

“EUited in diversity: between common constitutional traditions and national identities”

International Conference

Riga, Latvia – 2-3 September 2021

Conference proceedings



« UniE dans la diversité : entre traditions constitutionnelles communes et identités nationales »

Conférence internationale

Riga, Lettonie – 2-3 septembre 2021

Actes de la conférence



COURT OF JUSTICE
OF THE EUROPEAN UNION



CONSTITUTIONAL COURT OF
THE REPUBLIC OF LATVIA

PROGRAMME

Wednesday, 1 September

19:00 Welcome reception

Thursday, 2 September

9:30-10:00 Arrival and registration of the delegations

10:00-10:10 Opening of the Conference

Introductory speeches:

- Mr Koen Lenaerts, President of the Court of Justice of the European Union
- Ms Sanita Osipova, President of the Constitutional Court of the Republic of Latvia

10:10-11:35 **Discovering and defining constitutional traditions common to the Member States**

1st panel

Speakers

- H.E. Mr Egils Levits, President of the Republic of Latvia
- Mr Koen Lenaerts, President of the Court of Justice of the European Union
- Ms Ineta Ziemele, Judge at the Court of Justice of the European Union
- Mr Peter M. Huber, Justice of the Federal Constitutional Court of the Federal Republic of Germany
- Chaired by Mr Frank Clarke, Chief Justice of the Supreme Court of Ireland

11:35-12:05 Coffee break

12:05-13:05

Discussion

Introduction by Mr Frank Clarke, Chief Justice of the Supreme Court of Ireland

13:20-13:30 Flower-laying ceremony at the Freedom Monument by the President of the Court of Justice of the European Union and the President of the Constitutional Court of the Republic of Latvia (Freedom square, Riga)

13:30-13:40 Official photo of participants

13:40-13:50 Signing of the Guest Book of the Freedom Monument by the President of the Constitutional Court of the Republic of Latvia and the President of the Court of Justice of the European Union

13:40-15:00 Lunch

15:20-16:25 **Fundamental rights: scope of application, competences and harmonisation**

2nd panel

Speakers:

- Mr Lars Bay Larsen, Judge at the Court of Justice of the European Union
- Mr Tamás Sulyok (web), President of the Constitutional Court of Hungary
- Ms Claire Bazy Malaurie (web), Member of the Constitutional Council of the French Republic
- Chaired by Ms Danutė Jočienė, President of the Constitutional Court of the Republic of Lithuania

- 16:25-17:00** Discussion
Introduction by Ms Danutė Jočienė,
President of the Constitutional Court of the Republic of Lithuania
- 17:00** End of day one of the Conference
- 19:00-21:30** Dinner hosted by the President of the Constitutional Court of the Republic of Latvia

Friday, 3 September

10:30-11:55 The level of fundamental rights protection

3rd panel

Speakers

- Ms Sacha Prechal, President of Chamber at the Court of Justice of the European Union
- Mr Rajko Knez, President of the Constitutional Court of the Republic of Slovenia
- Mr Gunārs Kusiņš, Justice of the Constitutional Court of the Republic of Latvia
- Mr Johannes Schnizer, Member of the Constitutional Court of the Republic of Austria
- Chaired by Ms María Encarnación Roca Trías, Vice-President of the Constitutional Court of the Kingdom of Spain

11:55-12:45

Discussion

Introduction by Ms María Encarnación Roca Trías,
Vice-President of the Constitutional Court of the Kingdom of Spain

12:45-14:00

Lunch

14:00-15:25

Limitations on the exercise of fundamental rights

4th panel

Speakers

- Mr Maciej Szpunar, First Advocate General of the Court of Justice of the European Union
- Mr François Daoût, President of the Constitutional Court of the Kingdom of Belgium
- Ms Snježana Bagić (web), Deputy President of the Constitutional Court of the Republic of Croatia
- Mr Francesco Viganò, Judge at the Constitutional Court of the Italian Republic
- Chaired by Ms Persefoni Panayi (web), President of the Supreme Court of the Republic of Cyprus

15:25-16:15

Discussion

Introduction by Ms Persefoni Panayi,
President of the Supreme Court of the Republic of Cyprus

16:15-16:45

Concluding remarks

Ms Sanita Osipova, President of the Constitutional Court of the Republic of Latvia
Mr Koen Lenaerts, President of the Court of Justice of the European Union

16:45-17:15

Farewell cocktail





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Ms Sanita Osipova

President of the Constitutional Court
of the Republic of Latvia



Foreword by Ms Sanita Osipova, President of the Constitutional Court of the Republic of Latvia

The European Union was established and shaped to be an area of democracy and justice, uniting countries through their common values with the primary goal of protecting human dignity.

A constitutional judiciary is vital to the existence of a democratic legal system, especially in the long-term. The parliamentary tradition holds primary responsibility for democracy – that is, the right of the people to govern their country. The parliament is a reflection of its people on both a national, as well as on a European Union level, as people elect their representatives without requirements for specific knowledge or education. The people elect individuals they trust, relying on them to represent the electorate with honour and take political decisions accordingly. The people place the power of the nation state, and of a united Europe, in safe hands.

The constitutional judiciary, on the other hand, is responsible for the rule of law, without which the existence of democracy would be impossible. Judges are selected upon careful examination of their education, experience and reputation. They carry the responsibility of ensuring that democracy is exercised in a legitimate manner, and ensuring that fundamental human rights are respected. This is the basis of our complex modern power structure, which implies a balance between constitutional organs of the State, which are based on the principle of division of the power of the State. The legislator adopts laws, and the courts enforce them, thus establishing binding case-law.

The rule of law is designed with the aim of ensuring justice in society: politicians are responsible for enshrining values in laws, while judges enforce those values, making justice accessible to anyone who has not been able to achieve it otherwise, allowing the public to seek such justice before a court. Justice is delivered at all levels, both at the level of the individual Member States and at the level of the European Union as a whole. While there are many courts, the judiciary is one, all courts working towards a common goal: to nurture the European Union as an area of democracy and justice by administering law.

One and the same, the people, as a sovereign, legitimise the power structures of their nation states and legitimise the exercise of power at the level of the European Union. Democratic power is exercised within and throughout the framework of law. For this reason, it is vital to develop a pan-European legal area in which every citizen of the European Union and every nation state is equal, not only in decision-making, but also in the implementation of such decisions, inter alia, within their jurisdiction. At a national level, the constitutional judiciary has

the final say on the legitimacy of laws and regulations, while at a European level, this power is vested in the Court of Justice of the European Union ('the CJEU'). It is essential for the judiciary of each nation state and the judiciary of the European Union to work together in order to create a fair and just legal landscape which is accessible to every European citizen, and which aims to safeguard both the common values of the European Union and the right of nation states to self-determination, which is first and foremost expressed through their constitutional identity.

This volume of articles contains presentations delivered in the conference 'EU-nited in Diversity: Between Common Constitutional Traditions and National Identities', which was organised by the Constitutional Court of the Republic of Latvia and the CJEU and took place on 2 to 3 September 2021 in Riga (Latvia). This was the first time in the history of the European Union where judges from the constitutional courts and constitutional jurisdictions of 23 Member States, as well as the CJEU met to discuss the EU's common legal traditions and how to reconcile them with the constitutional traditions and national identities of Member States to establish a single, harmonious European area of justice.¹

The protection of fundamental rights is an area where the competences of the Member States' constitutional courts and the CJEU often clash. It is therefore important to discuss how to reconcile the diverse national identities and constitutional values of the Member States, while ensuring consistent interpretation and application of European Union law. The conference was another way in which the CJEU and national constitutional courts could come together to pursue their common goal: justice.

The conference was held in two sessions consisting of four panel discussions, and it aimed, firstly, to seek a common approach to discovering and developing constitutional traditions common to the Member States in a more structured and inclusive dialogue between the CJEU and the constitutional courts of the Member States. Secondly, to examine the role of the CJEU and the constitutional courts in ensuring 'unity in diversity'. Thirdly, to discuss means of further stimulating the dialogue between the CJEU and the constitutional courts of the Member States, looking at both formal instruments of cooperation and informal channels of communication. Finally, to explore the procedural and methodological possibilities for a more transparent relationship between the CJEU and the constitutional courts of the Member States.

¹ | See full list of participants on page 238.

This volume contains a number of important solutions and proposals that will contribute to cooperation and will aid in achieving a common understanding of issues which are relevant to each Member State. This will be facilitated, inter alia, by the intention to establish future cooperation at European Union level with a new system in which the constitutional courts of the Member States would be involved more actively. This would take the form, first, of making better use of the existing system whereby Member States present their opinions in cases before the CJEU ensuring that the CJEU is informed how and whether a particular issue affects the constitutional traditions or national identity of the Member State. Secondly, it is essential for the CJEU to increase its comparative assessment of constitutional law when adjudicating cases.

Cooperating at a European Union level and at a national level has revealed two things: there are the common values of the European Union, the European constitutional tradition of democracy, human dignity, the rule of law, and there is the value and importance of each Member State in this area, characterised above all by its national constitutional identity, which the countries of the European Union are committed to safeguarding. The CJEU is prepared to respect this national constitutional identity; however, it is necessary to establish criteria for defining what constitutes a national constitutional identity. This is important because it cannot be contradictory to the European constitutional tradition. It is essential to draw figurative borders between the common constitutional traditions of Europe as a whole and the sacrosanct core of constitutional identity of each Member State. In this respect, it is the universities which are developing comparative constitutional law theory, thereby increasingly revealing the constitutional core of each country, which are crucial for the future of the European Union. I am therefore delighted that this volume of presentations, which has been put together with the support of the CJEU and bringing together the proposals made by our esteemed colleagues at the Riga Conference, will serve as a driving force to academics to undertake further research on these issues.

The most important thing is that this discussion has been opened and the judges of the constitutional courts of the Member States of the European Union and the judges of the CJEU have met and agreed to further develop their dialogue at future meetings.

I would like to express my gratitude to the Latvian Constitutional Court and the CJEU for both this conference and this volume, and wish our readers to find inspiration for new ideas.

Ms Sanita Osipova,
President of the Constitutional Court of the Republic of Latvia
(until 11 February 2022)



Mr Koen Lenaerts

President of the Court of Justice
of the European Union



Introductory speech by Mr Koen Lenaerts, President of the Court of Justice of the European Union

President Levits,

President Osipova,

Dear Colleagues,

Ladies and Gentlemen,

Welcome to our conference “EUnited in Diversity: Between Common constitutional traditions and national identities”, co-organised by the Court of Justice of the European Union and the Constitutional Court of the Republic of Latvia, to which I am particularly grateful for having invited us to this wonderful venue, the Mazā ģilde, in the beautiful city of Riga.

