Case Note

Melloni in Three Acts: From Dialogue to Monologue

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Introduction

On 13 February 2014, the Spanish Constitutional Court came to a final decision regarding the fate of Mr Stefano Melloni. The story of the case is worthy of attention not only from the perspective of the interaction between the Spanish Constitutional Court and the Court of Justice of the European Union (CJEU), but also from the standpoint of the conflicting levels of rights' protection in Europe. The story of *Melloni* can be described in three acts: setup, confrontation, and resolution.

First, the setup: in 2011, the Spanish Constitutional Court made its first and (so far) only preliminary reference to the CJEU.[1] The Constitutional Court was faced with a collision between the constitutional right to fair trial of persons convicted *in absentia* and the obligation under EU law to execute a European arrest warrant (heretofore EAW).[2] This setup generated great anticipation, both because

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[1] Constitutional Court Order 86/2011, 9 June. I already commented upon the order for reference in this journal: A. Torres Pérez, 'Constitutional Dialogue on the European Arrest Warrant: The Spanish Constitutional Court Knocking on Luxembourg's Door', 8 *EUConst* (2012) p. 105.

[2] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between member states (2002/584/JHA).

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of the protagonists and the type of conflict, since in this case what obstructed one member state from complying with EU law was its higher level of constitutional protection for the right in question.[3]

Next came the confrontation: the CJEU was asked about the interpretation and validity of the corresponding provision of the EAW Framework Decision[4] in light of the right to a fair trial, as it is enshrined in the EU Charter of Fundamental Rights. Moreover, for the first time, the CJEU was questioned on the interpretation of Article 53 of the Charter, which has remained one of the most elusive provisions of EU law since its inception.[5] Luxembourg issued the preliminary ruling on 26 February 2013 and, as expected, the CJEU upheld the validity of the Framework Decision.[6] In addition, its interpretation of Article 53 excluded any limits to the primacy and effectiveness of EU law as a result of more protective constitutional rights.

The third and last act follows the resolution of the case: it took nearly a year for the Constitutional Court to issue the final decision.[7] While the outcome does fulfil the mandates of EU law, the reasoning proves quite unsettling.

In what follows, these three acts of this judicial interplay will be examined with special attention on the third and final one. From the perspective of dialogue, the setup seemed very promising. And yet as the story unfolded, the actors grew more entrenched and quite one-sided, and the resolution was anti-climactic in terms of the expectations generated. An epilogue concerning Article 53 of the EU Charter is also included, since the primary interest of *Melloni* resided not so much in the specific case, but rather in the underlying conflict between differing levels of rights protection in a pluralist framework.

[3] For the role of constitutional conflicts, see G. Martinico, *The Tangled Complexity of the EU Constitutional Process* (Routledge 2012).

[4] Council Framework Decision 2009/299/JHA of 26 Feb. 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial.

[5] J. Bering Liisberg, 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?', 38 *Common Market Law Review* (2001) p. 1171; L.F.M. Besselink, 'The Member States, the National Constitutions and the Scope of the Charter', 8 *Maastricht Journal of European and Comparative Law* (2001) p. 68; R. Alonso García, 'The General Provisions of the Charter of Fundamental Rights of the European Union', 8 *European Law Journal* (2002) p. 492; M. Pérez de Nanclares, 'Artículo 53', in A. Mangas Martín (ed.), *Carta de los Derechos Fundamentales de la Unión Europea-Comentario artículo por artículo* (Fundación BBVA 2008).

[6] CJEU 26 Feb. 2013, Case C-399/11, *Stefano Melloni* v. *Ministerio Fiscal.*

[7] Spanish Constitutional Court, STC 26/2014, 13 Feb. 2014.

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First Act: The Spanish Constitutional Court goes to Luxembourg

On 9 June 2011, the Spanish Constitutional Court made a preliminary reference in a case involving the execution of an EAW.[8] The facts of the case are well known to everyone who has followed the *Melloni* saga. For those unfamiliar with it: in a nutshell, back in 1996, the competent Spanish court, the *Audiencia Nacional,* granted an extradition order for Mr Melloni to Italy where he was sought for bankruptcy fraud. After being released on bail, he fled. Nonetheless, the proceedings against him continued before Italian courts and he was condemned in absentia to ten years' imprisonment for the crime of bankruptcy fraud. Throughout the trial, however, he was represented by two lawyers of his choice.[9] An EAW for the execution of the sentence was issued in 2004 and four years later he was detained in Spain. The *Audiencia Nacional* decided to execute the EAW and Mr Melloni filed a complaint (*recurso de amparo*) before the Constitutional Court alleging the infringement of his right to a fair trial (Article 24(2) Constitution).

According to established constitutional case-law, state authorities indirectly violate the Constitution if they allow the extradition of a person to another country in which public authorities do not respect the 'absolute content' of a fundamental right. The Constitutional Court had held that the right to participate in the oral trial and the right to one's own defence were part of the 'absolute content' of the right to a fair trial.[10] Thus, surrendering a person who had been condemned in absentia, without conditioning the surrender on the opportunity to apply for a retrial, constituted an indirect violation of the right to a fair trial. This doctrine was extended to the execution of an EAW in a 2006 judgment.[11]

[8] See, among others, L. Arroyo Jiménez, 'Sobre la primera cuestión prejudicial planteada por el Tribunal Constitucional. Bases, contenido y consecuencias', *Working Paper on European Law and Regional Integration*, WP IDEIR nº 8 (2011); M. Revenga Sánchez, 'Rectificar preguntando. El Tribunal Constitucional acude al Tribunal de Justicia (ATC 86/2011, de 9 de junio)', 41 *Revista Española de Derecho Constitucional* (2012) p. 139; M. González Pascual, 'Mutual Recognition and Fundamental Constitutional Rights: The First Preliminary Reference of the Spanish Constitutional Court', in M. Claes et al. (eds.), *Constitutional Conversations in Europe: Actors, Topics and Procedures* (Intersentia 2012) p. 161; A. Tinsley, 'Note on the Reference in C-399/11 *Melloni*', 2 *New Journal of European Criminal Law* (2012) p. 19; M. Pérez Manzano, 'El Tribunal Constitucional español ante la tutela multinivel de derechos fundamentales en Europa. Sobre el ATC 96/2011, de 9 de junio', 95 *Revista Española de Derecho Constitucional* (2012) p. 311; I. Torres Muro, 'La condena en ausencia: unas preguntas osadas (ATC 86/2011, de 9 de junio) y una respuesta contundente (Sentencia del Tribunal de Justicia de la Unión Europea de 26 de febrero de 2013)', 97 *Revista Española de Derecho Constitucional* (2013) p. 343.

[9] Mr Melloni argued that he had appointed a different lawyer in appeal, but the *Audiencia Nacional* held that the evidence submitted failed to prove that.

[10] STC 91/2000, 30 March, paras. 12-13. This interpretation was contested within the Court, as shown by the dissenting opinions to this judgment.

[11] STC 177/2006, 27 June. T. de la Quadra, 'El encaje constitucional del nuevo sistema europeo de detención y entrega (Reflexiones tras la STC 177/2006, de 5 de junio)', 78 *Revista*

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At the same time, the 2002 Framework Decision had been amended in 2009 to clarify that the executing judicial authority may refuse to execute an EAW if the person did not appear at the trial, unless that person

> (a) in due time: (i) either was summoned in person and thereby informed of the scheduled date and place of the trial which resulted in the decision, or by other means actually received official information of the scheduled date and place of that trial in such a manner that it was unequivocally established that he or she was aware of the scheduled trial; and (ii) was informed that a decision may be handed down if he or she does not appear for the trial; or
> (b) being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial.[12]

Hence, the constitutional and European legal systems were set on a collision course. In this context, the Constitutional Court decided to stay proceedings and request a preliminary ruling from the CJEU covering three questions. The first and the second concerned, respectively, the interpretation and validity of the Article 4a(1) Framework Decision. The third involved the interpretation of EU Charter Article 53.

