

# The Status of Human Rights Protection in Europe: It's Complicated

Jen Neller, in conversation with Dr Sonia  
Morano-Foadi\*

The 2015 Conservative election manifesto and debates about Brexit have brought the status of the European human rights institutions and the UK's relationship with them to the front pages; but within the surrounding debates, confusion has abounded. This is understandable, not only because of the multitude of acronyms and institutions with the word 'European' in their title, but also because the relationship between these institutions and their relationships with their Member States is convoluted and continually evolving.

Exemplifying this, the long-term project of harmonising human rights protections across the region has undergone considerable turbulence in recent years. The entry into force of the Lisbon Treaty in 2009 paved the way for the European Union to accede to the European Convention of Human Rights, which would result in the formal coordination of the two regional human rights systems. However, after years of painstaking negotiations, the Court of Justice of the European Union published Opinion 2/13 on 18 December 2014, finding that the Draft Accession Agreement as it stood was not compatible with the treaties of European Union law.<sup>1</sup> This brought the entire process to a standstill. It is within this context that our discussion of European human rights protections takes place.

In the first part of this article, I provide a brief overview of the historical development of the two European human rights regimes.

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<sup>1</sup> Opinion 2/13 of the Court (Full Court) of 18 December 2014  
ECLI:EU:C:2014:2454.

The relationship between them is then explored, using the case of *Bosphorus v Ireland* to illustrate the potential for disagreement and tension between the two courts.<sup>2</sup> In this case on decisions of the Irish High Court and the Irish Supreme Court in the 1990s, the European Court of Justice (ECJ, now the Court of Justice of the European Union, CJEU) and the European Court of Human Rights (ECtHR) reached contrary conclusions as to the human rights responsibilities of EU Member States when they implement European Community law. I then outline the accession process so far and the challenges presented by Opinion 2/13, explaining how the CJEU's unwavering demand that the autonomy of EU law be upheld in full has presented a substantial stumbling block.

In the final part of the article, I put some questions about the status and future development of human rights protections in Europe to Dr Sonia Morano-Foadi, a Reader in Law at Oxford Brookes University.<sup>3</sup> In April 2016, Dr Morano-Foadi and her colleague Dr Stelios Andreadakis were among a select collection of experts who, over a year after Opinion 2/13, presented their views to the European Parliament on how the accession project might best be resumed and taken forward.<sup>4</sup> The recommendations that they presented were based on an ongoing research project that commenced in 2010 and involved interviewing judges from both of the European courts on the accession process and the future of human rights protections in the region.<sup>5</sup>

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<sup>2</sup> *Bosphorus Hava Yollari Turizm v Ireland* App no 45036/98 (2006) 42 EHRR 1.

<sup>3</sup> The conversation published here occurred in an exchange of emails in May 2016.

<sup>4</sup> Sonia Morano-Foadi and Stelios Andreadakis, 'The EU Accession to the ECHR after Opinion 2/13: Reflections, Solutions and the Way Forward' (20 April 2016) <<https://polcms.secure.europarl.europa.eu/cmsdata/upload/2d9afaae-36ec-49ee-973b-6c3648c0dfd7/EP%20Hearing%20Contribution%20MoranoFoadi%20Andreadakis%20April%202016.pdf>> accessed 22 July 2016. A full recording of the meeting is available from European Parliament News, 'Committee on Constitutional Affairs - meeting 20/04/2016 (AM)' <[http://www.europarl.europa.eu/news/en/news-room/20160414IPR23145/Committee-on-Constitutional-Affairs-meeting-20042016-\(AM\)](http://www.europarl.europa.eu/news/en/news-room/20160414IPR23145/Committee-on-Constitutional-Affairs-meeting-20042016-(AM))> accessed 22 July 2016.

<sup>5</sup> British Academy, Small Research Grants scheme, SG 2011 Round, Reference number: SG110947. A number of additional university grants were awarded to the research team from 2010 to 2016 to continue topical research.

## The Accidental Development of Parallel Systems

The Council of Europe (CoE) and the European Union (EU) are entirely different organisations: they were created at different times and have different charters and mandates, which are presided over by different courts. However, as they have evolved and expanded, the area of overlap between them has increased, especially with regards to human rights and fundamental freedoms.

