding of the principle. See also Gareth Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time' (2006) 43 CML Rev 61, 66, cautioning against the principle as ill-suited for the task of drawing the line between EU competences and national autonomy.

52 Horsley (n. 49) 281.

53 Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, 2002) 14, also Letsas (n. 3) 706.

54 See Horsley (n. 49) 276–281. It is suggested that it is primarily when determining the 'scope of EU law' for the purposes of application of the Charter that parallels can be drawn with Horsley's analysis, see section 3.2.

55 See also Spielmann (n. 46) 63 on the 'systemic objective of the margin of appreciation' on one hand and its normative function on the other.

56 For example Letsas (n. 3) 721–722; Shany (n. 3) 909.

constitutional nature, by indicating formal deference based on the Court's position in the system of protection and its competence within that system for particular types of assessments. In essence, therefore, the systemic margin delimits *what* the Court does and does not do, or in other words the *scope of its jurisdiction* vis-à-vis the national authorities. If the systemic margin of appreciation is applied, the Court expresses the position that it simply should not (or not fully) perform the task in question. It should be emphasised, however, that due to the wide delimitation of the Court's jurisdiction and competence under the Convention, the systemic aspect of the margin of appreciation doctrine is generally speaking a product of the Court's own judicial self-restraint. The Court, therefore, retains the power to step in when there is evidence of arbitrariness or violation of the basic principles of the rule of law.[57]

The most well-known reliance on a systemic margin of appreciation occurs in the context of cases where the Court categorically declines to undertake the tasks of a national court of third or fourth instance.[58] The 'fourth instance doctrine', which may be seen as part of the larger construct of the margin of appreciation doctrine,[59] expresses the fact that the Court does not have the competence of a higher national courts and has a subsidiary role in relation to them.[60] In cases of this type it is settled jurisprudence, therefore, that the Court's scope of review does not reach the establishment of the facts, including the admission and assessment of evidence before national courts,[61] or the assessment of whether national law has been correctly applied by domestic courts.[62]

57 For example *Maumousseau and Washington* v. *France* App. No. 39388/05 (ECtHR, 6 December 2007) para. 79: 'not its task to substitute its own assessment of the facts and the evidence for that of the Turkish courts regarding the adequacy of such a delicate process or to review the interpretation and application of the provisions of international conventions (in the present case Article 13 of the Hague Convention and Article 12 § 1 of the Convention on the Rights of the Child), other than in cases of an arbitrary decision'.

58 On the 'fourth instance doctrine', see generally European Court of Human Rights, 'Practical Guide on Admissibility Criteria' (2011) <www.dp-rs.si/fileadmin/dp.gov.si/pageuploads/RAZNO/Admissibility_guide_ENG.pdf> accessed 26 November 2014, paras 354–361.

59 Jonas Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primacy in the European Convention on Human Rights* (Martinus Nijhoff, 2009) 238 for example remarks that both reflect the same aspects of the Court's case law, but that the 'fourth instance' is the preferred term when questions of reviewing errors of fact or law emerge.

60 For example *Ringier Axel Springer Slovakia* v. *Slovakia* App. No. 41262/05 (ECtHR, 26 July 2011), para. 107; *Artemov* v. *Russia* App. No. 14945/03 (ECtHR, 3 April 2014), para. 115.

61 See for example *Shtukaturov* v. *Russia* ECHR 2008 para. 67 and *Marchenko* v. *Ukraine* App. No. 4063/04 (ECtHR, 19 February 2009), para. 48: '[T]he Court notes that the applicant's contention that he had personally not organised and not participated in the action was rejected by the domestic courts of three levels of jurisdiction following adversary proceedings, in the course of which a wide range of evidence, including witness statements, was examined. In the absence of any *prima facie* evidence of procedural unfairness, the Court is not in a position to review this factual conclusion.'

62 See for example *X* v. *Finland* ECHR 2012, para. 216 and *Fedorenko* v. *Ukraine* App. No. 25921/02 (ECtHR, 1 June 2006), para. 27: 'The Court recalls that its

In recent years, however, it seems that there has been a certain increase in reliance on the systemic aspect of the margin of appreciation in other contexts as well, as the Court has become keener on taking a clear stance on the tasks it performs and the tasks it leaves to others. One such example expressing the principle of 'limited and shared jurisdiction' is, of course, to be found in the *Bosphorus Airways* judgment of 2005.[63] The judgment therefore exhibits a limitation on the scope of review of the same kind as otherwise when the systemic margin of appreciation is applied to state action. More recently, the most noteworthy turn towards an increase in the use of the systemic margin of appreciation has occurred in situations where two competing individual interests under Convention rights collide and have to be balanced against each other.[64] While such issues were previously resolved by the Court's own assessments both as regards the *interpretation* of norms and as regards the actual balancing exercise required by their *application* to the facts of the case, and equally couched in terms of the normative margin,[65] the second *Von Hannover* judgment clearly exhibits that they are now beginning to be more clearly characterised by a systemic margin of appreciation which focuses on the *scope of the Court's review* before the Court enters into any substantive proportionality assessment of its own.[66] This development towards the increased formalisation of the margin of appreciation doctrine can be argued to have begun with the *MGN* judgment, where Article 8 and Article 10 had to be balanced against each other. After affirming that the balancing of contradictory individual interests against each other was a difficult matter where the national authorities were in principle 'better placed' than the Court to perform the relevant assessment and should, therefore, enjoy 'a broad margin of appreciation' (in the normative sense), the Court went on to construct a new element of the margin of appreciation in such contexts.[67] It established that if the national court had correctly applied the relevant Convention principles, as elaborated in its case law, and carefully weighed the individual interests in question against each other, the Strasbourg Court 'would require strong reasons to substitute its view for that of the final decision' of the national court.[68] While the Court still pronounces on the *interpretation* of the relevant Convention norms in these cases, the consequence of the new approach is a separate analytical step whereby the Court calibrates the *scope of its review* before deciding whether it also performs the *application* of Convention standards to the facts of the case. The focus of analysis has, thus, shifted from full substantive analysis of all cases towards analysing the quality of the national court's

jurisdiction to verify compliance with the domestic law is limited … and that it is not its task to take the place of the domestic courts. It is primarily for the national authorities, notably the courts, to resolve problems of the interpretation of domestic legislation.'