This set the stage for a very promising opportunity, since the conflict between the Constitution and the obligation to comply with EU law is one of the most challenging issues in the European pluralist compound. The main role was played by the Spanish Constitutional Court, whose preliminary reference was without precedent and showed itself to be 'in the mood for dialogue'.[13] The Constitutional Court elaborated arguments supporting the constitutional interpretation of the right to a fair trial, signalled the potential for conflict and offered several avenues to resolve it.[14] Also, for the first time, the CJEU was confronted with the interpretation of EU Charter Article 53.

Española de Derecho Constitucional (2006) p. 277; M. Cedeño Hernán, 'Vulneración indirecta de derechos fundamentales y juicio en ausencia en el ámbito de la orden europea de detención y entrega, a propósito de la STC 199/2009, de 28 de septiembre', 20 *Revista General de Derecho Europeo* (2010) p. 1 at p. 3-7; C. Izquierdo Sans, 'Conflictos entre la jurisdicción comunitaria y la jurisdicción constitucional española (en materia de derechos fundamentales)', 34 *Revista Española de Derecho Europeo* (2010) p. 193, at p. 216-218.

[12] Art. 4a(1), as amended by 2009 Framework Decision. This article contains two other grounds in which the execution of an EAW issued following a trial at which the person did not appear in person may not be refused

[13] G. Martinico, 'Preliminary Reference and Constitutional Courts. Are You in the Mood for Dialogue?', in F. Fontanelli et al. (eds.), *Shaping Rule of Law through Dialogue* (Europa Law Publishing 2010) p. 221 at p. 224-227.

[14] Torres Pérez, *supra* n. 1, p. 125.

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Second act: Nothing new under the sun

The CJEU's preliminary ruling was awaited with great anticipation.[15] While the answers to the questions about the interpretation and validity were rather predictable, the interpretation to be given to Charter Article 53 was more intriguing.

The interpretation and validity of the EAW Framework Decision

With regard to the first question about the interpretation of Article 4a(1), the CJEU argued that this Article precluded an interpretation according to which the execution of an EAW may be conditioned upon the conviction of a person who had been notified or represented by lawyers being open to review in the issuing member state. Such an interpretation, it held, would run counter to the text and the purpose of that provision, which was to clarify the circumstances in which execution may not be refused when a person had been condemned in absentia. Indeed, the 2009 amendment of the Framework Decision was intended to facilitate judicial cooperation in criminal matters by harmonizing the grounds of non-recognition of decisions rendered in trials at which persons concerned were not present.[16]

In addition, the Constitutional Court had argued that Article 4a(1) should be interpreted systematically in connection with the Article 1(3) Framework Decision, which establishes that the Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights enshrined in TEU Article 6. After Lisbon, Article 6 laid out the architecture for rights protection within the Union: paragraph 1 renders the Charter legally binding at the same level of the treaties; paragraph 2 authorizes (or rather compels) the accession of the EU to the European Convention on Human Rights (ECHR); and paragraph 3 retains the general principles of EU law, which are taken from the constitutional traditions common to the member states and the ECHR as sources of EU fundamental

[15] For comments on the CJEU preliminary ruling see, among others, N. De Boer, 'Addressing Rights Divergences under the Charter: Melloni', 50 *Common Market Law Review* (2013) p. 1083; P. Martín Rodríguez, 'Crónica de una muerte anunciada: comentario a la sentencia del Tribunal de Justicia (Gran Sala), de 26 de febrero de 2013, Stefano Melloni, C-399/11', 30 *Revista General de Derecho Europeo* (2013) p. 1; V. Skouris, 'Développements récents de la protection des droits fondamentaux dans l'Union européenne: les arrêts *Melloni* et *Akerberg Fransson*' 2 *Il diritto dell'Unione Europea* (2013) p. 229; B. García Sánchez, '¿Homogeneidad o estándar mínimo de protección de los derechos fundamentales en la Unión Europea?', 46 *Revista de Derecho Comunitario Europeo* (2013) p. 1137; X. Groussot and I. Olsson, 'Clarifying or Diluting the Application of the EU Charter of Fundamental Rights? – The Judgments in Åkerberg and Melloni', II *LSEU* (2013) p. 7; M. Brkan, 'L'arrêt *Melloni*: nouvelle pierre dans la mosaïque de la protection des droits fondamentaux dans l'Union européenne', 1 *Rev. Aff. Eur.* (2013) p. 139.

[16] CJEU *Melloni, supra* n. 6, paras. 39-46.

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rights. The CJEU recast this argument as an issue concerning the proper interpretation of the Charter without mentioning the general principles of EU law.

The second question challenged the validity of Article 4a(1) in light of the right to an effective judicial remedy and fair trial (Article 47) and the right of defence (Article 48(2)) as laid down by the Charter. The answer to this question thus required interpreting those Articles of the Charter.

The CJEU held that the right to appear in person at the trial is not an absolute right and that the accused may waive that right, expressly or tacitly, provided that the waiver is established in an unequivocal manner, is attended by minimum safeguards commensurate to its importance, and does not run counter to any important public interest.[17] In the following paragraph, the Court declared that this interpretation of the Charter was in conformity with the ECHR and the corresponding case-law, citing *Sejdovic* v. *Italy* among other cases. The CJEU concluded that Article 4a(1) lays down the circumstances in which the person concerned must be deemed to have waived, voluntarily and unambiguously, the right to be present at their trial.

First, from a hermeneutical perspective, the reasoning of the Court is quite sparse, particularly so when compared to the Advocate-General's Opinion. Advocate-General Bot quoted Charter Article 52(3) and showed how the interpretation given to the relevant Charter Articles followed European Court of Human Rights (ECtHR) case-law. In contrast, the reasoning of the CJEU goes in the reverse direction. It began by spelling out the interpretation of Charter, which partly reproduces ECtHR case-law without actually providing specific citations, suggesting an autonomous interpretation.[18] Only in the following paragraph did the CJEU refer to the ECHR, citing several cases without any elaboration. In doing so, the CJEU reinforces the autonomy of the Charter as the main source for protecting rights within the EU legal order.[19]

Second, one might argue that the CJEU and ECtHR interpretations are not totally coincidental. Pursuant to paragraph (a) of Article 4a(1), a person must be surrendered if he or she had been informed about the trial, but nothing is said of the need for representation by a lawyer appointed by them.[20] According to the ECtHR, even if a person was adequately notified and the absence was not justified, he or she cannot be deprived of the right to be defended by a lawyer.[21]

[17] CJEU *Melloni, supra* n. 6, para. 49.

[18] CJEU *Melloni, supra* n. 6.

[19] The CJEU procedes in a similar way in *Fransson,* see S. Iglesias Sánchez, 'La confirmación del ámbito de aplicación de la Carta y su interrelación con el estándar de protección', 46 *Revista Española de Derecho Comunitario* (2013) p. 1157, at p. 1170.

[20] Pérez Manzano, *supra* n. 8, p. 327.