Human rights were at the heart of the CoE from its inception in 1949,<sup>6</sup> which was the culmination of 10 countries seeking closer ties with one another shortly after the Second World War. A year later, Member States adopted the European Convention on Human Rights (ECHR), a legally binding document which was to be presided over by the European Court of Human Rights (ECtHR). Today, the 47 Member States of the CoE are bound by the ECHR and the judgments of the ECtHR, as well as any additional ECHR protocols and CoE conventions that they have ratified.<sup>7</sup>

In contrast, economic integration has been the cornerstone of the EU's establishment and evolution. The roots of the union lie in the formation of the European Coal and Steel Community between six countries<sup>8</sup> in 1952, which also established the European Court of Justice (ECJ, now known as the Court of Justice of the European Union, CJEU). The European Economic Community (EEC) was then born in 1958, which the UK joined in 1971. In 1993, the European single market was achieved and the EEC transformed into the European Union. Due to the focus on economic integration, the status of human rights within the EU has emerged in a more ad hoc manner than in the CoE, and has grown up as the character of EU

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<sup>6</sup> Article 3 of the Statute of the Council of Europe states that 'Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms'.

<sup>7</sup> Other CoE conventions include: the Convention on Action against Trafficking in Human Beings; the Framework Convention for the Protection of National Minorities; the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; and the European Social Charter.

<sup>8</sup> France, Germany, Italy, Belgium, Luxembourg and the Netherlands.

law has developed. In particular, the centrality of human rights is the result not only of treaty developments, but also of ECJ rulings.

With the ECJ's assertion of the primacy of Community law in 1964,<sup>9</sup> national constitutional protections of fundamental rights became at risk of being overruled by a body that provided no substantial human rights guarantees. For many years, this tension was assuaged — but not resolved — by references by the ECJ and within EC treaties to the ECHR and the rulings of its court as a common standard. Fundamental rights first entered into the EEC treaties through the preamble of the Single European Act in 1986, and were later included more substantially in the Treaty of Amsterdam in 1997, facilitating greater constitutional authority for the EU. In case law, the ECJ has explicitly accorded 'special significance' to the ECHR since the 1991 case of *ERT v DEP*.<sup>10</sup>

In 2000, the Charter of Fundamental Rights of the European Union (the Charter) consolidated the rights established in the EEC/EU treaties, along with other rights drawn explicitly from the constitutional traditions of Member States, the CJEU, the ECHR and other international treaties. Finally, the Treaty of Lisbon of 2009 conferred legally binding status on the Charter, and fundamental rights thus became fully incorporated within and central to the EU. However, it should be noted that the scope of the Charter is narrower than that of the ECHR, as it applies only to actions taken by the EU and its Member States in the enactment or fulfilment of EU legal obligations.

It is therefore more through necessity than design that the EU has become a human rights body. Its corpus of human rights and fundamental freedoms has developed at every stage alongside and in confluence with the ECHR, with harmony actively pursued by both European courts through dialogue and reference to each other's decisions.<sup>11</sup> Indeed, former president of the CJEU Vassilios Skouris

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<sup>9</sup> Case 6/64, *Flaminio Costa v Ente Nazionale per l'Energia Elettrica (ENEL)* [1964] ECR 1141.

<sup>10</sup> Case C-260/89, *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* [1991] ECR I-02925.

<sup>11</sup> See Sonia Morano-Foadi and Stelios Andreadakis, 'A Report on the Protection of Fundamental Rights in Europe: A Reflection on the Relationship between the

has described the ECHR as the ‘beacon that guides’ the EU in its mission to protect human rights.<sup>12</sup>

However, the existence of these parallel systems has presented two main difficulties: firstly, the fact that EU law has not been legally bound by the ECHR means that conflicting requirements could be placed on Member States, whereby they would have to choose between breaching their obligations under EU law or violating the ECHR. Secondly, there has always been a tension between the EU’s deference to the ECHR as an external source of authority on human rights and its determination that EU law should be wholly autonomous. The tension between integration and autonomy was at the heart of the ECtHR’s ruling in the case of *Bosphorus*, which is discussed in the next section, and continues to dominate the struggle for accession, which is discussed thereafter.