63 *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi* v. *Ireland* ECHR 2005-VI, para. 149. See generally the discussion of this judgment in Chapter 3, this volume.

64 See also Spielmann (n. 46) 61–65 and Chapter 9, this volume.

65 For example *Von Hannover* v. *Germany* ECHR 2004-VI.

66 *Von Hannover* v. *Germany (No. 2)* ECHR 2012.

67 *MGN* v. *United Kingdom* App. No. 39401/04 (ECtHR, 18 January 2011), para. 142.

68 Ibid. para. 150.

decision, with the implication of deferral if the national court has conscientiously applied Convention standards.[69] Like before, however, this element of the systemic margin of appreciation is a measure of self-restraint and the Court will step in if manifest deficiencies in the national court's treatment of the issues present themselves.[70]

The approach of dividing the interpretation and application of norms into two steps is of course a characteristic of the EU preliminary rulings proceedings. It is interesting to note, therefore, how this approach seems to be emerging in the recent ECtHR case law on the balancing of competing individual interests under Convention rights. Through giving Contracting States the responsibility for the application of Convention norms, a formal screen is erected behind which they will enjoy more autonomy and control over how Convention norms are implemented nationally. As a general conclusion it can therefore be said that, based on a systemic rationale, this opens up the width of the margin of appreciation when it comes to the application of Convention norms *in concreto*. At the same time, it is clear that another type of judicial restraint may be appropriate to the other step in the judicial process, the interpretation of fundamental human rights norms. Here, a normative margin may be implied as the relevant Court may still through a conscious choice adjust the level of detail with which it provides its interpretative guidance before deferring the application of norms, so interpreted, to the national level.[71]

Issues of competences and their delimitation between the EU institutions (including the ECJ) on the one hand and the EU institutions and Member States on the other overlap to a greater extent in the EU than in the ECHR system.[72] As mentioned, some of the issues dealt with under the systemic element of the margin of appreciation within the ECtHR are an integral part of preliminary rulings proceedings before the ECJ. Facts and rules of evidence are firmly within the jurisdiction of the referring court, both prior to the ECJ giving its interpretative guidance, when the national court formulates the questions and the legal issues,[73] and following the ECJ's interpretation of EU law. Using its interpretative competence, the ECJ however sometimes reformulates the questions posed or

69 See also for example *Palomo Sánchez and Others* v. *Spain* ECHR 2011; *Axel Springer AG* v. *Germany* App. No. 39954/08 (ECtHR, 7 February 2012) (note the dissenting opinion of Judge López Guerra, joined by judges Jungwiert, Jaeger, Villiger and Poalelungi); and *Von Hannover* v. *Germany (No. 2)* (n. 66).

70 See for example *Fáber* v. *Hungary* App. No. 40721/08 (ECtHR, 24 July 2012); *Ristamaki and Korvola* App. No. 66456/09 (ECtHR, 20 October 2013); and *Jalbă* v. *Romania* App. No. 43912/10 (ECtHR, 18 February 2014).

71 As pointed out by Tridimas the ECJ may in 'outcome' cases present the national court with 'an answer so specific that it leaves the referring court no margin for manoeuver and provides it with a ready-made solution to the dispute' (n. 36) 739.

72 See Sacha Prechal, Sybe de Vries and Hanneke van Eijken, 'The Principle of Attributed Powers and the "Scope of EU Law"', in Leonard Besselink, Frans Pennings and Sacha Prechal (eds), *The Eclipse of the Legality Principle in the European Union* (Wolters Kluwer, 2011) 213 and Horsley (n. 43) 391–397.

73 For example *Pfleger* (n. 28) para. 27; *Tsakouridis* (n. 37) para. 35.

modifies or explains the legal context before responding to the referring court.[74] Application of national law also falls within the jurisdiction of the national court, but again the line may be more blurred than in the ECHR context as national law implements EU law and EU law principles require its effective implementation.[75] Particularly in cases where Directives harmonise national law, it is possible to see an increased overlap between systemic deference and normative engagement, depending on the extent of positive harmonisation in each situation. While the ECJ leaves the determination of factual and legal issues to the national court, the normative engagement is reflected by the fact that the national court is still required to interpret national law in conformity with secondary EU legislation and not to rely on an interpretation of secondary EU legislation which would be in conflict with fundamental rights or general principles[76] or would deprive it of its effectiveness.[77]

Determining the 'scope of EU law' is prima facie for the ECJ. If there is doubt as to the situation coming within the scope of EU law, the ECJ may leave that determination to the national court, under an approach that may be compared to the systemic margin under the ECHR. In *Dereci and Others*, for example, it was left to the national court to determine whether residence rights of a third country national came within the scope of EU law, by virtue of his family members' status as Union citizens. The ECJ guided the referring court to examine the issue under Article 7 EUCFR if the situation was found to come within the scope of EU law, but otherwise in light of Article 8 ECHR.[78]

In the EU, judicial competence is broader than legislative competence and has been considered to coincide with the 'scope of EU law'.[79] Building on Horsley's

74 For example *Tsakouridis* (n. 37) para. 26, where the Court reiterated that it may find it necessary, in order to give the national court a useful answer, to consider provisions of EU law which the national court has not referred to. See also *O and S* v. *Maahanmuuttovirasto* (n. 37) para. 60 and Case C-279/09 *Deutsche Energiehandels-und Beratungsgesellschaft mbH* v. *Bundesrepublic Deutschland* [2010] ECR I-13849 (*DEB*), where the ECJ was asked about the compatibility with the principle of effectiveness of national rules relating to litigation costs. The ECJ recast the question as one relating to whether the contested national rules (precluding legal aid to companies) were compatible with Article 47 EUCFR.