[21] ECtHR 22 Sept. 1994, Case No. 16737/90, *Pelladoah* v. *The Netherlands*; ECtHR 22 Sept. 1994, Case No. 14861/89, *Lala* v. *The Netherlands*.

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Paragraph (b) indicates that execution cannot be refused if the person was informed of the trial and represented by a lawyer, but this is a separate clause. Even in that case, the surrender might still amount to a violation of the Convention. For instance, in *F.C.B.* v. *Italy*, although the person had been represented by a lawyer, the ECtHR ruled that Article 6 had been violated since 'it does not appear that Mr F.C.B., whether expressly or at least in an unequivocal manner, intended to waive his right to appear at the trial and defend himself'.[22] In fact, the applicant in this case was being held in a Dutch prison when the trial took place. Thus, in exceptional circumstances, it is possible that a person who had been informed of the trial and was represented by a lawyer was absent for reasons beyond his or her control.[23] Following the ECtHR, the waiver does not need to be explicit but it must be unequivocal. Following the Framework Decision and the CJEU's interpretation, the waiver is automatically inferred from (a) having had prior knowledge of the trial, or (b) being informed of the trial and represented by a lawyer, but even in those circumstances, in exceptional cases, the surrender of a person convicted in absentia without the possibility to obtain a retrial could violate the ECHR.[24]

Furthermore, refusing the execution of an EAW in cases of trial in absentia, except for the situations laid down in Article 4a in which surrender may not be refused, is an option for the member states. Thus, a person could be surrendered to another member state without having been informed about the trial or defended by a lawyer, and without recourse for a retrial. In that case, the ECHR would clearly be infringed.[25]

Third, and most importantly from the perspective of constitutional dialogue, while the Spanish Constitutional Court acknowledged the autonomy of EU law, and did not question the compatibility with the ECHR, the Constitutional Court had invited the CJEU to interpret the Charter as providing for a higher level of protection. The CJEU did not devote a single word to that possibility, nor did it deign to reject it.[26]

In contrast, Advocate-General Bot expressly confronted this possible interpretation and formulated arguments to dismiss it. The Advocate-General argued, first, that the level of protection afforded by the FD was 'adequate' for the objectives of enhancing the procedural rights of persons, facilitating judicial cooperation in criminal matters, and improving mutual recognition of judicial decisions between

[22] ECtHR 28 Aug. 1991, Case No. 12151/86, *F.C.B.* v. *Italy,* para. 33.

[23] Torres Pérez, *supra* n. 1, p. 115.

[24] Martín Rodríguez, *supra* n. 15, p. 11.

[25] Pérez Manzano, *supra* n. 8, p. 327.

[26] J. Díez-Hochleitner, 'El derecho a la última palabra: ¿Tribunales constitucionales o Tribunal de Justicia de la Unión?', *WP IDEIR*, nº 17 (2013) p. 21.

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the member states.[27] Second, Advocate-General Bot held that there were no reasons for going any further than the ECtHR; and third sustained that the CJEU could not rely on the constitutional traditions common to the member states in order to provide for a higher level of protection.[28] In order to ascertain those common constitutional traditions, the Advocate-General took into account the fact that the Framework Decision had been enacted unanimously by all the member states, as well as the hearings held before the Court. One might disagree with those arguments, but at least the Advocate-General expressed them.[29]

Admittedly, there was no need from the perspective of the EU to exceed the standard of protection provided by the ECHR.[30] Furthermore, it could even be abusive to protect convicted persons in cases in which they had been informed about the trial and had been defended by an appointed lawyer (unless there were other reasons to believe that the person had not waived the right to be present). Actually, if recourse to retrial were always available, it could act as an incentive for defendants to decline attending trials in other countries. Furthermore, consideration must be made for effective crime fighting and the protection of the victims. Hence, there existed reasons not to follow the constitutional interpretation when interpreting the Charter.

Nevertheless, since the interpretation held by the CJEU was less protective of individuals than the interpretation of the Constitutional Court, the CJEU should have more fully articulated its reasoning. Mutual recognition could be an argument to prevent a member state from unilaterally enforcing a higher level of protection, but not an argument to reject adopting that interpretation at the EU level and amending the Framework Decision accordingly.

The elusive meaning of Article 53 of the Charter

The most relevant question involved the interpretation of EU Charter Article 53. While the Spanish Constitutional Court offered three possible interpretations, the question was basically whether this Article could be interpreted as allowing the Constitutional Court to refuse to execute the EAW in order to secure a higher

[27] A-G Opinion in *Melloni, supra* n. 6, para. 83.

[28] *Melloni, supra* n. 6, para. 84.

[29] For instance, the reference to the position of the state governments in the legislative procedure and the hearing before the CJEU as the only source for ascertaining the common constitutional traditions of the member states is questionable. Indeed, in this case, the position defended by the Spanish government clashed with the constitutional interpretation of the right to a fair trial, as A-G Bot acknowledged, A-G Opinion in *Melloni,* supra n. 6, para. 141.

[30] According to what was argued above regarding the ECHR, the CJEU could have warned against an automatic application of Art. 4a(1) and emphasized the need to make sure that the waiver of the right to be present was unequivocal.

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level of constitutional protection of the right to a fair trial – and thus 'avoid restricting or adversely affecting' a constitutional right.

Put simply, that possibility would have entailed interpreting Charter Article 53 along the same lines as ECHR Article 53. The Charter would set a minimum floor of protection that the states may supersede in such a way that state courts would be allowed to unilaterally set aside state measures implementing EU law in accordance with more protective constitutional rights.

In his Opinion, Advocate-General Bot rejected this interpretation on the basis of an absolute conception of the primacy principle. Advocate-General Bot relied on the reference to the 'respective fields of application' in Article 53 to hold that the Charter could not have the effect of lowering the level of constitutional protection outside the field of application of EU law. It follows from Bot's Opinion that within the field of application of EU law, constitutions would be displaced by the Charter.[31]

The CJEU resolutely rejected an interpretation of Article 53 that would set a floor of protection enabling state courts to unilaterally set aside implementing measures that violated the Constitution under its higher constitutional standard. But the CJEU did not fully embrace the interpretation of Advocate-General Bot either. The CJEU acknowledged the combined application of the Charter and state constitutions within the field of application of EU law[32] and held:

> (…) Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.[33]

State courts may thus apply national standards of protection of fundamental rights on two conditions: first, on the condition that constitutional rights do not undermine the level of protection provided for by the Charter; and second, provided that the primacy, unity or effectiveness of EU law are not compromised.

The first condition indicates that Charter is a floor below which the member states cannot fall. They would only be able to review state acts implementing EU law under a higher standard of constitutional protection, not lower.[34] According

[31] A-G Opinion in *Melloni, supra* n. 6, paras. 97-105.

[32] C. Ladenburger, 'The Interaction between the Charter of Fundamental Rights, the European Convention of Human Rights and National Constitutions', *FIDE 2012 Institutional Report*, <www.fide2012.eu/index.php?doc_id=88>, p. 24,

[33] CJEU *Melloni, supra* n. 6, para. 60.