### Existing Tensions and the Case for Formal Integration

In 1990, in the case of *M & Co v Federal Republic of Germany*, the ECtHR established the foundations for a doctrine of ‘equivalent protection’, whereby a Member State that has transferred certain powers to an international organisation is assumed to be acting in adherence with the ECHR so long as that organisation is considered to provide comparable protection.<sup>13</sup> Such protection was deemed to be provided under EEC law due to the oversight of the ECJ.<sup>14</sup> In *Bosphorus* the doctrine’s application to the EU was confirmed, but it was ruled that the presumption is rebuttable on a case-by-case basis.<sup>15</sup> Member States therefore remain at risk of prosecution for

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Court of Justice of the European Union and the European Court of Human Rights Post Lisbon’ (July 2014) <<https://dm.coe.int/CED20140017597>> accessed 22 July 2016, 36.

<sup>12</sup> Council of Europe, ‘Dialogue between Judges’ (2009) <[http://echr.coe.int/Documents/Dialogue\\_2009\\_ENG.pdf](http://echr.coe.int/Documents/Dialogue_2009_ENG.pdf)> accessed 25 September 2016.

<sup>13</sup> App no 13258/87 (1990) 64 DR 138.

<sup>14</sup> In *Matthews v United Kingdom* (1999) 28 EHRR 361, however, the ECtHR saw fit to review an EC law on the basis that it was beyond the mandate of the ECJ.

<sup>15</sup> (n 2). See also C Costello, ‘The Bosphorous Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe’, 6(1) *HRL*

breaches of the ECHR that are directly and unavoidably caused by their implementation of EU law.

The *Bosphorus* decision provides a clear example of the tensions that can emerge between overlapping rights regimes. The case concerned a decision by the Irish Ministry of Transportation to impound a plane that had been leased by the applicant company. The applicant company, based in Turkey, had leased the plane from a company in the then Federal Republic of Yugoslavia (FRY). In 1993 the United Nations Security Council adopted Resolution 820 (1993), which provided that States should impound, *inter alia*, all aircraft in their territories ‘in which a majority or controlling interest is held by a person or undertaking in or operating from the Federal Republic of Yugoslavia’, in response to the extreme human rights violations that were being perpetrated in the area. That resolution was implemented by EU Regulation (EEC) no. 990/93, which came into force on 28 April 1993.

The tension in this case came when the European Court of Justice and the European Court of Human Rights formed differing opinions on the same issues and facts. While the case was originally heard in the Irish High Court, the Irish Supreme Court referred the matter to the European Court of Justice. The ECJ found that Ireland had correctly implemented the EU Regulation relating to sanctions and that the decision to impound the plane was not disproportionate. Specifically, the European Court of Justice formed the opinion that:

As compared with an objective of general interest so fundamental for the international community, which consists in putting an end to the state of war in the region and to the massive violations of human rights and humanitarian international law in the Republic of Bosnia-Herzegovina, the impounding of the aircraft in question, which is owned by an undertaking based in or operating from the Federal Republic of Yugoslavia, cannot be regarded as inappropriate or disproportionate.<sup>16</sup>

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*Rev* (2006) 87; J Callewaert, ‘The European Convention on Human Rights and European Union Law: A long way to harmony’ (2009) 6 *EHRL Rev* 768, 773.

<sup>16</sup> Case C-84/95 *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport, Energy and Communications and others* [1996] ECR I-03953, para 26.

The applicant company then brought the case to the European Court of Human Rights, which ruled in the company's favour in June 2005. Throughout the entirety of the legal proceedings the applicant company maintained that there was no breach of sanctions: the applicant company was based in Turkey, had leased the plane prior to the sanctions coming into effect, had full rights of the use of the plane and was even depositing the lease payments to the Yugoslavian company into a frozen bank account in Turkey. The ECtHR confirmed that the applicant company had a right to conduct its business and had suffered significant financial losses due to the impounding of the plane.

In the example of *Bosphorus*, then, the two courts came to different conclusions, even though they agreed on the facts of the case and both relied on well-established human rights principles in formulating their decisions. The opposing results were therefore due to differing *interpretations* of the issues at stake. While the ECJ prioritised the importance of maintaining a sanctions regime that was designed to impede a brutal civil war, the ECtHR focused on the disproportionate effects that the sanctions regime had inflicted on an innocent third party (the applicant company).