75 Case C-176/12 *Association de médiation sociale* v. *Union locale des syndicats CGT and Others* (Judgment 15 January 2014), paras 38–40 and Opinion of Advocate General Cruz Villalón, paras 88–89.

76 See for example Case C-101/01 *Lindqvist* v. *Anklagarkamaren i Jonkoping* [2003] ECR I-12971, para. 87 (proportionality); Case C-403/09 PPU *Detiček* v. *Sgueglia* [2009] ECR I-12193, para. 34.

77 See for example Case C-571/10 *Kamberaj* v. *Instituto per l'Edilizia Sociale della Provincia Autonoma di Bolzano* (Judgment 24 April 2012), para. 78 and *Chakroun* (n. 43), para. 43.

78 Case C-256/11 *Dereci and Others* [2011] ECR I-11315, para. 72. In *Åkerberg Fransson* (n. 41) this determination was also left to the national court while the ECJ confirmed that it falls with its own jurisdiction to interpret the meaning of the applicable Charter provisions (para. 36, cf. para. 29).

79 As both Dashwood and Weatherill have suggested, national action can fall within the scope of EU law in areas where EU institutions do not have competence to legislate. See Alan Dashwood, 'The Limits of European Community Powers' (1996) 21 E.L.

suggestions, here it may be possible to identify a varying degree of systemic restraint, depending on the link with EU competences, and further, depending on the existence and exercise of legislative competences enjoyed by the EU institutions. At this stage, however, only tentative suggestions can be made. While case law to date confirms that the ECJ will not consider the mere existence of legislative competences sufficient to bring matters within the scope of EU law,[80] the exercise of competences by EU institutions may affect the ECJ's scrutiny over Member State measures.[81]

On that construction, cases that concern the implementation of EU obligations, for example through implementation of regulations and directives, provide a stronger impetus for the ECJ to engage in a normative way with the situation in the Member States than in circumstances when the matter comes within the scope of EU law by virtue of negative harmonisation, thereby engaging both general principles and fundamental human rights protection.[82] As an example of the former, showing a strong link with the exercise of EU legislative competences, is the Court's decision in *Volker und Markus Schecke*, where the ECJ engaged normatively with the Charter provisions on the protection of privacy and data protection in interpreting a regulation.[83] In *DEB*, on the other hand, the matter was brought within the scope of EU law by the delayed implementation of a directive and possible liability of the Member State. Here the ECJ left the assessment of compatibility with Article 47 EUCFR of the national rules on legal aid to the national court, albeit with clear guidance as to the outcome.[84]

From case law decided to date, it seems also possible to suggest that where the EU has legislative competences relating to fundamental human rights which are separate from Charter provisions, and where the EU legislature has exercised those competences, the Court shows less systemic restraint than when legislative competences are weaker or where a Charter provision is invoked in isolation.[85] The Directives

Rev. 113 and Stephen Weatherill, 'From Economic Rights to Fundamental Rights', in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (Hart, 2013) 17. See also Sarmiento (n. 27) 1272–1287.

80 See for example C-309/96 *Annibaldi* [1997] ECR I-7493. That solution in itself would sit uncomfortably with subsidiarity as a general principle; see generally the suggestions of AG Sharpston in Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177, paras 163–171, and for the federalising effects of such a construction, paras 172–176. The ECJ has not extended its jurisdiction in this respect in subsequent case law.

81 See also Carozza (n. 1) 55.

82 See Prechal *et al.* (n. 72) 216–217.

83 Joined Cases C-92 and 93/09 *Volker und Markus Schecke* [2010] ECR I-11063. See section 3.3.

84 *DEB* (n. 74), paras 60 and 61. Assessment of access to justice and remedies pursuant to Article 47 EUCFR starts from a position of deference to national authorities under the principle of procedural autonomy of the Member States. The ECJ nevertheless adjusts the intensity of the review depending on the circumstances at hand. See further Koen Lenaerts, 'National Remedies for Private Parties in the Light of the EU Law Principles of Equivalence and Effectiveness' (2011) 46 *Irish Jurist* 13, 16.

85 See generally Muir (n. 22) 223–225.

enacted on the basis of Article 19 TFEU, prohibiting discrimination, are illustrative of this finding. In *Sabine Hennigs*, for example, the ECJ itself undertook the balancing between measures determining pay in collective agreements and the right not to be discriminated against on grounds of age under the Framework Directive on Equal Treatment.[86] The Court declared a broad discretion for the Member States and social partners in matters of social and employment policy and found that the rationale for the rules was legitimate in principle.[87] However, the ECJ applied strict scrutiny to strike down the measure, finding that 'the principle of non-discrimination on grounds of age proclaimed in Article 21 of the Charter and given specific expression in Directive 2000/78, and more particularly Articles 2 and 6(1) of that directive, must be interpreted as precluding a measure laid down by a collective agreement such as that at issue in the main proceedings'.[88] This approach may be contrasted to the Court's approach in cases such as *Dominguez* and *O'Brien* where the ECJ showed more systemic deference in relation to labour law issues engaging Article 31(1) and Article 20 EUCFR respectively.[89] The Charter provisions were not discussed by the ECJ in these cases.

If the above suggestions are correct, we can assume that a 'weaker' link with EU legislative competences leads to more systemic restraint by the ECJ and consequently more leeway for the national court to determine the issue. On this understanding the weakest connection may be found in the so-called derogation cases, where negative harmonisation restricts Member States' regulatory authority, but leaves discretion to implement EU obligations. Fundamental human rights issues may arise in connection with derogations from EU law obligations. Generally, the balancing of Member State *interference* with EU fundamental rights (and the Charter) has not been undertaken consistently by the ECJ in this context and opinion remains divided, both descriptively and normatively, as to the appropriateness of the ECJ's review of concrete fundamental human rights balancing by national authorities in these circumstances.[90] In 2006, Kombos suggested that a

86 Case C-297/10 *Sabine Hennigs* [2011] ECR I-7965, paras 77–78. Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.

87 *Sabine Hennigs* (n. 86) para. 65, cf. Article 6(1) of the Framework Directive on Equal Treatment.