Let me also say right at the start that it is a great privilege and pleasure to meet again, on this occasion, my former colleague and dear friend, President Levits. Having known him for almost two decades now, I would like to congratulate all the Latvians who are here with us today because you have a great Head of State.

The idea of this conference was born in 2019. It was supposed to take place already one and a half years ago, in March 2020. However, as you all know, the pandemic prevented it from happening then. And even though virtual meetings have proven far more feasible and constructive than initially expected, we also learned that they cannot replace personal encounters.

The purpose of this conference is twofold.

Its purpose is, first, to shed more light on two important constitutional features of the crossroad between our common EU legal order and the different domestic legal orders, namely the common constitutional traditions on the one hand and national identities on the other.

Thus, we have two entire days before us where we will hear and discuss a lot, in four consecutive panels, about discovering and defining the common constitutional traditions and about the protection of fundamental rights in the multilayer legal system that characterises the European Union and its Member States.

Secondly, this conference shall enable us to strengthen the bonds – also on a personal level – that underpin mutual trust among the judiciaries of the Member States and the Court of Justice. That trust is essential since the courts that we represent are all constituent parts of one and the same European Union judiciary. Moreover, our courts are, together with the European Court of Human Rights, the ultimate guardians of the fundamental rights and more generally of the rule of law within the European Union.

The motto of the European Union “[E]United in diversity” has been chosen for a good reason as introductory slogan of this conference. It not only reflects so well what the EU stands for but also perfectly describes our own role as judges in our common legal space.

The recent years have shown that the full respect of the founding values of the European Union, such as pluralism, non-discrimination and the rule of law, is not self-evident. This phenomenon also translates into an increasing number of cases where our courts have to deal with such fundamental legal issues in a broader societal and highly political context.

Hence, our courts are regularly called upon to crystallise, apply and thus uphold the very fundamental rules of law which have their source in the Treaties, the Charter, the national constitutions and last but not least the European Convention on Human Rights. Due to the very nature of this multi-layer system, these challenges can only be met through trustful cooperation between us, which takes into account our diversities, but at the same time strives for our unity.

This cooperative spirit is even more important, as the judiciary would hardly be able to fulfill its task to uphold the rule of law and in particular to guarantee the protection of fundamental rights if the trust of the citizens in the judiciary fades due to internal wrangling.

This being said, the motto “[E]United in diversity” as such obviously invites for open and ongoing discussions and I am sure that this conference allows us to have a stimulating and fruitful exchange of views on common constitutional traditions and national identities.

Before giving the floor to President Osipova, I would like to thank her and the Constitutional Court of the Republic of Latvia again for having made this conference happen and welcoming us in so splendid surroundings.

Thank you.



Flower-laying ceremony at the Freedom Monument by the President of the Court of Justice of the European Union and the President of the Constitutional Court of the Republic of Latvia



Ms Sanita Osipova

President of the Constitutional
Court of the Republic of Latvia



Introductory speech by Ms Sanita Osipova, President of the Constitutional Court of the Republic of Latvia

Your Excellency, President of the Republic of Latvia, President of the Court of Justice of the European Union, Presidents, Vice-Presidents and judges of the constitutional courts and supreme courts of the EU, dear guests, ladies and gentlemen.

I am truly honoured to welcome you today at the conference 'EUUnited in diversity: between common constitutional traditions and national identities'.

The Conference is co-organised by the Court of Justice of the European Union ('the CJEU') and the Latvijas Republikas Satversmes tiesa (Latvian Constitutional Court) thanks to the initiative of my predecessor Professor Ineta Ziemele and President Lenaerts back in 2019.

This is our third attempt to hold this Conference. It was initially planned to be held in March 2020. Eighteen months later, we have finally succeeded.

Europe and the world are completely different to what they were eighteen months ago in so many respects and will never be the same. The objective of unity and common understanding in Europe has advanced even more considerably. This is true especially in times of crisis, when we realise that by working together in the long term, we can achieve more than by working individually. Furthermore, for this purpose, dialogue is an essential tool as it is also for the courts. We – the judges, communicate through our judgments. At the same time, we can also use other means of dialogue, such as direct discussions between the constitutional courts, the supreme courts and the CJEU. Dialogue is vital in finding common points. Hence, the idea of the conference – an informal meeting between the constitutional jurisdictions and the CJEU to facilitate common discussion on our shared future.

I am pleased that today we have been able to meet each other – be it in person or virtually. The format of this conference is set to enable an open, but non-public discussion in order to facilitate the dialogue between the judges themselves. A dialogue to contribute to our work in advancing our common values.

The aim of the conference is, firstly, to search for a common approach in discovering and developing constitutional traditions common to the Member States through a more structured and inclusive dialogue between the CJEU and the constitutional courts of the Member States. Secondly, it is to examine the role that the Court of Justice and constitutional

courts play in ensuring 'unity in diversity'. Thirdly, we will discuss ways to explore both formal and informal communication channels between the CJEU and the constitutional courts of the Member States. Fourthly, in this conference we will explore the procedural and methodological options for a more transparent relationship between the CJEU and the constitutional courts of the Member States.

This two-day conference consists of four panels represented by speakers and chairs. Within the framework of every panel, we will open the floor for the discussions. All participants, including those that have joined us virtually, are equally encouraged to participate in the discussions.

I hope that we will all engage in an interesting exchange of views and new ideas that we can develop in the future. Thank you again for being here and for joining us at this conference.





TEVZEMEI
UN
BRIVIBAI

Giftshop



Participants of the conference

1st panel

**Discovering and defining
constitutional traditions
common to the
Member States**



H.E. Mr Egils Levits

President of the Republic of Latvia

Contribution by H.E. Mr Egils Levits, President of the Republic of Latvia

On primacy, common constitutional traditions, and national identity in the common European constitutional space

1.

This is a historical moment in the development of the **common European constitutional space** because for the first time the courts that guard the *two legal systems* have come together for a common debate.

On the one hand, there is the European Union legal system, guarded by the Court of Justice of the European Union. On the other, there are 27 national constitutional systems, guarded by national constitutional courts.¹

The two systems *together* constitute the common *European constitutional space*. It is not a state, but a legal space which includes 27 sovereign states and 1 specific supranational organisation – the European Union. This is a concept that constitutional law experts might have a hard time grappling with, but it is no doubt a real phenomenon. We are part of a common constitutional *space* without sharing a common *state*.

This common constitutional space has two dimensions: the European dimension and the national constitutional dimension with its 27 Member States. These are two *parallel* dimensions, which exist *autonomously*.

As the Court has indicated on numerous occasions, European law is autonomous from national legal systems. It develops its own system of concepts and uses specific legal terminology. Even when the terms are the same as in the national systems, the interpretation and content may be different. The autonomy of the European legal system is one of the essential characteristics of European law. The other dimension consists of 27 different national constitutional systems.

1 | In some Member States – Supreme courts or Councils of State.

Such a construction – two legal dimensions confluent into one unique constitutional space – naturally raises the question: What are the *risks for contradictions and conflicts* between these two dimensions? The very construction has an inherent risk. The Court deals only with European law, while national constitutional courts can only operate under their national constitutions (even when they include references to European law).

2.

The contradictions and conflicts between European law and national law should be resolved by a firm and simple principle – **the primacy of European law** (primary and secondary) over the entirety of national law (including constitutional law). This means that where a conflict arises between an aspect of EU law and an aspect of the national law of a Member State, European law should always prevail.

The primacy of European law is a, or rather *the*, fundamental principle of the European Union, which allows its functioning not only as a simple international organisation, but, moreover, as a supranational legal union (*Rechtsgemeinschaft*). Without this, the pursuit of European policies would become unworkable. Therefore, it is an essential element, a *conditio sine qua non*, of the (constitutional) identity of the European Union as it is now. We want the European Union to run smoothly, so we have recognised and should continue to respect the primacy of European law over the legal systems of the Member States.

However, it is important to stress that primacy does not mean supremacy. Whereas supremacy as a substantive rule refers to the order of precedence within one hierarchical system of legal rules, primacy is rather a procedural rule to resolve the conflict of laws. The jurisprudence of the Court refers only to the term ‘primacy’.

Therefore, there are no hierarchical relations between European law and national constitutional law.

A *general* challenge to the principle of primacy by national institutions – for example, constitutional courts by reference to the national constitution or national law in general – would without doubt destroy the European Union.

3.

However, the general rule of the primacy of European law is achieved by **two modifications** in specific situations. If prudently applied by both the Court and the national constitutional courts, these two modifications will allow us to avoid most, or at least the most radical, conflicts between European and national laws, which might otherwise create judicial and political tensions within the European Union.

One of these modifications is Article 4(2) of the Treaty on European Union (TEU). It says that the European Union should respect the *national identity* of the Member States. The other modification is known as the *common constitutional traditions*.

Both features are interfaces or channels between European law and national constitutional laws, but they have different effects.

The first feature, national identity, *restricts* the competence of the European Union. The second feature, common constitutional traditions, generated mostly by national constitutional courts, is a *legal source* for the Court and *shapes* European law. National constitutional courts interpret their national constitutions and these interpretations feed into European law through the channel of common constitutional traditions, thus contributing to its development.

These two specific modifications to the general rule of primacy of European law – national identity and common constitutional traditions – are safeguards that *help to prevent* conflicts or contradictions between the two dimensions of the common European constitutional space and the relevant courts: the 27 national constitutional courts and the Court. This is how we should look at the common European constitutional space and its principal structure.

4.

First, we will take a look at the **common constitutional traditions**. Defining the common constitutional traditions is the task of the Court. It is not up to the Latvian, German, or Spanish constitutional courts to claim what we should understand by the common constitutional traditions. The mandate is clear. It is only the Court that can define what the content of the common constitutional traditions will be.

In defining these traditions, the Court follows a *comparative approach*. Comparative law is crucial for the European legal system. According to German law professor Häberle, the comparative approach is one of five methods of interpretation used to explain European law beyond the grammatical, systematic, historical, and teleological methods.²

The comparative approach implies that we give proper regard to all aspects of constitutional traditions, avoiding blunt generalisations. This, in turn, requires a more *sophisticated methodological approach* to defining common constitutional traditions. Although a methodology for identifying such common traits is emerging in European legal science and practice, it is an area which is currently still underdeveloped.

2 | Häberle, P., 'Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat — Zugleich zur Rechtsvergleichung als „fünfter“ Auslegungsmethode', *Juristen Zeitung*, 44. Jahrg., Nr. 20, 1989, pp. 913-919.

We should start by including *all* 27 Member States in this benchmark analysis. If as much as one Member State is not included, our understanding of common constitutional traditions will suffer. The Court has a research department that deals with these matters and develops succinct overviews of constitutional changes in Member States. Normally, such reports do not cover all Member States and are rather limited to stating facts. These studies are no doubt too limited. The Court should be able to benefit from a more detailed understanding of what these common traditions are.