[34] The tricky issue here is how to decide whether the Charter or the constitution protects better, see D. Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, National Courts and the New

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to the second condition, the Charter is not just a floor, but it might also become in practice a ceiling. State courts may only enforce more protective constitutional rights when 'primacy, unity, and effectiveness' of EU law are not compromised. Otherwise, the Charter displaces national constitutions, and as a consequence the level of constitutional protection will be lowered. Hence, the CJEU maintains an absolute understanding of the primacy principle, following *Internationale Handelsgesellschaft*.[35] The interpretation given to Article 53 will be assessed from a broader perspective in the Epilogue.[36]

With regard to the solution of the specific case, the main argument for rejecting the possibility of enforcing a higher level of constitutional protection was the effectiveness of the Framework Decision. The CJEU also argued that making the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing member state (in order to avoid an adverse effect on the right to a fair trial guaranteed by the constitution) would cast doubt on the uniformity of the standard of protection of fundamental rights as defined in the Framework Decision. That standard reflects the consensus reached by all member states regarding the scope of procedural rights enjoyed by persons convicted in absentia who are subject to an EAW (through the harmonisation of the conditions of execution).[37]

I agree that the Constitutional Court interpretation should not have been accommodated in this case. Nevertheless, while the effectiveness of the Framework Decision and the uniformity in the interpretation of the right to a fair trial are important arguments, the CJEU should have made greater effort to ground its position.[38] The fact that a consensus (of state governments) was reached at the EU level does not mean that the agreed standard is enough from the perspective of rights protection;[39] or that a better level of protection cannot be accommo-

Framework of Fundamental Rights Protection in Europe', 50 *Common Market Law Review* (2013) p. 1267, at p. 1295-1296; Groussot and Olsson, *supra* n. 15, p. 25.

[35] CJEU 17 Dec. 1970, Case C-11/70, *Internationale Handelsgesellschaft mbH* v. *Einfuhr- und Vorratsstelle für Getreide und Futtermittel,* in which the CJEU held that 'The validity of a community measure or its effect within a member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure.'

[36] As several commentators have claimed, the interpretation given by the CJEU still needs to be further clarified, Skouris, *supra* n. 15, p. 242; Brkan, *supra* n. 15, p. 143-146; Groussot and Olsson, *supra* n. 15, p. 27.

[37] CJEU *Melloni,* para. 63

[38] Pérez Manzano, *supra* n. 15, p. 332. The arguments about the role of consensus and harmonization were more elaborated in the Opinion of A-G Bot.

[39] As has been held recently in CJEU 8 April 2014, Joined Cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd.*

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dated. Otherwise, state governments could circumvent the respective constitutions by enacting EU legislation.[40]

In addition, the need to respect national constitutional identity pursuant to Article 4(2) TEU might have some bearing. Indeed, Advocate-General Bot acknowledged that secondary law might be challenged on the basis of Article 4(2), although he concluded that the particular constitutional interpretation of the right to a fair trial did not affect the national constitutional identity of the state in this case.[41] I believe that the Advocate-General's conclusion was sound. And yet, at least, the CJEU should have considered that possibility, since the Constitutional Court had grounded the interpretation of the right to a fair trial upon the principle of human dignity and argued that the physical presence at the trial was part of the essential content of that right.[42]

Regarding the argument premised upon effectiveness, the CJEU might as well have considered the extent to which effectiveness would be undermined by accommodating a higher constitutional level of protection and whether a restriction would be justified. In this specific case, I believe that the countervailing interests and values, such as the need to effectively fight crime and protect victims' rights, in a context of mutual recognition, outweighed individual protection, as the person concerned was informed and represented by lawyers of his choice. A better articulation of the balancing would have been welcomed since, in the end, Luxembourg mandated the Constitutional Court to lower the level of rights protection.

To recapitulate, in the second act of the story related here, the CJEU struggled with finding the solution to the conflict. In my view, the CJEU, facing a potential clash between the Constitution and EU law, should have been more responsive to the claims and arguments regarding rights interpretation voiced by the Constitutional Court.[43] In addition, the interpretation of Charter Article 53 was resolved in three short paragraphs. It is neither the duty nor the purpose of Courts to produce academic essays, but given the relevance of this clause for the interaction between the respective declarations of rights and the fact that this was the first opportunity for the CJEU to clarify its meaning, greater articulation would have been welcomed. In any event, the merits of the CJEU's interpretation will be discussed below. It should be noted that this second act ended with a climactic cliff hanger: Is the Constitutional Court going to lower the standard of constitutional protection in order to comply with EU law or rise up against the CJEU?

[40] J-H. Reestman and L. Besselink, 'Editorial', 9 *EuConst* (2013) p. 169, at p. 173-175.

[41] A-G Bot in *Melloni,* paras. 139-141, argued that this interpretation was contested within the Court, and had not been defended by the Spanish government in the hearing,

[42] Order 86/2011, *supra* n. 1, paras. 2 and 5.

[43] D. Grimm, 'The European Court of Justice and National Courts: The German Constitutional Perspective after the Maastricht Decision', 3 *Columbia Journal of European* (1997) p. 229, at p. 238; M. Cartabia, 'Europe and Rights: Taking Dialogue Seriously', 5 *EuConst* (2009) p. 25, at p. 30.

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Third act: Back to Spain

In fact, an act of rebellion was not expected, but the Spanish Constitutional Court kept us (and Mr Melloni) waiting for almost a year. Moreover, while the Constitutional Court did what was required to comply with EU law, overruling the constitutional interpretation of the right to a fair trial regarding the surrender of persons convicted *in absentia* and dismissing the individual complaint, its reasoning was quite disturbing.

Restating the controlimiti *doctrine*

The Constitutional Court began its reasoning by claiming that it ought to 'complete'[44] the answer given by the CJEU with the doctrine that had been established by the Constitutional Court in Declaration 1/2004.[45] In Declaration 1/2004, the Constitutional Court had ruled on the compatibility between the Spanish Constitution and the unborn European Constitution. In that decision, the Spanish Constitutional Court formulated its version of the *controlimiti* doctrine and came up with the well-known distinction between the supremacy of the Constitution and the primacy of EU law.[46]

With its reference to Declaration 1/2004, the Constitutional Court reminds us that there are substantive limits to European integration, even if they are not explicitly stated in the Constitution. These limits include the respect for fundamental rights.[47] Moreover, respect for fundamental rights is regarded as a precondition for the primacy of EU law. At the same time, the Court argued that it falls to the CJEU to review the validity of EU law and to secure a high degree of fundamental rights protection. Finally, the Constitutional Court, quoting from Declaration 1/2004, claimed that in the unlikely event that EU law became irreconcilable with the Spanish Constitution, and that the hypothetical excesses of EU law with respect to primary law were not resolved through the ordinary mechanisms, as a last resort, the preservation of state sovereignty and the supremacy of the constitution might lead the Constitutional Court to confront the potential conflicts through the corresponding constitutional procedures.[48] Despite the vague-

[44] STC 26/2014, *supra* n. 7, para. 3.

[45] Constitutional Court Declaration 1/2004, 13 Dec. 2004.

[46] R. Alonso García, 'The Spanish Constitution and the European Constitution: The Script for a Virtual Collision and Other Observations on the Principle of Primacy', 6 *German Law Journal* (2005) p. 1001; A. López Castillo et al., *Constitución española y Constitución europea* (Centro de Estudios Políticos y Constitucionales 2005).

[47] DTC 1/2004, *supra* n. 45, para. 2.

[48] DTC 1/2004, *supra* n. 45, para. 4: 'En el caso difícilmente concebible de que en la ulterior dinámica del Derecho de la Unión Europea llegase a resultar inconciliable este Derecho con la Constitución española, sin que los hipotéticos excesos del Derecho europeo respecto de la propia

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ness of this passage, the message was clear: the Constitutional Court retains the last word in the event of a clash between the Spanish Constitution and EU law.