To overcome this impasse, the ECtHR chose to invoke the doctrine of equivalent protection (which is now widely referred to as the 'Bosphorus presumption') in order to recognise that the state had acted in accordance with a legitimate general interest in its implementation of EU law. However, the presumption does not completely absolve EU Member States of their ECHR responsibilities, as it is dependent on the provision of adequate protection and is rebuttable in cases of 'manifest deficiency'.<sup>17</sup> Thus,

If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. However, any such presumption can be rebutted if, in the

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<sup>17</sup> See *Matthews* (n 14).

circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient.<sup>18</sup>

What the ECtHR created, then, was a potential justification for EU Member States whose actions might otherwise have been found to have breached the ECHR. This was controversial due to the ‘two-tier’ human rights system that this was deemed to create, where the ECtHR would apply different standards to EU and non-EU Member States. This issue was assuaged by the prospect that the presumption could be rebutted, but this perpetuated the risk that EU Member States could face contradictory obligations, which would cause the credibility of both the CJEU and the ECtHR as human rights authorities to be compromised.<sup>19</sup>

Article 6(2) of the Treaty of Lisbon sought to resolve this issue by stating that the EU shall accede to the ECHR, as this would ‘complete’ the coverage of ECHR protection and thereby release Member States from the possibility of conflicting obligations. Here, however, a further challenge arises through the concern that all parties to the ECHR should be treated equally. This would most likely require the presumption of equivalent protection – even as modified by *Bosphorus* – to be revoked in order to allow for meaningful judicial review by the ECtHR.<sup>20</sup> Almost seven years later, though, the question of how to accede while meeting the requirements of both the EU and the CoE institutions remains an unsolved riddle.

### The Current Situation and the Path Ahead

From the outset, it was recognised that the accession of the EU to the ECHR was both technically and politically ambitious: technically because of the intricacies of EU law, and politically because of the number of national and international institutions whose input and agreement would be required to achieve such a monumental recalibration of the European legal order. In 2012, Protocol 8 to the

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<sup>18</sup> *Bosphorus* (n 2) para 156.

<sup>19</sup> Costello (n 15) 88-9.

<sup>20</sup> Morano-Foadi and Andreadakis (n 11) 53-5.



Treaty on the Functioning of the European Union established some key prerequisites to the Article 6(2) declaration that the EU shall accede to the ECHR. In particular, Protocol 8 specifies that an accession agreement should ‘make provision for preserving the specific characteristics of the Union and Union law’ and should ‘not affect the competences of the Union or the powers of its institutions’.<sup>21</sup>

Subsequently, the Draft Accession Agreement (DAA) is one of several documents seeking to establish the terms and conditions by which the EU would accede to the ECHR, which have been compiled by negotiators from the EU and from each of the CoE’s 47 Member States.<sup>22</sup> The DAA aims to provide for the Protocol 8 prerequisites and to resolve several complex issues, including: ensuring that the EU will be treated on an equal footing to other contracting parties; determining the participation of the EU in ECHR institutions and budgets; safeguarding the exclusive authority of the CJEU to interpret EU law and resolve disputes within its domain; ensuring that the division of competences between the EU and its member states is not affected by accession; and ensuring that the position of member states under the ECHR (with respect to any reservations they may have made) is not affected by the accession.

In June 2014, Advocate General Kokott from the CJEU delivered an Opinion on the DAA in which she highlighted several difficulties but concluded overall that the DAA was compatible with EU law.<sup>23</sup> Therefore, the publication of the CJEU’s contrasting finding six months later was a considerable shock to all those involved. Whereas Kokott had identified specific areas where some further provisions were required to fully safeguard the autonomy of EU law and to resolve certain procedural questions, the CJEU’s Opinion 2/13 was less positive in tone. Opinion 2/13 picked up on

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<sup>21</sup> Articles 1 and 2 of Protocol No. 8 Relating to Article 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.

<sup>22</sup> ‘Draft Revised Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms’ (Strasbourg, 10 June 2013) <[https://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting\\_reports/47\\_1\(2013\)008rev2\\_EN.pdp](https://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1(2013)008rev2_EN.pdp)> accessed 22 July 2016.