There should also be a more dogmatic approach as to how the traditions of the 27 Member States are *synthesised*. This is a field of study for judicial theorists, lawyers, and, of course, judges. Synthesising two extremely complex systems to create a superior single system that underpins basic principles is a challenging task. Further, combining 27 national systems into one is all the more challenging. Considering that the judges responsible for defining these doctrines have gathered here today for the first time in this format, it is worth considering the manner in which we can create a system or approach that allows us to synthesise these 27 national constitutional traditions.

Comparative law theory may well be helpful here. Comparative law experts deal with these issues every day. But of course, there are also some specific aspects at play. What we need is a thoroughly detailed and methodological approach. This would be a *transparent way* to show the national constitutional courts and the citizens of Europe all of the nuances of the common constitutional traditions, which when synthesised through the jurisprudence of the Court, flow into European law.

5.

As for the second interface or connection between European law and the national constitutional systems, Article 4(2) TEU refers to **national identity**.

The concept of national identity in Article 4(2) TEU is very similar to the concept of constitutional identity or *constitutional core* (*Verfassungskern*) in many national constitutional laws and practices in the Member States. The concept of the constitutional core means fundamental, legally unchangeable provisions and principles of the national constitution. This concept originated from Article 79(3) of the Grundgesetz (Basic Law of the Federal Republic of Germany) in 1949. It is used by several other Member States, including in the Preamble to the Latvijas Republikas Satversme (Constitution of the Latvian Republic) which describes the constitutional core and its integrity.

According to Article 4(2) TEU, the Union should *respect* the national identity of the Member States. Respect requires *self-restraint* on the part of the European Union's institutions in the fields wherein the Member States have transferred their competences to the Union according to Article 2 to 6 TFEU. As a result, national identity should be regarded as an *exception* to the competences of the Union.

Consequently, in a specific situation where the national identity of a Member State opposes European Union law, the principle of the primacy of European Union law is *not applicable*.

The constitutional cores of all Member States are similar, but not identical. All are democratic states based on the rule of law. Nevertheless, their constitution and constitutional core reflects their different history, culture, and other aspects that are unique to each state. The notion of national identity in Article 4(2) TEU is equally defined for *all* Member States. According to that provision, the EU respects their national identities, 'inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'. It respects 'their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security'. If the constitutional core of a Member State fits that definition, the Court should respect it.

But *which institution* is entitled to examine whether a constitutional core conforms to the definition of Article 4(2) TEU? Of course, it is up to national constitutional courts to define and decide on their constitutional core (or a similar concept). But, should the Court automatically accept the definition from national constitutional courts, or does it have the right (or duty) to examine it, and, by interpretation of Article 4(2) TEU, in some cases to reject it?

It would be contrary to the idea of the constitution of a democratic state that the national constitutional court is not entitled to define even the very core of the constitution and its central provisions. This is the position of several constitutional courts and constitutional theories of the Member States, including the Latvijas Republikas Satversmes tiesa (Latvian Constitutional Court).

On the other hand, there is a risk that Article 4(2) TEU could be abused if a 'simple' interest of a Member State was to be intentionally declared as a part of its constitutional identity and therefore national identity.

I think this is a crucial point of issue because it could *not be resolved by judicial means*.

It seems that only a *responsible position* from both sides could diminish, if not completely resolve, such a dispute. On the one hand, the Court should, in principle, *accept* the argument of national identity (constitutional core), with the exception of cases of obvious abuse. It is not for the Court to engage in a national constitutional debate which by the thorough examination of Article 4(2) TEU, would be de facto unavoidable. However, the national constitutional court should also be careful when using these notions in the context of European law.

To conclude, the debate over the 'last word' cannot be closed either by judicial interpretation of Article 4(2) TEU or by the interpretation of national constitutions. But, careful reflection and self-restraint on both sides can avoid controversies on this issue in *practice*, which could otherwise be detrimental to the common European constitutional space.

Thank you for your time!

Humanitas non Europaeas solum, religio non
humanas tantum, sed et leges nostras tam
in eis, quaeque, ut dicitur, non solum in
venerunt, sed etiam, ut dicitur, in
in tantis, ut dicitur, in tantis, ut dicitur, in

United in diversity we draw inspiration from the
cultural, religious and humanist inheritance of
Europe, from which have developed the universal
rights of the inviolable and inalienable rights of
every person, freedom, democracy, equality
and the rule of law.

Unies dans la diversité, nous nous inspirons
des cultures, religieuses et humanistes de
l'Europe, de laquelle se sont développés les
droits universels qui constituent les droits
inviolables et inaliénables de la personne humaine
et, la démocratie, l'égalité et l'état

Ilja Šuplja

Konrad

Guest Book of the Freedom Monument signed by the President of the Constitutional Court of the Republic of Latvia and the President of the Court of Justice of the European Union



Mr Koen Lenaerts

President of the Court of Justice
of the European Union



Contribution by Mr Koen Lenaerts, President of the Court of Justice of the European Union

The constitutional traditions common to the Member States: the comparative law method

President Levits,

Dear colleagues,

Ladies and Gentlemen,

I am honoured to share this first panel with President Levits and three outstanding and experienced judges, Chief Justice Frank Clarke, Justice Peter Huber and my dear colleague Judge Ineta Ziemele.

My contribution to this panel will focus on the way in which the comparative law method is applied by the Court of Justice of the European Union. In so doing, I shall argue that that method of interpretation and the constitutional traditions common to the Member States go hand-in-hand.

To that end, I shall divide my contribution into two parts. First, I shall look at the constitutional authority that enables the Court of Justice to engage in a comparative study of the laws of the Member States. Second, I shall examine whether consensus is dispositive in the discovery of constitutional traditions common to the Member States.

However, before moving on, I would like to draw your attention to the Judicial Network of the EU, which was opened to the public via the website of the Court of Justice in November 2019.¹ Among many other documents, all persons interested in EU law may find on this website the research notes on comparative law drafted by the Research and Documentation Directorate of the Court of Justice. This gives new impetus to the comparative law method, the importance of which was also highlighted by the German Constitutional Court in its *Arrest Warrant III*

1 | See press release No 135/19 of 6 November 2019.

order delivered in December 2020, with respect to the direct application of the Charter of Fundamental Rights of the European Union by that Court in areas fully harmonised by EU law .²

1. The constitutional authority for the comparative law method

The comparative law method may be defined as an interpretative tool that serves the Court of Justice to resolve particular gaps, conflicts and ambiguities, be they at constitutional or legislative level. Whilst the comparative law method focuses primarily on the laws of the Member States, it does not rule out international law, or even the law of third countries such as the US.³

Three Treaty provisions provide the constitutional authority for the Court of Justice to apply the comparative law method.

First and foremost, by virtue of Article 19 TEU – a provision that gives concrete expression to the value of respect for the rule of law –, the Court of Justice is required to solve the cases over which it enjoys jurisdiction. Accordingly, as the Court stated already in 1957, where a case is brought before it and the Treaties do not contain any rules for its solution, ‘unless the [Court] is to deny justice it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case-law of the [Member States]’.⁴ It follows that Article 19 TEU invites the Court of Justice to engage in a comparative study of the laws of the Member States.⁵

2| Order of the Bundesverfassungsgericht of 1 December 2020, 2 BvR 1845/18, 2 BvR 2100/18 (see also press release No 108/2020 of 30 December 2020), in which the Second Senate endorses the approach newly adopted by the First Senate in its *Right to be forgotten II* order of 6 November 2019, 1 BvR 276/17 (see also press release No 84/2019 of 27 November 2019). Quote from press release No 108/2020: “When interpreting the EU fundamental rights, it is necessary to draw on both the human rights guaranteed by the European Convention on Human Rights and specified by the European Court of Human Rights, and the fundamental rights as reflected in common constitutional traditions and shaped by the constitutional and supreme courts of the Member States.” See in this context also the *Right to be forgotten I* order of the First Senate of 6 November 2019, 1 BvR 16/13, and press release No 83/2019 of 27 November 2019.

3| Lenaerts, K., and Gutman, K., ‘The Comparative Law Method and the Court of Justice of the European Union: Interlocking Legal Orders Revisited’ in M. Andenas and D. Fairgrieve (eds), *Courts and Comparative Law*, Oxford University Press, Oxford, 2015.

4| Judgment of 12 July 1957, *Algera and Others v Common Assembly*, 7/56 and 3/57 to 7/57, [EU:C:1957:7](#), para. 55.

5| Judgment of 5 March 1996, *Brasserie du pêcheur and Factortame*, C-46/93 and C-48/93, [EU:C:1996:79](#), para. 27.

The two other Treaty provisions refer rather explicitly to the comparative law method.

Thus, Article 6(3) TEU mandates the EU to respect '[f]undamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, [which] shall constitute general principles of the Union's law'. Likewise, Article 52(4) of the Charter states that '[in] so far as [the] Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions'.

Furthermore, by stating that the principle of non-contractual liability of the EU is to be developed 'in accordance with the *general principles common to the laws of the Member States*',⁶ Article 340 TFEU clearly indicates that the authors of the Treaties envisaged recourse to the comparative law method as a means of filling lacunae in the EU legal order.

It follows from those three Treaty provisions and Article 52(4) of the Charter that the comparative law method may be relied upon in order to incorporate into the EU constitutional fabric the constitutional traditions common to the Member States, either by discovering general principles or by providing content to the rights recognised in the Charter.

Two examples from the case law may illustrate this point. In the first example, the Court of Justice came to the conclusion that there was no constitutional tradition common to the Member States, whilst in the second, it found that there was.

In *M.A.S. and M.B.*,⁷ a VAT case, the Court of Justice recalled that the Member States must ensure, in cases of serious VAT fraud, that effective and deterrent criminal penalties are adopted. Nevertheless, in the absence of EU harmonisation, it is for the Member States to determine the applicable limitation rules. Thus, a Member State is free to consider that its limitation rules form part of substantive criminal law.⁸

6| See Article 340(2) TFEU.

7| Judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, [EU:C:2017:936](#).

8| Where that is the case, the Court pointed out that such a Member State must comply with the principle that criminal offences and penalties must be defined by law, a fundamental right enshrined in Article 49 of the Charter.

The reasoning of the Court of Justice implicitly shows that, when it comes to the legal nature of limitation rules in criminal matters, there is no common legal tradition in the laws of the Member States. Indeed, the Research and Documentation Directorate had examined twelve legal systems and identified three different approaches, namely procedural, substantive, and hybrid.⁹ Accordingly, the absence of EU harmonisation – coupled with the absence of a common legal tradition – militated in favour of leaving the question to the laws of the Member States.