In *Melloni,* the Constitutional Court did not elaborate on how the references to Declaration 1/2004 were supposed to 'complete' the preliminary ruling rendered by the CJEU. We might infer that the Court is conveying that, even though it will in this case overrule the constitutional interpretation of the right to a fair trial, thereby lowering the standard of constitutional protection, the Constitutional Court remains the ultimate guardian of the Constitution and constitutional rights. This power could be activated in case of an irreconcilable clash between the Constitution and EU law. The judgment thus contains an implicit warning signal.

Two of the concurring opinions argued that the section of the judgment in which the Constitutional Court recalls the *controlimiti* doctrine should have been removed, since it was superfluous for the resolution of the case and could be understood as challenging the interpretation given to Charter Article 53.[49]

In the Constitutional Court's *Melloni* judgment, not a word is uttered about Charter Article 53. In contrast to its finely articulated preliminary request to the CJEU for clarification on the potential interpretations of Charter Article 53, in the final judgment the Constitutional Court stays silent. Indeed, in Declaration 1/2004, the Constitutional Court had interpreted Charter Article 53 as a clause of 'minimum protection' along the same lines as ECHR Article 53. According to this interpretation, the Charter set a minimum floor that would allow for higher standards of constitutional protection.[50] As such, this understanding was one of the reasons to declare compatibility between the Spanish Constitution and the Charter.[51] That interpretation, however, was ruled out by the CJEU in *Melloni.* Considering that the Constitutional Court argued that fundamental rights are a precondition to primacy and that it claimed the last word in case of conflict, its silence on Article 53 is strikingly defiant.

The mere reiteration of passages from Declaration 1/2004 and the silence over Article 53 are far from indicative of any robust dialogue. In no way does the Constitutional Court link its previous position with the current case. There were reasons to be wary of the CJEU's interpretation of Charter Article 53, which

Constitución europea fueran remediados por los ordinarios cauces previstos en ésta, en última instancia la conservación de la soberanía del pueblo español y de la supremacía de la Constitución que éste se ha dado podrían llevar a este Tribunal a abordar los problemas que en tal caso se suscitaran, que desde la perspectiva actual se consideran inexistentes, a través de los procedimientos constitucionales pertinentes.'

[49] See the concurring opinions by Judges Asúa Batarrita and RocaTrías, who was the judge *rapporteur* in this case.

[50] DTC 1/2004, *supra* n. 45, para. 6.

[51] R. Alonso García, *El juez Nacional en la Encrucijada Europea de los Derechos Fundamentales* (Civitas 2014) p. 185-190: relevance of FJ 3 para. 5; De Boer, *supra* n. 15, p. 1094.

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consolidates an absolute understanding of primacy,[52] but the Constitutional Court did not spell them out. While the Spanish Constitutional Court struggled to sustain its power as the court with the last word, its avowal of this power remained poorly articulated.

Constitutional overruling

Following the preliminary ruling in *Melloni,* it became clear that, in order to comply with EU law, the current constitutional interpretation of the right to fair trial could no longer be sustained. The Constitutional Court eventually reversed that interpretation, but the Court portrayed this outcome as if it had been autonomously reached, failing to properly ground it.

The Constitutional Court justified its reversal as follows. After recalling the previous case-law on the right to a fair trial regarding persons convicted *in absentia* subjected to extradition procedures or an EAW, the Court held that the interpretation of this right had to be revised. The Court argued that in order to ascertain the 'absolute content' of a right,[53] the international treaties for the protection of fundamental rights needed to be taken into account. Among those treaties, the Court explicitly referred to the ECHR and the EU Charter,[54] as well as the interpretation by the respective courts. The Constitutional Court then proceeded to examine the interpretation of the right to fair trial in the case of convictions in absentia by the ECtHR in *Sejdovic* v. *Italy*[55] and by the CJEU in *Melloni.* The Constitutional Court concluded that the interpretations of both courts operated in this case as 'hermeneutic criteria' that permitted definition of the so-called absolute content of the right to a fair trial. As a result, the previous interpretation of the right was overruled and the court declared that: 'a conviction in absentia does not involve an infringement of the absolute content of the fundamental right to a fair trial, even if there is no remedy for the absent defendant, when this absence has been voluntarily and unequivocally decided by a person who was duly summoned, and had been effectively defended by an appointed Lawyer'.[56]

[52] Indeed, the Constitutional Courts from several member states have set constitutional rights as limits to the primacy of EU law, see A. von Bogdandy and S. Schill, 'Overcorning Absolute Primacy: Respect for National Identity under the Lisbon Treaty', 48 *Common Market Law Review* (2011) p. 1417, at p. 1435-1436.

[53] The 'absolute content' of a fundamental right is a concept that refers to the guarantees that have effect *ad extra*, in the sense that, if they are not upheld by foreign authorities, constitutional rights might be indirectly infringed by surrendering a person to another country.

[54] Note that the Charter is treated as an 'international treaty', STC 26/2014, *supra* n. 7, para. 4.

[55] Additional ECtHR judgments were also quoted.

[56] STC 26/2014, *supra* n. 7, para. 4.

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While the Constitutional Court complies with the preliminary ruling, the reasoning is flawed in several aspects. First, the Constitutional Court apparently followed the logic of Article 10(2) of the Constitution (without ever mentioning it), and thus the Charter and the CJEU's interpretation in *Melloni* were conceived as mere hermeneutic criteria.[57] Indeed, the Constitutional Court put the decision of the CJEU in *Melloni* on the same footing as the decision of ECtHR in *Sejdovic* v. *Italy*,[58] failing to acknowledge the binding effects of the preliminary ruling requested by the Constitutional Court itself. In addition, as a matter of constitutional doctrine, in Declaration 1/2004,[59] the Constitutional Court had acknowledged that, while account of the Charter had to be taken for the interpretation of constitutional rights through Article 10(2), the Charter was also incorporated through Article 93 in the national legal order.[60] It was on the basis of Article 93 of the Constitution that the primacy of EU law was accepted, with the limits stated above.[61]

Second, should the CJEU decision be no more than a hermeneutic tool, there would be no need to overrule the settled constitutional interpretation of the right to a fair trial concerning persons condemned in absentia and lower the level of protection. The duty of consistent interpretation under Article 10(2) does not preclude a more protective constitutional interpretation. Furthermore, there was no reason to revise the constitutional interpretation in light of ECtHR case-law, since the Convention allows member states to provide for better protection. The need to lower the standard of protection derives exclusively from the CJEU's decision in *Melloni*.

Third, the Constitutional Court portrayed this shift as a decision reached by the Court on its own motion,[62] but the fact that the Court reversed previous case-

[57] Pursuant to Art. 10(2), constitutional rights must be interpreted according to the Universal Declaration on Human Rights and other human rights treaties ratified by Spain. Art. 10(2) encapsulates an obligation of consistent interpretation with human rights treaties, which thus become hermeneutic sources. This article has mainly been used with regard to the ECHR. In the nineties, the Constitutional Court had declared that EU fundamental rights had to be considered in terms of Art. 10(2). A. Saiz Arnaiz, *La Apertura Constitucional al Derecho Internacional y Europeo de los Derechos Humanos. El Artículo 10.2 de la Constitución Española* (Consejo General del Poder Judicial 1999).

[58] Previously in the judgment, the Constitutional Court had held that the answer of the CJEU in *Melloni* would be 'very useful' to interpret the right to a fair trial, STC 26/2104, *supra* n. 7, para. 2.

[59] DTC 1/2004, *supra* n. 45, para. 6.

[60] Art. 93 of the Constitution is the clause that authorizes the transfer of powers to international organizations.