<sup>23</sup> View of AG Kokott relating to Opinion 2/13, EU:C:2014:2475.

several of the points noted by Kokott but found them to be more substantial obstacles, as well as adding some new objections.<sup>24</sup> The main areas in which non-compliance was found by the CJEU pertained to the autonomy of EU law,<sup>25</sup> the exclusive jurisdiction of the CJEU, the co-respondent mechanism (through which a case may be brought against both a Member State and the EU), and jurisdiction regarding the EU Common Foreign and Security Policy.<sup>26</sup>

Resolving the issues identified by Opinion 2/13 would require restarting negotiations between the EU and the CoE to amend the DAA. Additional declarations and/or memoranda of understanding might also need to be drafted, and it may even be necessary to propose further amendments to the ECHR and/or to the EU treaties.<sup>27</sup> Such additional amendments are likely to present considerable delays to the accession process, as any amendment to the ECHR will require the consent of the 47 CoE Member States, and, correspondingly, any amendment to the EU treaties will require the consent of the 28 EU Member States. Successful accession will therefore require a lot of patience and determination from all those involved, but the final arrangement should create a robust human rights regime across Europe as a result.

### The Status of Human Rights Protections in Europe: a Conversation with Dr Sonia Morano-Foadi

JN: It's been over a year since the CJEU published Opinion 2/13; what was the initial reaction to the Opinion and how has this changed?

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<sup>24</sup> Opinion 2/13 (n 1).

<sup>25</sup> See D Halberstam, 'It's the Autonomy, Stupid!' A Modest Defense of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward' (2015) 16 German Law Journal 105; E Lentsch, 'From Informal to Institutionalised Dialogue between the CJEU and the ECtHR: The Tightrope Walk between the EU's Autonomy and the Coherence of Fundamental Rights Protection in Europe' (Jean Monet Working Paper 12/2016) <[http://www.ceje.ch/files/6514/6486/9034/Geneva\\_JMWP\\_12-Lentsch.pdf](http://www.ceje.ch/files/6514/6486/9034/Geneva_JMWP_12-Lentsch.pdf)> accessed 25 September 2016.

<sup>26</sup> Morano-Foadi and Andreadakis (n 11).

<sup>27</sup> *ibid.*

**SM-F:** We did not anticipate such an outcome: Opinion 2/13 sent shockwaves through both the EU and the Council of Europe, as well as legal and academic communities around the world. An atmosphere of disappointment and pessimism was created across the European continent. Today, 16 months later, things look more stable as disappointment has been replaced by reflection and distress has become pragmatism.

**JN:** I understand that your earlier research anticipated that the principle of autonomy would be central to Opinion 2/13; why is autonomy such a pivotal issue in the accession negotiations?

**SM-F:** The CJEU has emphasised in strong terms that the EU is a unique legal order with its own constitutional framework, founding principles, institutional structure and full set of legal rules. This peculiarity has consequences for the procedure and conditions of accession to the ECHR. The CJEU Opinion took a very strict approach to the accession prerequisites laid down in the Treaties and in Protocol 8, especially in relation to the notion of autonomy. The origins of the EU concept of autonomy can be traced back to the case of *Costa v ENEL*,<sup>28</sup> the seminal decision through which the Court finished the job it had started in *Van Gend & Loos*,<sup>29</sup> where it had proclaimed that primary law could have direct effect in Member States' legal orders. The CJEU reasoned that direct effect meant little if national norms could later set aside integrated European law. Therefore, the need for a rule that ensured the primacy of European law over national law was established, and it was for this purpose that the concept of autonomy was developed.

While placing the fundamental rights recognised by the Charter at the heart of the EU legal structure, the CJEU emphasised in Opinion 2/13 that the autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires the interpretation of fundamental rights to be guaranteed within the framework of the structure and objectives of the EU. One point of contention here is the principle of mutual trust between EU Member States, which could affect the autonomy of EU law if it

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<sup>28</sup> *Costa* (n 9).

<sup>29</sup> Case 26/62 *Algemene Transport- en Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

were to be interpreted in a manner that is inconsistent with this autonomous legal system. The principle of mutual trust allows each Member State, save in ‘exceptional circumstances’, to assume that all other Member States are in compliance with EU law, especially regarding EU fundamental rights. Although such a presumption can be rebutted on grounds of public policy or in certain breaches of fundamental rights, it is potentially problematic, particularly with regard to the area of freedom, security and justice. The CJEU has acknowledged the necessity of allowing exceptions to mutual trust between EU Member States when, for example, the (absolute) protection from *refoulement* under Article 4 of the Charter is at stake. The Court set a high threshold to ‘rebut trust’ by establishing the criterion of ‘systemic deficiencies’, even though in the recent joined cases of *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* a more flexible approach emerged.<sup>30</sup> The principle of mutual trust is just one facet of the issue of autonomy which illuminates just how complex the issue is, making it extremely difficult to draft an accession agreement that fully respects the Protocol 8 prerequisites.