By contrast, in *Związek Gmin Zagłębia Miedziowego*,¹⁰ the Court of Justice relied on the constitutional traditions common to the Member States, as explored by Advocate General Sharpston,¹¹ in order to discover a new general principle, namely that of fiscal legality. According to that principle, ‘any obligation to pay a tax, such as VAT, and all the essential elements defining the substantive features thereof must be provided for by law’.

It is noteworthy that the scope of application of the comparative law method is not limited to primary EU law, i.e. to discovering general principles of EU law and interpreting provisions of the Charter. That method of interpretation has also been relied upon by the Court of Justice with a view to clarifying specific provisions of secondary EU law. It provides a good framework for the Court of Justice to undertake what I have called ‘federal common law-making’.¹²

Thus, in *Coman and Others*,¹³ the Court of Justice was called upon to interpret the term ‘spouse’ set out in the Citizens’ Rights Directive (Directive 2004/38). Advocate General Wathelet noted that, ever since that Directive was adopted, there has been a change in the legal recognition of marriage of persons of the same sex.¹⁴ That change showed that there was no consensus at Member State level on a definition of marriage, since some Member States allowed marriage of persons of the same sex, whilst the constitutions of other Member States expressly define marriage as a union of two persons of opposite sex. Therefore, the Court of Justice concluded that the term ‘spouse’ for the purpose of the derived right of residence of family members

9| Court of Justice, the Research and Documentation Directorate, Research Note of 15 May 2017, ‘Limitation rules in criminal matters’, available at: https://curia.europa.eu/jcms/jcms/p1_2170124/.

10| Judgment of 8 May 2019, *Związek Gmin Zagłębia Miedziowego*, C-566/17, [EU:C:2019:390](https://eur-lex.europa.eu/eli/jud_2019/390).

11| See also Court of Justice, the Research and Documentation Directorate, Research Note of 9 September 2018, ‘Scope of the principle of the legality of taxation, particularly in relation to value added tax’, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-11%20r-2018-005_neutralisee_synthese_en.pdf

12| K. Lenaerts and K. Gutman, “Federal Common Law” in the European Union: A Comparative Perspective from the United States’ (2006) 54 *American Journal of Comparative Law* 55.

13| Judgment of 5 June 2018, *Coman and Others*, C-673/16, [EU:C:2018:385](https://eur-lex.europa.eu/eli/jud_2018/385).

14| Opinion of Advocate General Wathelet in *Coman and Others*, C-673/16, [EU:C:2018:2](https://eur-lex.europa.eu/eli/jo_2018/2), point 58.

of Union citizens had to be interpreted in a neutral manner, thus deferring to the laws of the Member State where the marriage was legally entered into.¹⁵

2. The (relative) importance of consensus

The more convergence there is among the legal orders of the Member States, the more the Court of Justice will tend to follow in their footsteps. Where convergence is not total but a particular approach is common to a large majority of Member State legal systems, then the Court of Justice will normally follow that approach, adapting and developing it to fit within the EU context.

A good example is provided by the *Berlusconi* case, where the Court of Justice held that '[t]he principle of the retroactive application of the more lenient penalty forms part of the constitutional traditions common to the Member States.'¹⁶ In so doing, the Court of Justice implicitly relied on the comparative study undertaken by Advocate General Kokott who stressed the fact that '[that principle is] established in the (...) legal systems of almost [all Member States]'.¹⁷

However, the existence of divergences among national legal systems may not *automatically* rule out the incorporation, into the EU legal order, of a legal principle which is recognised in only a minority of Member States.

As applied by the Court of Justice, the comparative law method is not tantamount to finding the 'lowest common denominator'. Nor is that method an arithmetical formula that automatically pinpoints the 'common denominators' between the different Member State solutions. Instead, when applying that method, the Court of Justice, and here I quote from an opinion of Advocate General Lagrange of 1962, 'chooses from each of the Member States those solutions which, having regard to the objectives of the Treat[ies], appear [to] be the best'.¹⁸

15| Judgment of 5 June 2018, *Coman and Others*, C-673/16, [EU:C:2018:385](#), para. 36.

16| Judgment of 3 May 2005, *Berlusconi and Others*, C-387/02, C-391/02 and C-403/02, [EU:C:2005:270](#), para. 68.

17| Opinion of Advocate General Kokott delivered on 14 October 2004 in Joined Cases *Berlusconi and Others*, C-387/02, C-391/02 and C-403/02, [EU:C:2004:624](#), point 156 (the UK and Ireland were, at that time, the only exceptions).

18| See Opinion of Advocate General Lagrange delivered on 4 June 1962 in *Koninklijke Nederlandsche Hoogovens en Staalfabrieken v High Authority*, 14/61, not published, [EU:C:1962:19](#), at 283-284.

This shows that the comparative law method and teleological interpretation are deeply intertwined. With a view to ascertaining the different interpretative options available in national legal systems, the Court of Justice will first have recourse to the comparative law method in order to identify them. Next, it will choose the option which is best suited to the attainment of the objectives pursued by EU law.

The way in which this operates may be illustrated by contrasting *Mangold*¹⁹ with *Akzo*.²⁰

In the first case, the Court of Justice recognised, for the first time, that the principle of non-discrimination on grounds of age constitutes a general principle of EU law. That was so despite the fact that only two Member States had, when *Mangold* was delivered, conferred constitutional status on that principle.

Conversely, in *Akzo*, by opting for the approach followed in the majority of Member States, the Court of Justice held that legal professional privilege could not cover exchanges within a company or group of companies with in-house lawyers.²¹

But how may those two outcomes be reconciled? The Opinion of Advocate General Kokott in *Akzo* sheds light on the matter.

In her view, even if a legal principle is only recognised in a minority of Member States, it may still constitute a general principle of EU law in so far as it reflects a task with which the authors of the Treaties have entrusted the EU, or mirrors a trend in the constitutional law of the Member States.

This was the case for the principle of non-discrimination on grounds of age: as Article 19 TFEU shows, fighting age discrimination is, since the Treaty of Amsterdam, one of the objectives sought by the authors of the Treaties. In addition, that principle mirrored a recent trend in the protection of fundamental rights at EU level, which was given concrete expression in the solemn proclamation of the Charter.²² By contrast, Advocate General Kokott found that those two elements were missing in *Akzo*.²³

19| Judgment of 22 November 2005, *Mangold*, C-144/04, [EU:C:2005:709](#).

20| Judgment of 14 September 2010, *Akzo Nobel Chemicals and Akros Chemicals v Commission*, C-550/07 P, [EU:C:2010:512](#).

21| *Ibid.*, para. 44. Previously, in its judgment of 18 May 1982, *AM & S Europe v Commission*, 155/79, [EU:C:1982:157](#), the Court of Justice, taking account of the common criteria and similar circumstances existing at the time in the laws of the Member States, held that the confidentiality of written communications between lawyers and clients should be protected at EU level.

22| Opinion of Advocate General Kokott delivered on 29 April 2010 in *Akzo Nobel Chemicals and Akros Chemicals v Commission*, C-550/07 P, [EU:C:2010:229](#), point 96.

23| *Ibid.*, point 98.

Whilst the absence of consensus at national level does not preclude the Court of Justice from finding the law of the EU, such absence does counsel it to proceed with caution.

When considering a particular case, the Court of Justice will want to avoid ‘going too far’ and may therefore opt for a solution which is not necessarily the most ambitious, considered from the exclusive angle of EU law, but which has the advantage of being ‘compatible’ with the traditions of the Member States and of not hurting special sensitivities in certain Member States.

Thus, in *Mayr*,²⁴ a case where a female worker was dismissed whilst she was undergoing *in vitro* fertilisation treatment, as a result of which she was feeling sick and could not come to work, the Court of Justice held that, for the purpose of the protection of pregnant women against dismissal under directive 92/85, the principle of legal certainty prevents pregnancy from beginning before the ova are transferred to the uterus.²⁵ This meant that that directive did not apply to such a female worker. That said, the Court of Justice found that the principle of non-discrimination on grounds of sex could oppose such dismissal.²⁶

In the *C.D.* and *Z.* cases,²⁷ the Court of Justice was confronted with the question of determining who is entitled to maternity leave as provided for by Directive 92/85. Is it the commissioning mother or the surrogate mother, or both? As noted by Advocates General Wahl and Kokott, the laws of the Member States varied significantly.

24| Judgment of 26 February 2008, *Mayr*, C-506/06, [EU:C:2008:119](#).

25| At the time of the dismissal, the ova of Mrs Mayr had already been fertilised by her partner’s sperm cells, but those ova had not yet been transferred to her uterus. This meant that Mrs Mayr was not dismissed when she was pregnant for the purposes of Directive 92/85.

26| The Court of Justice observed that a dismissal could constitute direct discrimination on grounds of sex, if a female worker is dismissed on account of absence due to illness brought about by the *in vitro* fertilisation treatment that she is undergoing. Accordingly, such a dismissal would run counter to the principle of equal treatment for women and men which was at the time, as regards working conditions, implemented by Directive 76/207 (now Directive 2006/54).

27| Judgments of 18 March 2014, *C.D.*, C-167/12, [EU:C:2014:169](#), and of 18 March 2014, *Z.*, C-363/12, [EU:C:2014:159](#).

Against that background, the Court of Justice held that the Directive only applies to female workers who have been pregnant and have given birth to a child, and thus not to the commissioning mother.²⁸ That said, the Court pointed out the Directive did not oppose value diversity in the Member States. As it only establishes certain minimum requirements, nothing prevents Member States from granting maternity leave to commissioning mothers.²⁹

In the same way, when examining the compatibility of a national measure with EU law, the Court of Justice will 'gauge the temperature' of the Member State legal systems in order to ascertain the credibility and 'acceptability' of its decision for the whole of the EU. It follows that, in so far as there is no EU harmonisation and national diversity does not call into question one of the principles on which the EU is founded, the lack of consensus militates in favour of finding a solution that does not risk encountering incomprehension or resistance in some Member States, which could undermine the effectiveness and the uniform application of EU law.

This point is illustrated by *Liga Portuguesa de Futebol Profissional*, a case on online gambling where the Court of Justice applied a version of the principle of proportionality that allowed room for value diversity. '[T]he mere fact that a Member State has opted for a system of protection which differs from that adopted by another Member State cannot affect the assessment of the need for, and proportionality of, the provisions enacted to that end'.³⁰ Accordingly, the Court of Justice did not look for the least restrictive alternative to the freedom to provide services that it could think of, but examined the compatibility of the national measure in question with the principle of proportionality by reference to the objectives pursued by the competent authorities of the Member State concerned and the degree of protection which they seek to ensure.