[61] In this regard, see the concurring opinion of Judge Asúa Batarrita in STC 26/2014, *supra* n. 7, para. 3.

[62] See the concurrent opinion by Judge Roca Trías in STC 26/2104, *supra* n. 7, para. 2.

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law because it was compelled by the CJEU cannot pass unnoticed. Again, this attitude reveals the Court's reluctance to be placed under the interpretive authority of the CJEU. Yet, from the moment that the Court decided to make the preliminary reference, this outcome was quite foreseeable.[63]

This is not to insinuate that the Court was precluded from developing an argument of its own. The problem here is that the Constitutional Court portrays the preliminary ruling in *Melloni* as a mere hermeneutic tool and does not develop any other reasons to justify the reversal. Thus, in the end, no valid reasons are offered for lowering the constitutional standard of protection. The Court could have acknowledged the obligation to comply with the preliminary ruling and, at the same time, developed other arguments, such as the need to revise doctrine that had emerged in extradition procedures in light of the principles of mutual recognition and trust;[64] or the disproportionate protection of the right to a fair trial *vis-à-vis* other interests, such as the fight against crime or the victim protection; or the fact that the previous constitutional interpretation had been contested within the Court from the very outset.[65]

Finally, with regard to the scope of the reversal, it should be noted that the Constitutional Court does not circumscribe its overrule in cases involving EAWs, but in fact extends the new interpretation to extradition as well. There was no need to do this under EU law,[66] although there might be reasons for it, such as avoiding double standards of protection. The Court should have at least made them explicit.

The third and final act is one of anti-climax. After such a promising build-up, the Constitutional Court adopts a defensive attitude and refuses to engage in dialogue with the CJEU. The Court hides behind Declaration 1/2004 and attempts to present its overrule as an outcome reached of its own motion. In the end, the Court does not offer any valid arguments for lowering the standard of constitutional protection. If the preliminary ruling in *Melloni* were no more than a hermeneutic tool, there would be no need for that outcome. The Court fails to acknowledge the specific nature of EU law and the obligations that came with the preliminary reference.

[63] Revenga, *supra* n. 15.

[64] Along the lines of the dissenting opinion of Judge Pérez Tremps to the Order for reference, *supra* n. 1.

[65] See the dissenting opinions to the Constitutional Court judgment, STC 91/2000, 30 March.

[66] According to the concurrent opinion of Judge Ollero Tassara, there was no need to revise the constitutional interpretation outside the EU.

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Epilogue on Charter article 53

Beyond the specific case, the preliminary procedure is relevant in the broader discussion about levels of rights protection and the interpretation of Article 53 Charter. As seen above, in *Melloni*, the CJEU held that national authorities and courts remain free to apply more protective national standards of fundamental rights to state measures implementing EU law under two conditions; namely that neither (i) the level of protection provided for by the Charter, as interpreted by the Court, nor (ii) the primacy, unity and effectiveness of EU law are compromised. The first condition requires contrasting the levels of protection afforded by the Constitution and the Charter respectively. In practice, it is often difficult to ascertain whether the Constitution or the Charter provide a higher level of protection, particularly when conflicting rights need to be balanced.[67] We will set this complex issue aside in order to focus on the second condition.

In particular, how much leeway is there for the application of more protective constitutional rights? How should this safeguard clause be interpreted? For instance, Lavranos holds that 'the ECJ has tilted the existing balance towards the supremacy of the Charter over all other existing fundamental rights instruments' and that this approach 'does not necessarily result in the most optimal protection of fundamental rights',[68] while others have welcomed the interpretation of Article 53, and emphasized that state courts may still be able to enforce more protective constitutional rights in situations not entirely determined by EU law – in other words, when EU law leaves discretion to the member states for the implementation of EU law.[69]

Åkerberg Fransson offers an example in which the referring court was explicitly allowed to apply, in the case in question, a more protective constitutional standard of protection.[70] *Åkerberg Fransson* concerned the potential infringement of the right to *ne bis in idem* as a consequence of the combination of tax and criminal sanctions for the same acts of non-compliance of declaration obligations of the value added tax. After deciding that tax penalties and criminal proceedings for tax evasion constituted implementation of EU law for the purposes of Charter Article 51(1),[71] the CJEU held that state courts remained free to apply higher national

[67] See the references *supra* n. 34.

[68] N. Lavranos, 'The ECJ's Judgments in Melloni and Akerberg Fransson: Une ménage à trois difficulté', 4 *Grundrechte* (2013) p. 133; at p. 140; Reestman and Besslink, *supra* n. 40, p. 169.

[69] B. de Witte, 'Article 53', in S. Peers et al. (eds.) *The EU Charter of Fundamental Rights – A Commentary* (Hart Publishing 2013); Sarmiento, *supra* n. 34.

[70] CJEU 26 Feb. 2012, Case C-617/10, *Åklagaren* v. *Hans Åkerberg Fransson*. Actually both decisions were issued on the same date, and the judge rapporteur was also the same.

[71] *Supra* n. 70. para. 27-28. The main controversial issue in this case was the scope of application of the Charter and the corresponding interpretation of Art. 51(1) Charter. See, among others, Lavranos, *supra* n. 68; Skouris, *supra* n. 15; Groussot and Olsson, *supra* n. 15; Iglesias Sánchez,

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standards of protection under the conditions set in *Melloni,* which was expressly quoted.[72] The CJEU ruled that the *ne bis in idem* principle laid down in Charter Article 50 only protected against sanctions of a criminal nature[73] and confirmed that the referring court was allowed to examine the national provisions at stake under more protective national standards. The potential setting aside of one type of sanctions was not considered as compromising the primacy, unity or effectiveness of EU law, 'as long as the remaining penalties are effective, proportionate, and dissuasive'.[74] Hence, Charter Article 53 had some bearing in this case. The main discussion, however, actually concerned the scope of application of the Charter, since the situation was only loosely connected to EU law, and some would argue that the Charter should not even apply.[75]

In the field of the EAW, *Jeremy F*[76] offers a case in which the CJEU accommodated different standards of fundamental rights protection, although this time Charter Article 53 was not mentioned. This case resulted from the first preliminary reference requested by the French Constitutional Council. The case concerned the right to bring an appeal with suspensive effect against the decision to execute an EAW. This right was not established by the EAW Framework Decision. The CJEU ruled that the lack of a right to appeal did not violate the Charter. At the same time, the Court argued that 'the fact that the Framework Decision did not provide for a right of appeal with suspensive effect against the decision to execute a EAW, did not prevent the Member States from enforcing such a right'[77] and acknowledged that the states enjoyed a margin of discretion in implementing the Framework Decision. It concluded that 'provided that the application of the Framework Decision is not frustrated, (…) it does not prevent a Member State from applying its constitutional rules relating inter alia to respect for the right to a fair trial'.[78]

supra n. 19; Sarmiento, *supra* n. 34; B. van Bockel and P. Wattel, 'New Wine into Old Wineskins: The Scope of the Charter of Fundamental Rights of the EU after Åkerberg Fransson', 38 *European Law Review* (2013) p. 866; F. Fontanelli, '*Hic Sunt Nationes*: The Elusive Limits of the EU Charter and the German Constitutional Watchdog', 9 *EuConst* (2013) p. 315.

[72] CJEU *Åkerberg Fransson*, *supra* n. 70, para. 29. The only difference is that before reproducing the *Melloni*-clause, the CJEU stated that 'where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure *in a situation where action of the Member States is not entirely determined by European Union law* (…)'. (emphasis added). However, this was not any sort of pre-requisite in *Melloni,* in which the CJEU simply referred to situations 'where an EU legal act calls for national implementing measures'.