88 Ibid. para. 78. See also Case C-88/08 *Hütter* [2009] ECR I-5325, para. 50; Case C-555/07 *Kücükdeveci* [2010] ECR I-365, paras 39–40; Case C-341/08 *Petersen* [2010] ECR I-47, paras 61–62; and Case C-45/09 *Gisela Rosenbladt* [2010] ECR I-9391, para. 51.

89 Case C-282/10 *Dominguez* (Judgment 24 January 2012); Case C-393/10 *O'Brien* v. *Ministry of Justice* (Judgment 1 March 2012).

90 See generally the literature referred to above (n. 11) and, as to the appropriateness of review of human rights issues in the national context, see in particular the extra-judicial opinion of Advocate General Francis Jacobs in Francis G. Jacobs, 'Human Rights in the European Union: The Role of the Court of Justice' (2001) 26 E.L. Rev. 331. Jacobs suggested that fundamental human rights balancing within the Member States was a separate issue from balancing under the fundamental freedoms. See also Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 EuConst 375, 383; Armin von Bogdandy *et al.*, 'Reverse Solange – Protecting the

distinction could be drawn between situations where fundamental human rights coexist with the fundamental freedoms without posing a direct conflict, such as in the *ERT* – situation,[91] and situations where fundamental rights have the potential to restrict fundamental freedoms, such as in *Schmidberger* and *Omega*.[92] He argued that the ECJ leaves less systemic deference to the national court in the latter situation than in the former.[93] In derogation cases, where the issue seems better suited for the national court to determine, recent case law indicates such systemic deference – see *Pfleger* – where the ECJ left it to the national court to balance overriding reasons in the public interest against the freedom to provide services in Article 56 TFEU and concluded that the same balancing (undertaken by the national court) was applicable in respect of Articles 15 and 17 EUCFR pursuant to Article 51(2) EUCFR.[94]

Finally, when competing individual interests have to be balanced against each other, such as typically occurs in respect of intellectual property rights, protected in Article 17(2) EUCFR and other rights, such as the right to conduct a business, protected under Article 16 EUCFR, or data protection, protected under Article 8 EUCFR, the Court has left the concrete balancing to the national court. The ECJ has furthermore stressed that the Member States must, when transposing directives in these fields, 'take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order'.[95]

3.3 Normative elements of restraint

In its normative conception, the margin of appreciation doctrine at the ECtHR is used as an aid to the *interpretation* of Convention norms, and/or their *application* to the facts of the case, and functions as the logical counterpart to the Court's

Essence of Fundamental Rights against EU Member States' (2012) 49 CML Rev 489, 494–497.

91 Case C-260/89 *Elliniki Radiophonia Tiléorassi* [1991] ECR I-2925 (*ERT*).

92 Case C-112/00 *Schmidberger* [2003] ECR I-5659; Case C-36/02 *Omega Spielhallen* [2004] ECR I-9609.

93 Costas Kombos, 'Fundamental Rights and Fundamental Freedoms: A Symbiosis on the Basis of Subsidiarity' (2006) 12 EPL 433. *Schmidberger* and *Omega* (n. 92) arguably show less systemic deference than other cases of similar nature. Case C-438/05 *International Transport Workers' Federation* v. *Viking Line* [2007] ECR I-10779 shows systemic deference which may be explained by the national court being better placed to assess the concrete legal question on the relationship between the contested actions and the protection of workers in the concrete circumstances (paras 81–84). Conversely, Case C-341/05 *Laval un Partneri Ltd* v. *Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767 may be read as showing less systemic deference, because of the EU's exercise of legislative competence relating to the protection of posted workers (paras 107–110).

94 *Pfleger* (n. 28), paras 47–52 and para. 60.

95 See C-275/06 *Productores de Musica de Espana (Promusicae) ve Telefonica de Espana* [2008] ECR I-271, para. 68. See also for example Case C-70/10 *Scarlet Extended SA* v. *SABAM* [2011] ECR I-11959.

interpretative approaches.[96] Whether in the abstract terms of interpretation or the concrete terms of balancing and application, this kind of margin (hereinafter 'the normative margin of appreciation') is always linked to the determination of the content and outer limits of a Convention right. A wide normative margin, therefore, has the effect that the right in question allows states a wide range of options as to how they manage their affairs without violating that right. If it is narrow, the outer limits of the right in question are more restrictive and the scope for manoeuvre correspondingly more limited. In this conception, the margin of appreciation, therefore, has a clear *normative role* to play by governing *how* the Court performs its review, once it finds itself within the scope of review delimited by systemic elements. In terms of distinguishing between the normative and systemic margins, the key criterion is that the normative margin relates to situations where the Court performs its own substantive assessment on the merits of a case and does not defer it as such to the national level, while the standard against which the assessment is made may be either strict or lenient depending on the width of the margin.

When the ECtHR refers to the margin of appreciation in its judgments, it usually does not defer completely to the national level but engages normatively with the substance or merits of the case.[97] The normative function of the margin of appreciation has, therefore, generally been in focus in the literature. The normative margin has a distinct role to play in relation to proportionality assessments,[98] but it is also used in the context of defining the scope of protected rights in more abstract terms,[99] including when questions arise with respect to the existence of positive obligations.[100] As already mentioned, the ECtHR's jurisdiction under Article 32 ECHR extends to 'all matters concerning the *interpretation and application* of the Convention' (emphasis added). The default position, therefore, is full review and the Court relies on the normative margin as a tool for calibrating intensity with respect to both jurisdictional elements. However, as already explained in section 3.2, under the new systemic margin for competing private interests the Court may defer application and the actual balancing

96 Mahoney (n. 1).

97 A study of judgments (January 2006–March 2015, reported cases and importance level 1 on HUDOC), where a 'margin of appreciation' is expressly referred to, exhibits that in an overwhelming majority of cases, the margin of appreciation is used in its normative conception linked to the interpretation and application of rights as described in this section. Even where systemic elements of restraint are relied upon, in most cases the Court proceeds nevertheless to own normative assessments, exhibiting only partial deference.