28| Judgments of 18 March 2014, *C.D.*, C-167/12, [EU:C:2014:169](#), para. 36, and of 18 March 2014, *Z.*, C-363/12, [EU:C:2014:159](#), para. 58.

29| Judgment of 18 March 2014, *C.D.*, C-167/12, [EU:C:2014:169](#), paras 41 and 42.

30| Judgment of 8 September 2009, *Liga Portuguesa de Futebol Profissional and Bwin International*, C-42/07, [EU:C:2009:519](#), para. 58.

3. Concluding remarks

As applied by the Court of Justice, the comparative law method favours a dynamic interpretation of EU law. Where societal change brings about a high degree of convergence in the laws of the Member States, that method enables the EU legal order to cope with those changes, thereby aligning the EU's legal culture with those of its Member States.

A consensus-based analysis enables an evolving interpretation of EU law: the emergence of a consensus may militate in favour of departing from existing case law that has, with the passage of time, become inconsistent with contemporary societal values.

However, the existence of consensus among the Member States is not by itself decisive. It must leave room for the EU legal order to preserve its autonomy. Admittedly, the existence of such consensus plays an important role in supplying the content of EU law, notably in discovering general principles of EU law. The same applies when the Court of Justice engages in federal common law-making. But the incorporation into EU law of a norm based on consensus among the Member States must always be made subject to its consistency with the founding principles of that law.

In the same way, the absence of such a consensus does not prevent the Court of Justice from having recourse to other sources of law, such as international law, or from applying other methods of interpretation. That being said, the absence of a consensus counsels the Court of Justice to act with caution.

In addition, the application of the comparative law method at EU level may give rise to a 'spill-over effect' triggering public debate in the Member States in which the solution advocated by the Court of Justice is not present in their law. That approach produces cross-fertilization and mutual influence between the EU and national legal orders, thereby creating a 'common legal space' and giving concrete meaning to the motto 'United in diversity'.

Thank you for your attention.



Ms Ineta Ziemele

Judge at the Court of Justice of the European Union



Contribution by Ms Ineta Ziemele, Judge at the Court of Justice of the European Union, former Judge and President of the Constitutional Court of the Republic of Latvia

Common constitutional traditions as a means of legitimacy and coherence of the EU legal order

1. Introduction

There are many reasons why the development of dialogue between, on the one hand, the constitutional courts and courts with a constitutional control mandate of the Member States of the European Union ('the EU') and, on the other hand, the Court of Justice of the European Union ('the ECJ') is of particular importance at today's stage and nature of European integration. At the outset, I would like to refer briefly to a very interesting CNN analysis entitled 'Europe's disunity and lack of trust'. It appeared in summer 2021 and, I suggest, sums up the challenges that the EU faces: finding the Union's long-term purpose and legitimacy.¹ This observation has helped develop my thinking and I will share some of it in this contribution.

The points of departure are that on the one hand, the EU legal order has clearly developed features of a constitutional legal order of a supranational character, and that on the other hand, there are 27 other national constitutional orders within that same common European legal space. In other words, it is important to acknowledge fully the many constitutional legal orders as well as actors within the EU who push for a broader and deeper integration among the Member States. This, in my view, evidently requires a continuing dialogue of the constitutional courts, among which I would place also the ECJ; in that way, the plurality and commonality of views on constitutional issues would be better managed and better integrated within the common European legal space. To this end, I will, first, address the importance of plurality of constitutional traditions for the evolution of the idea of the Union; second, the importance of what is common among the 27 constitutional traditions for backing up the authority of

1 | At <https://edition.cnn.com/2021/08/29/europe/european-union-rule-of-law-analysis-intl-cmd/index.html>.

EU law; third, common constitutional traditions as a source of legitimation of EU law and of the work of the ECJ; and, fourth, the role of the ECJ in comparing and linking-up these traditions.

2. Plurality of constitutional traditions

As we all know, the driving forces of democracy are freedom of speech and the free exchange of ideas. The European Union is based on, among other things, the value of democracy. This means that not only at the level of the Member States but also at the level of the EU itself, the principle of democracy applies. I would like to suggest that the plurality of constitutional traditions is an essential aspect of the principle of democracy within the EU.

In other words, the plurality of constitutional traditions is the driving force and the basis for a free exchange of different ideas. It is true, that if the Member States and the European Parliament through a legislative process have come to agree on a common EU rule, the plurality of opinions has already led to a commonly accepted outcome. National traditions have found a common EU denominator. What is left for the ECJ is to disclose the meaning of this common agreement by applying clear methods of interpretation of EU law when asked to do so. However, today the EU outlook from legal and political points of view allows room for the plurality of constitutional positions in the Member States; it is a very important and necessary feature for the very idea of the EU. It allows for a competition of democratic ideas and solutions and for mutual inspiration, which, of course, is the essence of a democratic approach.

3. Common constitutional traditions as a legitimising element in the EU legal order

The founders of the European Union had, for a very good reason, thought to leave space for common constitutional traditions as another common denominator at the basis of EU law feeding into the EU general principles that the ECJ may need to apply. With the Charter of Fundamental Rights of the European Union ('The Charter') as binding law, common constitutional traditions, which in large part concern the protection of human rights, become a particularly important element within the EU legal system. Moreover, the closer the EU legal system becomes to a constitutional system, the more importance will have to be given to common constitutional traditions if the idea of the EU continues to be based on the close integration of national States. I would like to elaborate on this proposition.

Since we are in the presence of a supranational legal order formed by a hybrid legislative process preserving in part an intergovernmental element of legislating known in international law and since we do not have a single sovereign as a source of the legal order's normativity and authority, we still need to conceive better ways to provide EU law with legitimacy. Common constitutional traditions remain a perfect tool for this purpose. In a book chapter entitled 'Legal theory beyond the nation state' Roger Cotterell, Professor of Legal Philosophy, correctly argues that: 'The transnational law, like national law, must seek its moral authority in its ties to many networks of its community.'² Since EU law seeks the kind of authority that goes beyond what already exists in, for example, international law, the common constitutional traditions along with a few other elements of the EU legislative process have the capacity and the purpose to address that need. The idea of common constitutional traditions allows us to take stock of exactly what all 27 Member States consider as important common values in their relevant details. Common constitutional traditions, when assessed and incorporated as part of the application of EU law, allow us to see the ties to all 27 peoples of the EU and thus to establish the moral authority of that law. I want to emphasize, however, that the devil, as always, is in the detail to which I will revert at the end of this contribution.

Sir Herch Lauterpacht, a key figure in international law, early work on private law analogies of international law³ has provided me with the idea to seek analogies relevant for a better engagement with common constitutional traditions in EU law. I find that one such analogy is the notion of European consensus developed by the European Court of Human Rights ('the ECtHR') in its case-law since the early *Tyler case*. To recall, the ECtHR in this case stated that: '[...] In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the Member States of the Council of Europe in this field.'⁴ At the same time, one should not forget a powerful dissent of another eminent British international lawyer, judge of the ECtHR at the time, Sir Gerald Fitzmaurice. He considered that the ECtHR, by taking stock of the developments and commonly accepted standards in the Member State, had in fact legislated. *That clearly continues to be the risk when courts of international or supranational character articulate general principles of law based on common traditions or practices.* This risk will undoubtedly continue to restrain the courts, but it is particularly relevant at the stage of final decision-making. For the purposes of this contribution, the argument is that there is lots of space available for the ECJ to better engage with common constitutional traditions of the EU Member States.

2| See Cotterell, R., *The Politics of Jurisprudence. A Critical Introduction to Legal Philosophy*, 2nd ed., Oxford University Press, Oxford, 2003.

3| See Lauterpacht, H., *Private Law Sources and Analogies of International Law (With Special Reference to International Arbitration)*, London, 1927.

4| ECtHR, judgment of 25 April 1978, *Tyler v. United Kingdom*, CE:ECHR:1978:0425JUD000585672, § 31; 'the *Tyler case*'.

The ECtHR indeed uses the notion of European consensus to establish whether there is ground for an evolving interpretation of the European Convention on Human Rights and Fundamental Freedoms ('the ECHR') based on common State practice, which could even be seen as regional customary law or certainly subsequent practice of States parties to the ECHR which is an element in the general rule of treaty interpretation.⁵ The ECtHR has attempted to read an autonomous scope into the notion of European consensus going beyond the well-established structural elements of international law as a legal system.⁶ I would argue that the ECtHR has thus accepted the fact that the evolution of any legal system or regime is a necessary condition in any human society, especially where that legal regime deals with human rights, and has created space for much needed flexibility to react to developments in human relations.

Through the notion of European consensus the ECtHR has stayed in touch with developments at national level. It has kept the legitimacy of evolutive interpretation of the ECHR grounded and transparent. We can all see in the judgments of the Court where the comparative law analysis has been applied. Similarly to the notion of European consensus in the ECHR system, I see the notion of common constitutional traditions as a normative idea that enables us to react to evolution within the common European legal space and allows the ECJ to take that evolution into account. Furthermore, since the EU legal system is based on an extensive list of common values, as set forth in Article 2 TEU, and which may or may not be sufficiently concretised in the secondary legislation or in the Charter, identifying and defining the normative content of these values depends on establishing relevant common constitutional traditions.

For example, we agree that the European worldview is based on the recognition of human dignity as a fundamental value, and Europeans are largely of the view that human dignity is also a universal value. The Charter, having placed human dignity in Title I and having recognised this title as providing absolute rights, confirms this approach.⁷ However, what does Article 1 of the Charter really mean? For example, is the recognition of same sex marriage a concretisation of human dignity, while it remains a question for a number of

5 | Vienna Convention on the Law of Treaties, Art.31(3)(b).

6 | Ziemele, I., 'European Consensus and International Law', in Van Aaken, A., Motoc, I., *The European Convention on Human Rights and General International Law*, Cambridge University Press, 2018.

7 | The Charter, Title I, Article (1).

European societies?⁸ We could easily be in the situation addressed in the *Coman* case⁹ where the concretisation of human dignity in one State allowing for same sex marriage will by virtue of free movement of EU citizens have an effect in another State which has a different view on the scope of human rights. We can have rights stemming from EU law which, if not clashing directly with the national constitutional choices, may still bring about unease and that is not helpful to the legitimacy dimension of the common European legal space. What the actors within the EU legal order would not want to accept is the scenario of the *A, B and C v. Ireland* case where the ECtHR, while having clearly established European consensus concerning broad access to abortion, nevertheless allowed for the Irish exception because the people had repeatedly voted down such a possibility in national referenda.¹⁰ In other words, this international court did not see that it had a mandate to overrule a democratic majority or, as one might say, go against the constitutional identity in this regard. Indeed, the analogy with international law most likely ends here because, unlike EU law, international law permits persistent objections and so a State can stay outside of or even voice objection to an international normative process leading to the adoption or consolidation of a rule.