[73] CJEU *Åkerberg Fransson*, *supra* n. 70, para. 36.

[74] CJEU *Åkerberg Fransson*, *supra* n. 70, para. 36.

[75] This was the Opinion of A-G Cruz Villalón in *Åkerberg Fransson, supra* n. 70.

[76] CJEU 30 May 2013, Case C-168/13 PPU, *Jeremy F* v. *Premier minister.* F-X. Millet, 'How Much Lenience for How Much Cooperation? On the First Preliminary Reference of the French Constitutional Council to the Court of Justice', 51 *Common Market Law Review* (2014) p. 195.

[77] *Jeremy F*, *supra* n. 76 para. 51.

[78] *Jeremy F*, *supra* n. 76 para. 53.

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At the same time, the CJEU argued that the margin of discretion was not without limits and insisted on the need to respect the time limits set in the Framework Decision. Thus, the possibility to enforce a higher level of constitutional rights protection was circumscribed by the effectiveness of EU law. In practice, the stringent time limits could make it difficult to enforce the right to appeal.

The different outcomes in *Åkerberg Fransson* and *Jeremy F* on the one hand and *Melloni* on the other might be understood from the perspective of whether the situation was entirely determined by EU law or not.[79] In *Åkerberg Fransson,* EU law did not determine the type of sanctions that the member states ought to implement, but rather only that every member state is under obligation to take all appropriate legislative and administrative measures to ensure collection of all VAT due in its territory. In *Jeremy F,* the CJEU expressly acknowledged that the EAW Framework Decision offered discretion as to the specific manner of implementation and in particular regarding the possibility of providing recourse to appeal with suspensive effect against decisions relating to an EAW.[80] Member states could thus make allowance for that right as long as effectiveness was not undermined, and the time limit was met with compliance. In *Melloni*, the situation was entirely determined by EU law since the grounds for refusal in cases of trial in absentia had been harmonized and there was no margin of manoeuvre for the member states. The application of a higher standard would have undermined the effectiveness of the Framework Decision.

Arguably therefore, one might interpret that the Charter displaces the Constitution in situations entirely determined by EU law, whereas in situations partially determined by EU law, a higher constitutional level of protection may be enforced, as long as the primacy, unity and effectiveness of the Charter are not undermined. Along these lines, Advocate-General Bot in *Melloni* claimed the need to differentiate 'between situations in which there is a definition at European Union level of the degree of protection which must be afforded to a fundamental right in the implementation of action by the European Union and those in which that level of protection has not been the subject of a common definition'.[81] In the first situation, the 'fixing of level of protection reflects a balance between the need to ensure the effectiveness of European Union action and the need to provide adequate protection for fundamental rights'. In this case,

> if a Member State were to invoke, *a posteriori*, the retention of its higher level of protection, the effect would be to upset the balance achieved by the European Union legislature and therefore to jeopardise the application of European Union law (…).

[79] Millet, *supra* n. 76.
[80] Millet, *supra* n. 76, para. 52.
[81] Opinion of A-G Bot in *Melloni*, *supra.* n. 6, para. 124.

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> On the other hand, in the second case, the Member States have more room for manoeuvre in applying, within the scope of European Union law, the level of protection for fundamental rights which they wish to guarantee within the national legal order, provided that that level of protection may be reconciled with the proper implementation of European Union law and does not infringe other fundamental rights protected under European Union law.[82]

However the fact that the EU legislator reached an agreement regarding the level of rights protection should not automatically exclude the possibility of accommodating higher levels of constitutional protection. It is possible that state governments did not take into account or decided not to defend the way a specific right is protected within the respective state.[83] Governments are not the ultimate interpreters of fundamental rights and should not be able to dispose of the standard of constitutional protection by reaching an agreement at the EU level. This argument is reinforced by Article 4(2) TEU, if the interpretation given to a constitutional right is part of the national constitutional identity. Such cases might be exceptional but, under a pluralist structure, the primacy of EU law needs to be balanced against the backdrop of national constitutional rights protection.

In this regard, whether a case involves totally or partially determined situations,[84] the possibility of applying a higher standard of protection should not be automatically excluded when the primacy, unity and effectiveness of EU law are compromised. The principles of primacy and effectiveness[85] are without any doubt essential to the EU, but they should not automatically trump more protective fundamental rights. There might be cases, however exceptional, in which some restriction could be justified to secure more protective constitutional rights despite the compromise of those principles that would result. Indeed, the CJEU has already acknowledged such a possibility. For instance, in *Omega*,[86] the effectiveness of the freedom to provide services was compromised, yet the CJEU conceded that the restriction to the free provision of services was justified in order to protect human dignity in Germany, where the principle of human dignity is protected at a higher level than in other member states.[87]

[82] *Melloni*, *supra.* n. 6, para. 127.

[83] Reestman and Besselink, *supra* n. 40, p. 173-175.

[84] Actually, in practice it might be hard to tell apart situations totally or partially determined by EU law, since this is a matter of degree.

[85] The inclusion of 'unity', next to primacy and effectiveness is odd. The CJEU does not elaborate on how to understand the 'unity' of EU law, which is not necessarily the same thing as 'uniformity'.

[86] CJEU 14 Oct. 2004, Case C-36/02, *Omega Spielhallen und Automatenaufstellungs GmbH* v. *Oberbürgermeisterin der Bundesstadt Bonn.*

[87] See also CJEU 14 Feb. 2008, Case C-244/06, *Dynamic Medien Vertriebs GmbH*; CJEU 22 Dec. 2010, Case C-208/09 *Ilonka Sayn-Wittgenstein* v. *Landeshauptmann von Wien.*

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Admittedly, this type of case differs from *Melloni* and *Åkerberg Fransson*. *Omega* involves state measures that restrict a fundamental freedom of movement,[88] rather than state measures that implement secondary legislation.[89] It could be argued that, in a *Melloni/Åkerberg Fransson* type of situation, the EU legislature has (totally or partially) harmonized a certain field by means of secondary legislation. It is worth noting that, despite the different outcomes, neither in *Melloni* nor in *Åkerberg Fransson* did the CJEU admit that the enforcement of a more protective constitutional standard could restrict the primacy or effectiveness of EU law. And yet, if the CJEU has admitted restrictions on primacy and effectiveness on the basis of more protective constitutional rights when the states derogate from the EU fundamental freedoms of movement, why not when the states implement secondary legislation? As mentioned before, such an exception could be grounded on TEU Article 4(2),[90] but not solely on it. More protective constitutional rights could also be accommodated on the basis of Charter Article 53.

In sum, I would argue that there might be cases in which even the primacy and effectiveness of EU law would have to yield to more protective constitutional rights protection. This does not mean that state courts would be free to unilaterally apply the standards of constitutional protection. It should be for the CJEU to balance the different rights and interests at stake on a case-by-case basis. Article 53 could be interpreted as incorporating a mandate for the CJEU to allow for higher levels of constitutional protection when there were no other rights or interests that should prevail in the specific case.[91] Instead of an automatic application of primacy and effectiveness, then, the CJEU should take into consideration the possibility of accommodating more protective fundamental rights.