98 For example *Maslov* v. *Austria* ECHR 2008; *Evans* v. *United Kingdom* ECHR 2007-I. See also Kratochvíl (n. 3) 329 and Greer (n. 2) 22.

99 For example *Hatton* v. *United Kingdom* ECHR 2003-VIII, paras 97–103; *Hirst* v. *United Kingdom* ECHR 2005-IX, para. 60. See also Greer (n. 2). The dividing line between the use of the margin of appreciation in relation to concrete balancing under proportionality or in relation to abstract interpretation is not clear-cut, see Kratochvíl (n. 3) 331.

100 For example *Botta* v. *Italy* ECHR 1998-I, para. 33; *Schalk and Kopf* ECHR 2010, para. 105; *Beganovć* v. *Croatia* App. No. 46423/069 (ECtHR, 26 June 2009), para. 80.

of interests under the principle of proportionality to the national courts and limit its review to checking whether they have faithfully applied Convention standards.

Given, first, the formal boundaries between the EU and Member States in interpreting fundamental human rights norms, as reflected in Article 51(1) and 53 EUCFR and, second, the importance of systemic restraint in the exercise of shared jurisdiction, the default position is different before the ECJ. In addition, the scope of review undertaken by the ECJ through the preliminary rulings proceedings under Article 267 TFEU is restricted to interpretation and leaves the task of actual application of fundamental rights norms to the national courts. When assessing Member State action, a normative margin, whether wide or narrow, will in principle only relate to the interpretation of rights. One would therefore assume that the ECJ never presented the referring court with a complete solution to the problematic issue and that all interpretation were performed behind a protective layer of a limited jurisdiction (scope of review), comparable to the decisive reliance on the systemic margin under the ECHR described in section 3.2 above. However, as Tridimas has shown, 'outcome' cases give the national court such a specific answer to a dispute, that it is possible to equate those cases with the more common full substantive review at the ECtHR.[101]

If we situate ourselves within the interpretative dialogue between the ECJ and the national courts, a resonance of the ECHR normative margin of appreciation is discernible. Within these parameters, there are instances where the ECJ performs its own assessment of potential infringements of fundamental human rights in the national context. The Court calibrates the intensity of its review within this interpretation and is therefore in the same way engaged with the determination of the outer limits of the rights protected in the EU legal order through interpretation, including balancing under Article 52(1) EUCFR.

A number of qualifications must nevertheless be considered. First, the ECJ is competent also to consider questions of validity of EU secondary law in preliminary rulings proceedings (Article 267(1)(b) TFEU). When examining the validity of secondary legislation, the ECJ tends to be more assertive than when it examines implementation by the Member States. Here, the question is whether secondary law is in breach of a Charter provision and the ECJ exercises full review.[102] When the validity of secondary legislation is challenged on fundamental human rights grounds, regardless of whether it is in preliminary rulings proceedings or direct action cases under Article 263 TFEU, the ECJ's case law falls on a scale from a wide to a narrow normative margin. In *Volker und Markus Schecke*, for example, a narrow margin seems to have been applied and equally so in

101 Tridimas (n. 36) 739. It is however important for reasons of legitimacy that the final decision is that of the national court, see Anthony Arnull, *The European Union and Its Court of Justice* (Oxford University Press, 2006) 95–96.

102 See for example *Volker und Markus Schecke* (n. 83).

Test-Achats and *Digital Rights Ireland*.[103] Sometimes an intermediate margin may be identified,[104] and in yet other policy areas, a wide margin.[105]

In cases brought before the ECJ under Article 263 TFEU, the Court's assessment does not directly concern the actions or discretion of the Member States. It nevertheless provides a basis for the guidance given to them, and hence for the (subsequent) concrete assessment by the national courts. The ECJ tends to refer to the case law of the ECtHR in its assessment, including also the criteria used by the ECtHR in balancing of competing interests and the margin of appreciation granted as seen for example in *European Parliament* v. *Council*.[106]

The second qualification flows from the specificities of positive harmonisation. The EU institutions balance rights and legitimate Member State interests, as well as conflicting rights, when enacting secondary legislation.[107] Where the ECJ engages normatively with the implementation of regulations and directives in the national context, it takes into account the aim and scope of the harmonised rules, in addition to interpreting the provisions in light of Charter rights. The normative margin accorded to Member States by the ECJ may be wide or narrow, but the assessment and the scope of the margin is invariably also affected by the terms of the secondary legislation (the 'margin for the margin').

Case law relating to the protection of property rights, now expressed in Article 17(1) EUCFR, provides examples of a wide normative margin for both EU institutions and Member States, acting as agents of the EU. A wide margin is reflected in the

103 Case C-236/09 *Test-Achats ASBL and Others* [2011] ECR I-773, para. 32 (maintaining sex as a factor in determining insurance premiums found incompatible with Articles 20 and 21 EUCFR on equal treatment, and therefore invalid); Case C-293/12 *Digital Rights Ireland* (Judgment 8 April 2014), para. 69 (EU institutions found to have exceeded their discretion under Articles 7, 8 and 52(1) EUCFR when enacting Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L 105/54).

104 For example Case C-283/11 *Sky Österreich GmbH* (Judgment 22 January 2013) (a relatively broad margin for the institutions to determine appropriate restrictions on the right to property under Article 17 EUCFR and the freedom to conduct business under Article 16 EUCFR, which had to be balanced against the freedom of expression under Article 11 EUCFR).