However, it is rather clear that where we have 27 constitutional systems, even if one insists on exclusive competences and harmonised areas of EU law, there are and will be different constitutional traditions as well as common ones. I think it is imperative to answer the question of whether this reality of European societies should be made to fit into EU law which at the previous stage of integration of competences did not generate that many difficulties or whether there should be a more nuanced way of doing things. It is in this multifaceted context that I would like to submit that it is the common constitutional traditions which enable the EU institutions and the ECJ to stay in touch with the reality on the ground and also to avoid making an alternative world that the people are somewhat unready to follow. The importance of properly engaging with common constitutional traditions lies in the legitimising nature of such an approach.

8| Opinion of Advocate General Kokott of 15 April 2018, *V.M.A. v Stolichna obshtina, rayon 'Pancharevo'*, C-490/20, [EU:C:2021:296](#).

9| Judgment of 5 June 2018, *Coman and Others*, C-673/16, [EU:C:2018:385](#); 'the *Coman* case'.

10| ECtHR, judgment of 16 December 2010, *A, B and C v Ireland*, CE:ECHR:2010:1216JUD002557905.

4. When and how the engagement becomes necessary – the Court as a comparatist

It is with this understanding that I see the ECJ as a comparatist. In my view it is of great importance for the future of the Union that the Court identifies in what context comparative law material should be incorporated into its adjudication process and into the drafting of its judgments. In those cases where it has to interpret the Charter and where Articles 2 and 4 TEU are relevant, I see a prima facie need for that.¹¹ I will explain what I mean with reference to one case.

It is true that the Court replies to the questions posed by national courts and that this determines the scope of a case. The ECJ has stayed true to its task to be the primary interpreter of the EU law in accordance with the well-recognised methods of interpretation of EU law.¹² A typical approach is rather straight-forward, but human rights concepts are more open-ended and the Charter is certainly a witness to that. So, in the *Veselības ministrija* case,¹³ the Court had to provide the Latvijas Republikas Augstākā tiesa (Latvian Supreme Court) with an interpretation of Regulation (EC) No 883/2004¹⁴ and Directive 2011/24/EU¹⁵ in a situation where a child of a Jehovah's Witness family would not get medical treatment without a blood transfusion under Latvia's health system. The family found that an alternative treatment acceptable to them in line with their religion was available in Poland and asked the Latvian authorities for permission to get this treatment in Poland and then

11 | Article 2: The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. Article 4: 1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States.

2. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

3. Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties

12 | Lenaerts, K., et Gutierrez-Fons, J.A., *Les méthodes d'interprétation de la Cour de justice de l'Union européenne*, Bruylant, Paris, 2020.

13 | Judgment of 29 October 2020, C-243/19, [EU:C:2020:872](#).

14 | Regulation (EC) No 883/2004 of 29 April 2004 on the coordination of social security systems.

15 | Directive 2011/24/EU of 9 March 2011 on the application of patients' rights in cross-border healthcare.

receive reimbursement from the Republic of Latvia. The Latvian Supreme Court inquired about the impact the Charter has on the application of the relevant EU secondary law in the case at hand. The Supreme Court, however, only asked about Article 21 of the Charter on non-discrimination. It did not invoke the relevant articles on the rights of the child (Article 24) and the right to health (Article 35). The Court recalled with reference to a line of case-law and in particular the *Egenberger* case that the prohibition of all discrimination based on religion or belief is mandatory as a general principle of EU law. That prohibition, which is laid down in Article 21(1) of the Charter, is sufficient to confer on individuals a subjective right for them to rely on in disputes in a field covered by EU law.¹⁶ It pointed out that the refusal to grant the applicant in the main proceedings the prior authorisation provided for in Article 20(1) of Regulation No 883/2004 establishes a difference in treatment indirectly based on religion. It is, therefore, necessary to examine whether that difference in treatment is based on an objective and reasonable criterion. The protection of the social security system was held to be a relevant criterion to be considered by the national court when assessing such a difference in treatment.

With several nuances, the interpretation of the Directive went along similar lines in asking the national court to examine the proportionality of the actions of the State in view of indirect discrimination detected by the ECJ. In light of the facts of the case and the questions posed, I wonder, as far as the relevant context to be taken into account when interpreting the article of the Regulation and the Directive is concerned, whether the principle of the best interests of the child was not relevant. It is clearly part of the EU legal order even if the national court has not specifically invoked it. It is nevertheless clear that it is the interests of the child that prompted the national court to turn to the ECJ. I also wonder whether there might be a consensus or indeed a common constitutional tradition in the EU Member States, saying either that in such cases and because of the best interests of the child the State must do its utmost to find a relevant treatment within the EU, or whether States may ignore religion and perform the treatment necessary for the well-being and best interests of a child. There is no doubt that the best interests of the child are also part of common constitutional tradition in the EU Member States, but determining where the consensus or common tradition lies in the application of the principle in such a case would have opened for the ECJ an interesting examination on the effects of the Charter. One also needs to determine whether establishing the common tradition in such a case is relevant to inform the context or the objectives of the relevant secondary law in light of the Charter.

16| Judgment of 17 April 2018, *Egenberger*, C-414/16, [EU:C:2018:257](#), paragraph 76; 'the *Egenberger* case'.

In this Latvian case, in other words, what is of interest for the purpose of establishing the relevance of common constitutional traditions is the question on the interaction between Article 21 and Article 24, possibly Article 35, of the Charter, that is, between the principle of the prohibition of discrimination as concerns access to medical service for a child of the Jehovah's Witness family and the principle of the best interests of the child. One can say that for the purposes of EU law the Court's answer to the national court's question as to what the secondary legislation meant is sufficient and it has, in some ways, reinforced the transborder health provision idea through the non-discrimination principle. At the same time, I would argue that where a supranational legal order claims to be complete and coherent while having many complex layers and dimensions and its legitimacy having new challenges, the engagement with the context and the objectives of the secondary law in their constitutional dimension, which certainly refers to applicable general principles of law, is one way forward. This requires at a practical level to develop further the research capacity of the Court and its methodology for the use of the comparative constitutional material in its adjudicative work. The case at issue also confirms that, in the process of building common EU identity, what the national courts do and how they conceptualise a case is extremely important. In other words and yet again, *it takes two to tango and that tango becomes ever more important for the role of Europe in a globalised world.*

To conclude, I would like to congratulate the Latvian Constitutional Court on its 25th anniversary and to thank the Court for organising this important conference in a difficult pandemic period. It will hopefully be the beginning of a continuous and regular dialogue of the EU constitutional jurisdictions, and I am proud that this series of meetings with a possible impact on the future of our common legal space begins in Riga.





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The constitutional traditions common to the Member States: identification and concretisation

1. The common constitutional traditions in the case- law of the Court of Justice

1.1. Historical foundations

The constitutional traditions and/or legal principles common to the Member States have played a central role in the case-law of the Court of Justice from the very beginning, and quickly became central jurisprudential tenets of the EU legal order as one part of the entire legal order in a Member State.

From the very beginning, the Court of Justice has derived general legal principles from the administrative law systems of the Member States, in order to be able, for example, to circumscribe the legal requirements of an annulment of administrative decisions by institutions and other bodies of the European Union in accordance with the rule of law. Although EU law does not contain any general rules on the annulment of administrative decisions (revocation, withdrawal), it has drawn the regulatory regime applicable to them from the administrative law of the Member States. To take just one example, the decision in *Algera* of 12 July 1957 states:

‘The possibility of withdrawing such measures is a problem of administrative law, which is familiar in the case-law and learned writing of all the countries of the Community, but for the solution of which the Treaty does not contain any rules. Unless the Court is to deny justice it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case-law of the member countries.’¹

1 | Judgment of 12 July 1957, *Algera and Others v Common Assembly*, 7/56 and 3/57 to 7/57, [EU:C:1957:7](#).

A high point was the fundamental rights case-law of the Court of Justice in the 1970s and 1980s, which was encouraged in particular by the decisions of the Corte Costituzionale (Italian Constitutional Court) in the *Frontini* case² and the Bundesverfassungsgericht (German Federal Constitutional Court) in its *Solange I* decision,³ and examples of which include the decisions in the *Nold* and *Hauer* cases. However, as early as 1970, in its decision in *Internationale Handelsgesellschaft*, the Court of Justice had already emphasised the constitutional traditions common to the Member States as the basis of European protection of fundamental rights, provided that they were ensured within the framework of the structure and objectives of the European Economic Community.⁴

The first detailed statements on the free choice and pursuit of employment and the guarantee of property ownership could then be found in the judgment in *Nold*. The Commission had authorised Ruhr-Kohle AG to amend its trading rules, which established the conditions for admitting coal wholesalers to the right of direct supply. On that basis, *Nold*, a coal and constructions materials enterprise based in Darmstadt, lost its status as a direct purchaser, which it had held for years. In its action for annulment brought against the authorisation, it argued that its right of ownership and its free choice and pursuit of economic activity had been violated. The Court answered as follows:

‘14. If rights of ownership are protected by the constitutional laws of all the Member States and if similar guarantees are given in respect of their right freely to choose and practice their trade or profession, the rights thereby guaranteed, far from constituting unfettered prerogatives, must be viewed in the light of the social function of the property and activities protected thereunder. For this reason, rights of this nature are protected by law subject always to limitations laid down in accordance with the public interest. Within the Community legal order it likewise seems legitimate that these rights should, if necessary, be subject to certain limits justified by the overall objectives pursued by the Community, on condition that the substance of these rights is left untouched. As regards the guarantees accorded to a particular undertaking, they can in no respect be extended to protect mere commercial interests or opportunities, the uncertainties of which are part of the very essence of economic activity.

15. The disadvantages claimed by the applicant are in fact the result of economic change and not of the contested Decision. It was for the applicant, confronted

2| Corte Costituzionale, Decision No 183/1973 – *Frontini*, EuR 1974, paragraph 255.

3| BVerfGE 37, paragraph 271 et seq. – *Solange I*.

4| Judgment of 17 December 1970, *Internationale Handelsgesellschaft*, 11/70, [EU:C:1970:114](#).

by the economic changes brought about by the recession in coal production, to acknowledge the situation and itself carry out the necessary adaptations.¹⁵

This was further elaborated on in the judgment in *Hauer*, which remains (for the time being) the high point of the jurisprudential development of the EU's freedom of property rights and the freedom of trade or profession. Even though it was ultimately found that there was no violation of the fundamental rights in question, the decision is characterised by an extraordinary amount of effort in terms of argumentation and dogmatic reflection. The winegrower Liselotte Hauer applied for authorisation to plant vines on her property in Bad Dürkheim (Germany). Authorisation was refused on the ground, inter alia, that Regulation No 1162/76 on measures designed to adjust wine-growing potential to market requirements prohibited all new planting of vines for a longer period. The Court of Justice, which had been seised by way of a request for a preliminary ruling, stated:

'17. The right to property is guaranteed in the Community legal order in accordance with the ideas common to the constitutions of the Member States, which are also reflected in the first Protocol to the European Convention for the Protection of Human Rights. ...