**JN:** The issue of sovereignty is one that has been raised in both the Brexit campaign and arguments for the UK to distance itself from the ECHR (through the repeal of the Human Rights Act 1998 and the introduction of a ‘British Bill of Rights’); how do these concerns over sovereignty connect with or compare to the EU’s concern over autonomy?

**SM-F:** The issue of sovereignty used in the Brexit campaign relates to competence and to the transfer of powers from the UK, as a Member State, to the EU. However, arguments referring to sovereignty have been based on false assumptions that entire areas of law are now dealt with by the EU alone in its exclusive capacity as legislator. The reality is different as the EU only has exclusive competence in limited areas such as the customs union, the monetary policy and the common commercial policy. The rest is either within the competence of the Member State or is shared between the Member States and the EU.

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<sup>30</sup> Joined Cases C-404/15 and C-659/15, *Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen* [2016] OJ C 59.

In contrast, EU autonomy means that the EU legal order is different from the national or the international legal system, with its own structure, principles and values that if not respected will undermine the whole internal market project.

**JN:** What impact do you think that Brexit could have on the project of harmonising European human rights protections?

**SM-F:** If/when the UK leaves the EU, the whole EU project will be slowed down and a chain reaction might occur with other states leaving. This will occur in the short term. In the long term, I feel that the remaining countries of the EU could proceed towards a more integrated Europe, achieving a stronger Union and, subsequently, a more robust standard of human rights protections.

**JN:** Ultimately, do you think that the accession of the EU to the ECHR will simplify or further complicate the provision of human rights protections to citizens? Will it have a significant effect on human rights protections, or is the accession mostly a bureaucratic exercise?

**SM-F:** I guess it will be good. Not easy, but a sign of an increased understanding that protection of human rights is the route we should follow. At the end of the day, EU accession to the ECHR will be mainly advantageous to Member States, as citizens under the current system can bring a claim involving an EU regulation implemented at the national level to the ECHR and the State might be condemned even if it had no discretion in its implementation.

**JN:** How is the relationship between the two European courts, the CJEU and the ECtHR, after Opinion 2/13? Do you think that accession will still happen?

**SM-F:** Following further empirical work done with CJEU judges my colleagues and I believe the relationship is good and has been strengthened by an exchange of personnel/judges between the two courts which occurred recently. For example, the new Irish judge in the Strasbourg Court, Siofra O'Leary, was previously working as a *referendaire* with Judge O'Keefe at the CJEU. She masters EU law very well and it is extremely positive to have someone at the ECHR with a strong experience of EU law. At the same time, Dean Spielman, the former president of the ECtHR, is now an additional judge at the General Court of the CJEU.

I believe that accession is still possible, but it will require a considerable amount of time and effort before it becomes reality. Amendments to the DAA are inevitable if accession is to progress and be achieved, and this brings challenges related to reopening the DAA to negotiation.

**JN:** The accession can be seen as a logical step towards harmonising human rights protections across Europe. What might be the next step towards this goal? What might the achievement of complete harmonisation look like and is such a thing possible?

**SM-F:** In an ideal world I would suggest a unique system of human rights protection which could bring together the EU and the CoE, as in my view a historical error happened at the time of the inception of both entities. It was not foreseen how the two entities would evolve and that economic integration could not occur separately from human rights provisions. And so it would be beneficial to construct a unified human rights framework for Europe that was not constrained by the political and bureaucratic legacies of either organisation. More realistically, though, it is very difficult to predict how the harmonisation project will progress, especially in the current political climate. Two parallel processes are operating at all levels in Europe. The first is characterised by disintegration forces affecting both the European architecture and the concept of the nation-state. The second, which is less visible, is characterised by an emerging will of integration, inclusion and social justice. This originates at the grassroots level and could have important transformative effects on human rights protections across Europe.