105 For example Case C-195/12 *Industrie du bois de Vjelsam & Cie* (Judgment 26 September 2013) (a wide margin to determine appropriate energy production factors with reference to Articles 20 and 21 EUCFR on equal treatment).

106 Case C-540/03 *European Parliament* v. *Council* [2006] ECR I-576. The Directive's provision concerning integration requirements for children over 12 years old were challenged. The ECJ found that the limited margin granted to the Member States in the Directive was in conformity with ECHR standards, and that the relevant provision of the Directive should consequently not be annulled.

107 See further Clemens Ladenburger, 'European Union Institutional Report', in Julia Laffranque (ed.), *The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions* (Reports of the XXC FIDE Congress Tallinn, 2012) 192–200.

ECJ's formulation in pre-Charter case law in the following way: restrictions on the exercise of property rights must pursue objectives of general interest and not constitute 'a disproportionate and intolerable interference impairing the very substance of [the] rights'.[108] Harmonisation may, however, narrow the normative margin, such as where German rules on protection of business secrets were found incompatible with harmonised rules on environmental protection. The harmonised rules required the disclosure of the name of the waste producer, thereby narrowing the normative margin accorded to the national authorities.[109] Protection of intellectual property rights, in Article 17(2) EUCFR is, as mentioned above, frequently approached under systemic restraint, where the ECJ leaves it to the national authorities to find a fair balance between conflicting interests, within the margin left to them in the respective Directives.[110] However, the ECJ increasingly engages in a normative assessment in its guidance to the national court and does then vary the intensity of its review depending on the legal and factual circumstances.[111]

Protection of personal data in Article 8 EUCFR is another area characterised by detailed positive harmonisation and legislative balancing of conflicting rights, subject to which the national courts assess the fair balance in the concrete case. Respect for private life, protected in Article 7 EUCFR as distinct from protection of personal data, seems also to fall within the category of cases showing prima facie systemic restraint. The EU has limited competences in matters relating to privacy, resulting in actions of the Member States being brought within the scope of EU law as derogations from the fundamental freedoms. Case law relating to regulation of names, where the matter falls within the scope of EU law by virtue of Article 21 TFEU, shows however the ECJ's normative engagement, establishing an intermediary to a wide normative margin.[112] In *Grunkin-Paul*, for example, German authorities did not recognise the name given to a child in Denmark. The ECJ

108 Joined Cases C-20/00 and 64/00 *Booker Aquacultur Ltd* [2003] ECR I-7411, paras 68 and 92 and Case C-154/04 *Alliance for Natural Health* [2005] ECR I-6451, para. 126. Balancing conflicting interests, also qualifying as fundamental rights, such as protection of human health, may provide additional grounds for a wide margin – see *Alliance for Natural Health* (para. 129), and in respect of the right to conduct a business (Articles 15 and 16 EUCFR), Case C-544/10 *Deutsches Weintor eG* (Judgment 6 September 2012).

109 Case C-1/11 *Interseroh Scrap and Metal Trading GmbH* (Judgment 29 March 2012).

110 See text to (n. 97).

111 For example Case C-70/10 *Scarlet Extended SA* v. *SABAM* [2011] ECR I-11959, where the ECJ found that a fair balance had not been struck between intellectual property rights and the right to conduct a business, and Case C-314/12 *UPC Telekabel Wien GmbH* (Judgment 27 March 2014) where the Court considered national rules on injunctions and found that it did not seem that in the circumstances the injunction infringed the very substance of the freedom of an internet service provider to conduct a business.

112 Article 21 TFEU guarantees Union citizens the right of free movement and residence within the territory of the Union, subject to limitations and conditions set out in the treaties.

found a disproportionate interference with the right of free movement in Article 21 TFEU, interpreted in light of the Charter, but indicated a wider margin in respect of public policy considerations, had such considerations been brought up as a justification for infringement of the right to privacy.[113] In *Runevič-Vardyn* and *Sayn Wittgenstein*, the ECJ, within an approach characterised mainly by systemic restraint, acknowledged a wide normative margin to the Member State to place restrictions on names on the grounds of public policy considerations; the protection of the national language and prohibition of using noble titles in names, respectively.[114]

The right to respect for family life, now protected by Article 7 EUCFR, has historically been subject to a narrow margin for the national authorities in the indirect judicial review performed by the ECJ. Since *Carpenter*, where the ECJ famously established that when applying national immigration law in the context of the freedom to provide services, the UK authorities had not achieved a fair balance between the right to respect of family life and the maintenance of public order and public safety, the ECJ has consistently applied heightened scrutiny when family life is at issue as well as when the interests of children are at stake.[115]

Similar considerations seem generally to be at play in the EU context in these cases as under the ECtHR, when it comes to defining the width of the margin, or the intensity of judicial scrutiny, where important national interest relating to public policy and public security may lead to a wide normative margin for the national authorities.[116] Important individual interests may, however, provide countervailing considerations.[117] These considerations, and the balance sought by the EU institutions and Member States, have been codified in secondary law,

113 Case C-353/06 *Grunkin-Paul* [2008] ECR I-7639, para. 38. Advocate General (Sharpston) recognised the necessity for deference in para. 41 of her Opinion: 'This is clearly an area in which it behoves the court to tread softly, and with care. But just because it must tread softly, that does not mean that it must fear to tread at all.'

114 Case C-391/09 *Runevič-Vardyn and Wardyn* [2011] ECR I-3787 (protection of official language); Case C-208/09 *Sayn-Wittgenstein* v. *Landeshauptmann von Mann* [2010] ECR I-13693 (constitutional identity).

115 Case C-60/00 *Mary Carpenter* v. *Secretary of State for the Home Department* [2002] ECR I-6249, para. 43. See also for example Case C-200/02 *Zhu and Chen* v. *Secretary of State for the Home Department* [2004] ECR I-9925, paras 33 and 45 on financial conditions for the right of residence and the residence right of the child's parent respectively and Case C-127/08 *Metock and Others* [2008] ECR I-6241 (paras 70–74) on the entry of family members being determined by EU law, as interpreted by the ECJ, with only a residual margin applicable in individual cases.