19. Having declared that persons are entitled to the peaceful enjoyment of their property, that provision [Article 1 to the first Protocol to the ECHR] envisages two ways in which the rights of a property owner may be impaired, according as the impairment is intended to deprive the owner of his right or to restrict the exercise thereof. In this case it is incontestable that the prohibition on new planting cannot be considered to be an act depriving the owner of his property, since he remains free to dispose of it or to put it to other uses which are not prohibited. On the other hand, there is no doubt that that prohibition restricts the use of the property. In this regard, the second paragraph of Article 1 of the Protocol provides an important indication in so far as it recognizes the right of a State "to enforce such laws as it deems necessary to control the use of property in accordance with the general interest". Thus the Protocol accepts in principle the legality of restrictions upon the use of property, whilst at the same time limiting those restrictions to the extent to which they are deemed "necessary" by a State for the protection of the "general interest". [...]

5 | Judgment of 14 May 1974, *Nold v Commission*, 4/73, [EU:C:1974:51](#).

20. Therefore, in order to be able to answer that question [concerning whether the contested regulation was contrary to fundamental rights], it is necessary to consider also the indications provided by the constitutional rules and practices of the ... Member States. One of the first points to emerge in this regard is that those rules and practices permit the legislature to control the use of private property in accordance with the general interest. Thus some constitutions refer to the obligations arising out of the ownership of property (German Grundgesetz, Article 14(2), first sentence), to its social function (Italian constitution, Article 42(2)), to the subordination of its use to the requirements of the common good (German Grundgesetz, Article 14(2). second sentence, and the Irish constitution, Article 43.2.2°), or of social justice (Irish constitution, Article 43.2.1°). In all the Member States, numerous legislative measures have given concrete expression to that social function of the right to property. [...]
21. More particularly, all the wine-producing countries of the Community have restrictive legislation, albeit of differing severity, concerning the planting of vines, the selection of varieties and the methods of cultivation. In none of the countries concerned are those provisions considered to be incompatible in principle with the regard due to the right to property.
23. However, that finding does not deal completely with the problem raised by the Verwaltungsgericht. Even if it is not possible to dispute in principle the Community's ability to restrict the exercise of the right to property in the context of a common organization of the market and for the purposes of a structural policy, it is still necessary to examine whether the restrictions introduced by the provisions in dispute in fact correspond to objectives of general interest pursued by the Community or whether, with regard to the aim pursued, they constitute a disproportionate and intolerable interference with the rights of the owner, impinging upon the very substance of the right to property.'

It was likewise ultimately found that there was no such interference, or, moreover, a violation of the freedom of occupation.⁶

6 | Judgment of 13 December 1979, *Hauer*, 44/79, [EU:C:1979:290](#).

1.2. Dwindling importance in the case-law of the Court of Justice

With the increasing number of Member States and the establishment of the European Union's fundamental rights standards in the form of the European Convention on Human Rights and Fundamental Freedoms ('the ECHR'), but above all with the integration of the Charter of Fundamental Rights of the European Union ('the Charter') into primary law, reliance on the constitutional traditions common to the Member States has been receding ever further into the background in the case-law of the Court of Justice. This is understandable and is to a certain extent also in line with the Court of Justice's understanding of the autonomy of EU law. However, it does not meet the needs of the legal order and the constitutional structure of the European Union as a compound of its Member States.

2. The common constitutional traditions as the basis of the European legal order

2.1. Origins in the texts

According to Article 6(3) TEU, fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, are to constitute general principles of EU law. Furthermore, Article 52(4) of the Charter provides that fundamental rights under the Charter, in so far as they result from the constitutional traditions common to the Member States, are to be interpreted in harmony with those traditions. Other provisions of primary law also refer, at least in essence, to the constitutional traditions common to the Member States. This applies, for example, to the statement in Article 2 TEU, according to which respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities, are common to all Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail, or to the second and third paragraphs of Article 340 TFEU, according to which the European Union and the European Central Bank (ECB), respectively, must, in accordance with the general principles common to the laws of the Member States, must compensate any damage caused by their institutions or by their servants in the performance of their duties.

2.2. Common constitutional traditions in the area of fundamental rights

The older case-law of the Court of Justice impressively developed the principle that the constitutional traditions common to the Member States are of central importance, above all to the understanding of fundamental rights. This has not changed significantly with the Charter coming into force, as can be seen by taking a closer look at the function and structure of the fundamental rights guarantees in their various forms.

In its *Ökotox* decision of 27 April 2021, the Second Senate of the German Federal Constitutional Court held that the fundamental rights of the *Grundgesetz* (German Basic Law; 'the GG'), the guarantees of the ECHR and the fundamental rights of the Charter are predominantly rooted in common constitutional traditions and are thus expressions of universal and common European values, with the consequence that the ECHR and the constitutional traditions common to the Member States as well as the concrete expression given to them by constitutional and apex courts are not only to be taken as a basis for the interpretation and application of the fundamental rights of the GG, but are equally important for the purposes of interpreting and applying the fundamental rights of the ECHR and the Charter.

The fundamental rights guarantees laid down in the GG, the ECHR and the Charter are all based on the protection of human dignity, provide guarantees of protection which, in essence, are functionally comparable in terms of those parties entitled to rights protection and those obliged to provide it, in structure, and therefore largely constitute congruent guarantees.

2.2.1. Human dignity as the Archimedean point of all three catalogues

With Article 1(1) GG and the precedence of the fundamental rights section over the provisions concerning the law governing State organisation, the GG, for example, places emphasis on the primacy of the individual and his or her dignity over the power of the State and the enforcement of its interests.⁷ Accordingly, all public authorities are obliged to respect and protect human dignity, and this includes, in particular, the safeguarding of personal individuality, identity and integrity as well as fundamental equality before the law.⁸

7| See BVerfGE 7, 198 (204 et seq.) – *Lüth*.

8| See BVerfGE 5, 85 (204); 12, 45 (53); 27, 1 (6); 35, 202 (225); 45, 187 (227); 96, 375 (399); 144, 20 (206 et seq. paragraph 538 et seq.).

However, Article 1(2) GG also places the fundamental rights of the Basic Law in the universal tradition of human rights⁹ and in the development of the international protection of human rights, attaching particular importance to the European tradition and development of fundamental rights.¹⁰ The principles underlying the openness of the GG to international and European law (preamble and Article 1(2), Article 23(1), Articles 24, 25, 26 and Article 59(2) GG) ensure that this also applies to the further development of both the universal and the European protection of fundamental rights.

Since 1950, the national requirements regarding fundamental rights have been safeguarded and supplemented by the ECHR, with which the Contracting States took, according to the preamble, ‘the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration [of Human Rights of 10 December 1948]’, and they have since further refined them through 16 protocols. Even though human dignity is not expressly guaranteed within that framework, particular importance is attached to it in the ECHR. This is made clear in the prohibition of torture in Article 3 ECHR and the prohibition of slavery and forced labour in Article 4 ECHR, as well as in the preamble, which expressly refers to the Universal Declaration of Human Rights of 1948.¹¹

The Charter also places the focus on the individual, as evidenced by its preamble. Article 1 of the Charter recognises human dignity not only as a fundamental right in itself, but – according to the explanation to that article¹² – as ‘the real basis of fundamental rights’. Moreover, the fundamental rights laid down in the Charter are tied in with both the constitutional traditions common to the Member States and the ECHR, in accordance with Article 52 et seq. of the Charter, and – in so far as they apply to German State authority – have in principle the same function as the fundamental rights laid down in the German Constitution and the ECHR.¹³

9| See BVerfGE 152, 216 (240 paragraph 59) – *Recht auf Vergessen II*.

10| See BVerfGE 111, 307 (317 ff.); 112, 1 (26); 128, 326 (366 et seq.); 148, 296 (350 et seq. paragraph 126 et seq.); 152, 152 (177 paragraph 61) – *Recht auf Vergessen I*.

11| See also ECtHR, *Pretty v. United Kingdom*, judgment of 29 April 2002, No 2346/02, § 65.

12| OJ 2007 C 303 p. 1, at p. 17.

13| See BVerfG, decision of the Second Chamber of 1 December 2020 – 2 BvR 1845/18, inter alia – paragraph 37 – *Rumänien II*.

Thus, the common point of reference for all three catalogues is the Universal Declaration of Human Rights of 10 December 1948, which emphasises, in its preamble, the central importance of human dignity.¹⁴ Accordingly, all three catalogues of fundamental rights are ultimately concerned with the protection of the individual and his or her dignity. This is given concrete expression in the individual fundamental rights in an area-specific manner and fundamentally confers on the persons entitled to the rights concerned a right of self-determination in the respective areas of life, free from paternalism by public authority or social forces and structures.

2.2.2. Comparable structure and function of fundamental rights

Historically, jurisprudentially and functionally, the fundamental rights of the GG primarily guarantee the individual's rights in order to enable him to defend his self-determination against the State and other public authorities.¹⁵ They protect the freedom and equality of citizens from unlawful interference by public authorities. Such interference must be proportionate and must not affect the essence of the fundamental rights (Article 19(2) GG). But they are also constitutional decisions in an objective sense, establishing values and principles which – irrespective of individual concern – oblige public authorities to ensure that these rights do not become devoid of purpose in the reality of economic and social life. Fundamental rights thus form the constructive basis of participation and benefit rights as well as the State's duties to protect (*Schutzpflicht*). This does not call their primary orientation into question, but serves to reinforce their validity in everyday life.¹⁶

In terms of substance, and as interpreted by the European Court of Human Rights, the ECHR also contains guarantees of individual freedom and equality and safeguard them against State intervention where it is not in accordance with law and is not necessary in a democratic society (see, for example, Article 8(2) ECHR). These guarantees are open to development¹⁷

14| UN A/RES/217 A (III); see also Klein, E., in: *Festschrift für Klaus Stern*, 2012, p. 389 (390 et seq.) Chassin, C-A., in: Biad, A., Parisot, V., *La Charte des droits fondamentaux de l'Union européenne*, 2018, p. 138 et seq.

15| See BVerfGE 7, 198 (204 et seq.) – *Lüth*.

16| See BVerfGE 50, 290 (337) – *Mitbestimmung*.