To recapitulate, in *Melloni,* the CJEU has acknowledged the co-existence and simultaneous application of the Charter and the Constitution to state measures within the field of application of EU law.[92] The possibility of enforcing higher

[88] The CJEU has recently confirmed the application of the Charter to state measures derogating from the fundamental freedoms of movement, CJEU 30 April 2014, Case C-390/12, *Robert Pfleger.*

[89] Structurally, CJEU 21 Dec. 2011, Joined Cases C-411/10 and C-493/10, *N.S.* v. *Secretary of State for the Home Department,* and *M.E., A.S.M., M.T, K.P., E.H.* v. *Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform,* is different from all the above since in that case the issue was not about a more protective constitutional right, but rather about a systemic violation of the ECHR.

[90] Von Bogdandy and Schill, *supra* n. 52.

[91] A. Torres Pérez, 'Constitutional Identity and Fundamental Rights: The Intersection between Articles 4(2) TEU and 53 Charter', in A. Saiz Arnaiz and C. Alcoberro (eds.), *National Constitutional Identity and European Integration* (Intersentia 2013).

[92] Groussot and Olsson, *supra* n. 15, p. 27, about the CJEU interpretation, held that 'On the one hand, it reflects the pluralist nature of EU law by recognising the cumulative application of several layers of fundamental rights binding Member States and mandates the ECJ to engage in a dialogue with the national constitutional courts. On the other hand, it strongly protects the level

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levels of constitutional protection, however, depends on whether the primacy, unity, and effectiveness of EU law are compromised or not. The extent to which these principles are compromised is also a matter of interpretation. Particularly in fields not entirely determined by EU law, this safeguard clause should not be interpreted strictly.[93] As has been argued here, in any type of case (totally or partially determined by EU law), even if primacy, unity, and effectiveness were compromised, constitutional rights should not be automatically set aside, but rather the CJEU should examine whether a restriction on those principles might be justified in order to accommodate more protective constitutional rights. These situations might be exceptional, but they should not be excluded outright. Obviously, if those principles were not compromised, state courts may enforce the respective constitutional standards of protection, which is the only thing that has been admitted by the CJEU in *Melloni* and *Fransson.*

Concluding remarks

Fundamental rights in Europe are protected by highly integrated systems[94] in which the respective declarations of rights and courts are not hierarchically ordered. In this context, the interpretation of fundamental rights becomes a shared endeavour. Courts from different systems participate in the activity of giving meaning to parallel and overlapping rights. From a normative perspective, judicial dialogue provides an avenue for interaction. Robust dialogue involves the exchange of arguments on the basis of mutual recognition with the goal of reaching a common agreement. Judicial dialogue cannot be understood as consisting of a single, isolated occasion for interaction, but rather it needs to be conceived from a diachronic perspective, as the exchange of arguments develops case after case.[95]

In the context of rights protection in a pluralist system, the case of *Melloni* represented a crown jewel. The case pitted a right with greater constitutional than EU protection against the obligations stemming from EU law. It revolved around

of protection of the Charter and the effectiveness and uniformity of EU law.' And yet, the absolute conception of primacy upheld by the CJEU is hardly compatible with a pluralist approach.

[93] De Boer, *supra* n. 15, p. 1103, held that the Court should not strictly interpret the condition on the 'primacy, unity and effectiveness', but rather allow considerable leeway for the member states to apply their own national rights standards; Sarmiento, *supra* n. 34, p. 1295 conceived this safeguard clause as an exceptional remedy, and argued that in situations partially determined by EU law this clause should be applied only in exceptional circumstances.

[94] P. Eeckhout, 'Human Rights and the Autonomy of EU Law: Pluralism or Integration', *Current Legal Problems* (2013) p. 1.

[95] A. Torres Pérez, *Conflicts of Rights in the European Union. A Theory of Supranational Adjudication* (OUP 2009) at p. 110-112; R Bustos Gisbert, 'XV Proposiciones generales para una teoría de los diálogos judiciales', 95 *Revista Española de Derecho Constitucional* (2012) p. 13.

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two interrelated issues: how the right to a fair trial should be interpreted (enshrined in the Constitution, the Charter, and the ECHR); and how the conflicts between levels of protection should be approached (in terms of Charter Article 53).

The order for reference was a very promising start. The Constitutional Court elaborated its arguments supporting its interpretation of the right to a fair trial and even suggested several interpretations for Charter Article 53. At the same time, the Constitutional Court acknowledged the autonomy of EU fundamental rights, and by virtue of the reference request, the authority of the CJEU as a counterpart in dialogue. The events unfortunately unfolded in a quite disappointing manner from the perspective of robust dialogue.[96] With regard to the interpretation of the right to a fair trial, the CJEU ignored the position of the Constitutional Court and the invitation to interpret the Charter along the Spanish Court's lines, or to accommodate diverging interpretations. With regard to the interpretation of Charter Article 53, the CJEU followed the tired script, refusing to acknowledge any potential limits to primacy on the basis of more protective constitutional rights. The Constitutional Court then reacted defensively, albeit in compliance with the CJEU's ruling, brandishing the sword of the *controlimiti* doctrine and disparaging the weight of EU law upon the constitutional order.

After a promising start, the respective courts retreated to the safe havens of EU primacy and constitutional supremacy in a struggle for ultimate authority. Notwithstanding, the underlying pluralist framework and the building of a common space of fundamental rights require a dialogical approach. Judicial dialogue leads to more fully reasoned outcomes and enhances participation in the interpretive process in such a way that the interpretive outcome may be regarded as a shared product.

Constitutional courts must adapt to a transformed scenario in which several courts coexist and overlap in adjudicating fundamental rights. Constitutional Courts do have a role to play as guardians of the Constitution *vis-à-vis* the CJEU. They can enhance fundamental rights protection in the EU by maintaining their leverage and acting as a counterbalance to the CJEU. In order to have a significant role and avoid isolation, however, they must acknowledge the impact of EU law upon the constitutional system.[97] In turn, the CJEU should take care to recognize the potential limits to integration, since the absolute primacy of EU law remains disputed. The primacy and effectiveness of EU law are paramount in the EU, and diminished standards of constitutional protection is an inherent risk of belonging to a broader community in which other interests or rights might prevail. How-

[96] De Boer, *supra* n. 15.

[97] M. Bobek, 'The Impact of the European Mandate of Ordinary Courts on the Position of Constitutional Courts', in M. Claes et al. (eds.), *Constitutional Conversations in Europe: Actors, Topics and Procedures* (Intersentia 2012).

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ever, such an unwanted outcome should try to be avoided.[98] In cases where higher constitutional levels of protection are the issue, the CJEU should carefully weigh the competing arguments and look to build on its persuasive authority by addressing them.

Meanwhile, underlying the CJEU's interpretation of Article 53 endures an absolute view of primacy, which has generally been accepted as orthodox since *Internationale Handelsgesellschaft*, but is hardly compatible with the overall pluralist framework. Although a forceful defence of primacy might have been wanting back in the seventies, at present and particularly when state constitutions are at stake, a more nuanced approach would better suit the 'compound nature of the European constitutional order'.[99] As I see it, Charter Article 53 embodies a pluralist understanding in the field of fundamental rights. This is not to accord state courts the freedom to unilaterally set aside state acts implementing EU law in favour of a more protective constitutional standard. Rather, Article 53 would require the CJEU to evaluate the potential justification for restrictions to the primacy or effectiveness of EU law when more protective constitutional rights are involved.

[98] As de Witte *supra* n. 69, put it, 'In order to avoid this from happening, both the EU legislative organs and the Court of Justice of the EU should pay greater attention to the question of whether room should be left for additional protection of fundamental rights by national law.'

[99] Reestman and Besselink, *supra* n. 40, p. 175.

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