116 *Tsakouridis* (n. 37) (wide margin in relation to determining when criminal activity (drug dealing) constitutes a threat to the fundamental interests of society, justifying a restriction on free movement and residence); Case C-348/09 *PI* (Judgment 22 May 2012) (wide margin in relation to restrictions on free movement and residence due to committing a heinous crime).

117 See the ECJ's guidance to the national court in both *Tsakouridis* (n. 37) para. 53 and *PI* (n. 116) para. 32. See also Case C-249/11 *Byankov* (Judgment 4 October 2012), para. 47.

currently Directive 2004/38/EC.[118] Heightened scrutiny in cases relating to the protection of family life often goes hand in hand with the strengthening of the status of Union citizenship.[119] That is not always the case, however.[120] Recent case law on the interpretation of the Family Reunification Directive also shows the ECJ leaving a narrow normative margin to the national authorities when interpreting the Directive in light of Article 7 EUCFR.[121] Again, the Directive itself, as interpreted by the ECJ, confines the margin left to the Member States.

Finally, cases relating to the right to asylum in Article 18 EUCFR provide examples of systemic and normative restraint alike. While the ECJ has determined broadly the 'scope of EU law' and consequently examined issues relating to Member States' decisions relating to applications for asylum under the Charter,[122] the ECJ nevertheless respects the boundaries set by the relevant harmonisation measures. With the exception of cases relating to reception conditions for asylum seekers, where substantive guidance and a narrow normative margin may be identified,[123] most cases concern the division of responsibility between Member States under the Dublin II Regulation.[124] Here the Court refers to the Member States' obligations to exercise their discretion with due respect for the objectives and effectiveness of the Common European Asylum System, only engaging with a normative assessment under the Charter if and when particular core rights are at issue in that context.[125]

118 Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77 (Citizens' Rights Directive).

119 Such as in *Carpenter* (n. 115) where, as commentators have pointed out, EU law guaranteed better rights than could have been established under ECHR in a comparable case, see Helen Toner, *Partnership Rights, Free Movement and EU Law* (Hart Publishing, 2004) 158–161.

120 See for example Case C-451/11 *Dülger* (Judgment 19 July 2012), paras 52–53. In *Dülger*, a third-country national spouse of a Turkish national was refused residence in Germany. The ECJ found that limitation of 'family members' to Turkish nationals would undermine the objective of the provision of Decision 1/80 and would be contrary to the right to respect for private and family life under Article 7 EUCFR.

121 See for example *O and S* v. *Maahanmuuttovirasto* (n. 37) and *Chakroun* (n. 43).

122 Case C-411/10 *NS* [2011] ECR I-13905, para. 69.

123 Joined Cases C-199–201/12 *X, Y and Z* (Judgment 7 November 2013) (sexual orientation and fear of persecution); Joined Cases C-71 and 91/11 *Germany* v. *Y and Z* (Judgment 5 September 2012) (freedom of religion and fear of persecution) and Case C-465/07 *Elgafaji* [2009] ECR I-921 (individual threat in situations of armed conflict). The ECJ interpreted the provisions of Directive 2004/83/EC (on the minimum standards for the qualification and status of third-country nationals or stateless persons as refugees [2004] OJ L 304/12) in light of the Charter; however, provisions of the Directive set out in detail the obligations of the Member States in these cases.

124 Regulation (EC) No. 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] OJ L50/1.

125 See for example Case C-245/11 *K* v. *Bundesasylamt* (Judgment 6 November 2012) (family life) and Case C-648/11 *MA and Others* v. *Secretary of State for the Home Department* (Judgment 6 June 2013) (unaccompanied minors).

3.4 Overlap between systemic and normative elements of restraint

The dividing line between the two forms of judicial restraint is by no means clear-cut and the widest normative margins indicating lenient review may in fact be hard to distinguish from the systemic margin where the relevant court defers altogether on certain elements of assessment. This is particularly so in the ECHR context. Sometimes, of course, it is clear that the relevant court relies on systemic rationales to exclude certain issues from the scope of its review, while proceeding to applying the normative margin to those elements that still remain within that scope. But the fact that both courts may in certain circumstances cross the jurisdictional boundaries otherwise dictated by systemic elements complicates the picture. Thus, the ECtHR generally retains the power to abandon judicial restraint and perform its own assessments if 'manifest deficiencies' present themselves in the conduct of the national (or EU) authorities otherwise deferred to.[126] And in order to give a 'useful answer', the ECJ may for its part reformulate the questions or legal context posited by the referring court.[127]

It is also possible that the use of judicial restraint ranges from the systemic to the normative in respect of the same or similar issues, notably in cases where the division into interpretation of norms and their concrete application is at issue. This results in a picture of different shades of grey as opposed to bright-line contrasts.[128] In cases involving competing individual interests under the ECHR, it is of course quite possible that calibration of the scope of review under the systemic margin renders the outcome that there is in fact a 'strong reason' to substitute the Court's full review (interpretation *and* application/balancing) for that of the national courts.[129] But the Court otherwise also often seems to couple deference to national courts with some normative commentary of its own, thus combining deference and own assessments.[130] In such instances, the invocation of the systemic rationale nevertheless creates a protective layer indicating a relatively large scope for manoeuvre before any Strasbourg reassessment takes place.

126 The aptly descriptive phrase 'manifest deficiencies' is taken from *Bosphorus Airways* v. *Ireland* (n. 63), para. 156, but applies across the board in cases involving the systemic margin of appreciation.

127 For example *Tsakouridis* (n. 37), para. 26.

128 *Animal Defenders* v. *United Kingdom* ECHR 2013, is a case in point from the ECHR context. While attaching 'considerable weight to [the] exacting and pertinent reviews, by both parliamentary and judicial bodies, of the complex regulatory regime governing political broadcasting in the United Kingdom' (para. 116), the Court also performed a detailed own review of the measure in question (paras 117–124). It is, thus, difficult to distinguish whether the systemic or the normative margin carried the day. Dissenting, Judges Ziemele, Sajó, Kalaydjieva, Vučinić and de Gaetano opined that the Court did not perform 'full analysis' and left too wide a margin to the state. In the EU context see, *Familiapress* (n. 36) and the 'outcome' cases discussed by Eeckhout (n. 9).

129 For example *Fáber* v. *Hungary* (n. 70).

130 For example *Axel Springer AG* v. *Germany* (n. 69); compare paras 98–100 and 101; *Verlagsgruppe News GMBH and Bobi* v. *Austria* App. No. 59631/09 (ECtHR, 4 December 2012), compare paras 82, 83 and 86.

Similarly, as we have seen, the ECJ frequently crosses the lines between 'guidance' and 'outcome' and even abandons the systemic deference implied by the preliminary reference procedure to give interpretative guidance that extends to the national courts' final assessments relating to fact and the application of law. In *DEB* the ECJ left the concrete assessment to the national court, relying in that sense on systemic restraint, but in its engagement with the scope of Article 47 EUCFR, the Court drew on criteria established under ECtHR case law on Article 6 ECHR, guiding the national court in its balancing under proportionality.[131] Case law on Article 7 EUCFR shows the same tendency, in particular where Union citizenship is at stake,[132] as does case law relating to intellectual property rights under Article 17(2) EUCFR. The demarcation between the systemic and normative is not always clear under the Framework Directive on Equal Treatment, where the ECJ has sometimes relied on systemic deference,[133] but sometimes engaged normatively with the balancing of interest.[134] In cases on the right to asylum, the competence is explicitly left with the Member States to grant asylum on humanitarian or other discretionary grounds, but in certain cases the ECJ may step in to enforce a particular Charter right within that context.[135]

In sum, it is clear that the two types of judicial restraint may overlap to varying degrees in both systems. The difference between the two is, nevertheless, important as the two approaches have different implications in terms of the extent to which the relevant court engages normatively with setting out the parameters of 'European rights'. In the final analysis, an overall assessment of the court's reasoning and the outcome of the judgment will be required to ascertain which of the two approaches (normative engagement or systemic deference), or which kinds of combinations between them, were applied and to which parts of the case as a whole.

4 Conclusions

The jurisdiction of the two courts vis-à-vis the national authorities, and their scope of review of national law are prima facie different. Systemic elements relating to the composite EU legal order, most notably the preliminary rulings proceedings, create a protective layer, which formally restricts judicial intervention by the ECJ when it comes to the implementation and application of EU law, including Charter provisions, in the national context. In contrast, the ECtHR's jurisdiction reaches all matters concerning the interpretation *and* application of Convention norms (Article 32 ECHR). This will generate different presentation of core

131 *DEB* (n. 74) para. 61.

132 As to the ECJ detecting arbitrariness or inconsistency in the national context, see in particular *Grunkin-Paul* (n. 113), para. 37 and *Runevič-Vardyn* (n. 114), para. 92.

133 See in particular Case C-411/05 *Palacios de la Villa* [2007] ECR I-8531, paras 71–72 (for the competent authorities to find the right balance) and Case C-341/08 *Petersen* [2010] ECR I-47, para. 64. See also Case C-476/11 *HK Denmark* (Judgment 26 September 2013), paras 64–65.

134 *Sabine Hennigs* (n. 86) and (n. 88).

135 See text to (n. 126).

systemic issues and possibly also diverging case law. At the same time, however, both courts recognise that the establishment of facts and the interpretation of national law are in principle within the mandate of the national courts. Importantly also, both courts exercise a certain control over defining their jurisdiction and the use it has been put to exhibits clear tendencies towards a closer resemblance between the two systems. The ECJ has, thus, in some instances adopted approaches that resemble the ECtHR's full jurisdiction under Article 32 ECHR and the ECtHR has sometimes opted for a self-imposed systemic restraint resembling the interpretative dialogue of the preliminary rulings proceedings under Article 267 TFEU.[136]

When it comes to normative elements of restraint, relating to the content and outer limits of rights within the substantive jurisdiction of each court, similarities are even more pronounced, subject to the specific characteristics of the composite legal order of the EU and the scope and nature of positive harmonisation. In light of how the two systems are to a certain extent normatively integrated, with ECHR provisions explicitly mentioned as normatively relevant for the interpretation of Charter rights in Article 52(3) EUCFR, it seems quite possible that the case law might develop towards a clearer common language for when and how a margin of appreciation or judicial restraint in the normative sense is appropriate and for how to calibrate its width in light of various influencing factors.

For a clearer understanding of the dynamics of human rights adjudication across Europe, it is important to distinguish between systemic and normative elements influencing the intensity of judicial intervention. As has been shown, there are different underlying rationales and different consequences in practice. In the 'limited and shared' jurisdiction emerging in the integrated system of fundamental human rights protection in Europe, it will become increasingly important that the courts are able to explain the reasons behind any dissimilarity in their case law. While we have identified commonalities in approaches and trends towards increased affinity between systems, we do not at this point make any normative claims as to how approaches to judicial restraint should evolve in each system. What we do claim, however, is that the development of a common language is an important step in order to navigate the similarities *and* differences between the systems. It would be helpful, therefore, if both courts developed a clearer approach to the calibration of the scope and intensity of judicial intervention, while making the difference between systemic and normative elements of restraint more explicit in their reasoning.

136 Further exhibiting the trend towards closer resemblance between systems, Protocol 16 to the ECHR will also, once it takes effect, construct an advisory opinion procedure under the Convention where the jurisdiction of the Court will be expressly confined to interpretative dialogue, see Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms (adopted 2 October 2013) CETS No. 214.