17| See, in relation to the ECHR as a 'living instrument', ECtHR, *Tyler v. United Kingdom*, judgment of 25 April 1978, No. 5856/72, § 31; *Marckx v. Belgium*, judgment of 13 June 1979, No. 6833/74, § 41; *Airey v. Ireland*, judgment of 9 October 1979, No. 6289/73, § 26; *Rees v. United Kingdom*, judgment of 17 October 1986, No. 9532/81, § 47; *Cossey v. United Kingdom*, judgment of 27 September 1990, No. 10843/84, § 35; *Loizidou v. Turkey* (preliminary objections), judgment of 23 March 1995, No. 15318/89, § 71.

and have become increasingly convergent with national constitutions. The protection of fundamental rights under the ECHR is not limited to protection against interference by the State on the individual's sphere of freedom, but also comprises – similar to the GG – obligations to guarantee and protect rights.¹⁸

This also applies to the fundamental rights of the Charter, which protect the freedom and equality of EU citizens not only against interference by the institutions, bodies, offices and agencies of the European Union, but also against interference by Member State authorities when they are implementing EU law (Article 51(1) of the Charter). The addressees of the Charter – like those of the GG and the ECHR – are bound by the principle of proportionality and must not affect the essence of fundamental rights (Article 52(1) of the Charter). In addition, principles are derived from the fundamental rights of the Charter – in so far as they are not horizontally applicable¹⁹ – and those principles may give rise to further (derivative) entitlements.²⁰ Against that background, the fundamental rights of the Charter constitute a fundamentally functional equivalent to the guarantees of the GG.²¹

2.2.3. Largely congruent content

The three catalogues of fundamental rights are also largely congruent in terms of content. This already results in part from the 'most favourable provision' principle of Article 53 ECHR, in accordance with which the ECHR may not be construed as limiting or derogating from human rights and fundamental freedoms laid down in the law of the Contracting States. The provision therefore makes clear that the ECHR in any event constitutes a minimum standard common to the Contracting States, beyond which, however, they may go.²²

18| See Grabenwarter, C., Pabel, K., *Europäische Menschenrechtskonvention*, 7th Ed. 2021, § 19; Meyer-Ladewig, J., Nettesheim, M., in: Meyer-Ladewig, J., Nettesheim, M., v. Raumer, S., *EMRK*, 4th Ed. 2017, Art. 1, paragraph 8; Cremer, H. J., in: Dörr, O., Grote, R., Marauhn, T., *EMRK/GG*, 2nd Ed. 2013, Chapter 4, paragraph 63 et seq.

19| Regarding Article 21 of the Charter, see CJEU, judgment of 22 November 2005, *Mangold*, C-144/04, [EU:C:2005:709](#), paragraph 77; judgment of 19 January 2010, *Kücükdeveci*, C-555/07, [EU:C:2010:21](#), paragraphs 22, 51; critical in that regard: Højesteret (Denmark), judgment of 6 December 2016 – 15/2014.

20| See Pache, E., in: Pechstein, M., Nowak, C., Häde, U., *Frankfurter Kommentar EUV/GRC/AEUV*, 2017, Art. 51 GRC, paragraph 38; Hatje, A., in: Schwarze, J., Becker, U., Schoo, J., *EU-Kommentar*, 4th Ed. 2019, Art. 51 GRC, paragraph 22.

21| See BVerfGE 152, 216 (239 et seq., paragraph 59); BVerfG, decision of the Second Chamber of 1 December 2020 – 2 BvR 1845/18, inter alia – paragraph 37.

22| See Grabenwarter, C., Pabel, K., *EMRK*, 7th Ed. 2021, § 2, paragraph 14.

Therefore, in determining the content of guarantees, the European Court of Human Rights repeatedly refers to both national and EU fundamental rights.²³

Similar considerations apply to the Charter. Already in its preamble, it refers to the constitutional traditions common to the Member States as well as the inviolable and inalienable human rights protected in international conventions and in the ECHR, thereby making clear that it serves to give (further) concrete expression to universal and European legal principles. In 2009, the Treaty on European Union expressly elevated that concrete expression to the rank of primary law (Article 6(1) TEU), but at the same time also stipulated that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, constitute general (legal) principles of EU law (Article 6(3) TEU). This is expressly clarified again in Article 52(3) and (4) of the Charter.

2.3. Mutual influence of the fundamental right guarantees

Against that background, it is not only the interpretation of the fundamental rights guaranteed in the German Constitution that is determined by the ECHR, the Charter and the constitutional traditions common to the Member States as well as the concrete expression given to them by the constitutional and supreme courts. The interpretation of the Charter must also be guided by the ECHR and the constitutional traditions common to the Member States as given concrete expression by the aforementioned courts.²⁴ The same applies to the ECHR.

This remains true notwithstanding that the ECHR (only) has the status of a Federal law in the German legal system (Article 59(2) GG), accordingly is subordinate to the GG and does therefore not, in principle, belong to the standard of review of the German Federal Constitutional Court. However, in accordance with its settled case-law, the guarantees of the ECHR guide the interpretation of the fundamental rights and the rule-of-law principles of

23| See ECtHR (Grand Chamber), *Bosphorus Airways v. Ireland*, judgment of 30 June 2005, No 45036/98, § 148; *Zolothukin v. Russia*, judgment of 10 February 2009, No 14939/03, § 79; *Scoppola v. Italy*, *Bayatyan v. Armenia*, judgment of 17 September 2009, No 10249/03, § 105; *Armenia*, judgment of 7 July 2011, No 23459/03, § 103 et seq.; ECtHR, *TV Vest As & Rogaland Pensjonistparti v. Norway*, judgment of 11 December 2008, No 21132/05, §§ 24, 67; see also Kraus, D., in: Dörr, O., Grote, R., Marauhn, T., *EMRK/GG Konkordanzkommentar*, 2nd Ed. 2013, Chapter 3, paragraph 24; Richter, D., in: Dörr, O., Grote, R., Marauhn, T., *EMRK/GG Konkordanzkommentar*, 2nd Ed. 2013, Chapter 9, paragraphs 3, 74; Meyer-Ladewig, J., Nettesheim, M., v. Raumer, S., *EMRK*, 4th Ed. 2017, introduction, paragraph 22.

24| See BVerfG, decision of the Second Chamber of 1 December 2020 – 2 BvR 1845/18, inter alia – paragraph 37 – *Rumänien II*.

the GG in accordance with Article 1(2) GG²⁵ and thus have gained an indirect constitutional dimension. This also applies to the Charter²⁶ as well as the constitutional traditions common to other democratic constitutional States in the European legal space²⁷ and the concrete expression given to them by the apex courts.²⁸ The fact that the abovementioned sources are also taken into account in the interpretation of the fundamental rights of the GG is not merely an expression of the GG's openness towards European law and the German Federal Constitutional Court's responsibility for integration. Rather, it takes into account Germany's integration into the European legal space and its development, promotes the strengthening of common European fundamental rights standards and prevents friction and inconsistencies in guaranteeing fundamental rights protection in the interest of its effectiveness and legal certainty.

In view of the express provisions in the Treaties, the common roots, not least in human dignity, and the largely congruent content of the guarantees, the ECHR and the constitutional traditions common to the Member States as well as the concrete expression given to them by the constitutional and apex courts are also to be taken as the basis for the interpretation and application of the Charter – taking into account *inter alia* the fundamental rights of the GG and the case-law of the German Federal Constitutional Court. This was expressed by the Second Senate already before, i.e., in its decision of 1 December 2020.²⁹

These findings are not questioned by the fact that the fundamental rights guarantees of the Charter, the ECHR, the GG and other national constitutions are not completely congruent, for example with regard to the external form that they take or institutional integration³⁰ as a large proportion of the (minor) divergences is based less on conceptual differences in the specific guarantees than on the different ways in which they have been given concrete expression by the competent courts. However, the interpretation of the Charter must not be based on particular understandings that are evident only in the legal practice of individual Member States.

25| See BVerfGE 74, 358 (370); 111, 307 (316 et seq.); 120, 180 (200 et seq.); 128, 326 (367 et seq.); 138, 296 (355 et seq., paragraph 149); 152, 152 (176, paragraph 58) – *Recht auf Vergessen I*.

26| See BVerfGE 152, 152 (177 et seq., paragraph 60) – *Recht auf Vergessen I*.

27| See Storr, S., Unger, S., Wollenschläger, F., (ed.), *Der Europäische Rechtsraum*, 2021.

28| See BVerfGE 32, 54 (70); 128, 226 (253, 267); 154, 17 (100, paragraph 125).

29| See BVerfG, decision of the Second Chamber of 1 December 2020 – 2 BvR 1845/18, *inter alia* – paragraph 37 – *Rumänien II*.

30| See BVerfGE 152, 216 (233, paragraph 44) – *Recht auf Vergessen II*.

Where substantive divergences exist, it is up to the Court of Justice to clarify them within the framework of a preliminary ruling procedure pursuant to Article 267(3) TFEU in order to preserve unity and coherence of EU law.³¹

2.4. Constitutional identity and national reservations of review

It is also inherent to the constitutional traditions common to the Member States that the Member States participate in European integration only on the basis of their respective national constitutions and that, therefore, a certain degree of constitutional identity or sovereignty is inviolable, the preservation of which the national constitutional and apex courts must ensure.

2.4.1. Constitutional limits on open statehood and constitutional identity

The vast majority of national constitutions contain explicit or implicit provisions – developed by case-law and jurisprudence – on the limits to open statehood of the respective Member State even if the concrete boundaries of those limits have not yet been sufficiently clarified in any Member State.

With respect to Germany, for instance, the German Federal Constitutional Court has repeatedly emphasised in a long line of case-law³² that the conferral of power to integrate does not entail the power ‘to abandon, through the conferral of sovereign rights on intergovernmental institutions, the identity of the constitution by affecting its basic structure. i. e., the substructures that constitute it’.³³ The constitution amending legislator has codified that case-law in the third sentence of Article 23(1) GG and settled that Article 79(2) and (3) applies to ‘... the establishment of the European Union and to the amendment of its legal bases in the Treaties by which ... [the] content of [the GG] is amended or supplemented or such amendments or supplements are enabled ...’.³⁴ Similar provisions

31| See BVerfGE 152, 216 (244 et seq., paragraph 71) – *Recht auf Vergessen II*; BVerfG, decision of 27 April 2021 – 2 BvR 206/14 – paragraph 73 – *Ökotox*.

32| BVerfGE 37, 271 et seq. – *Solange I*; 73, 339 et seq. – *Solange II*; 75, 223 et seq. – *Kloppenburg*.

33| BVerfGE 73, 339, 375 et seq. – *Solange II*.

34| For a somewhat less serious approach to those limits, see Schwarze, J., ‘Ist das Grundgesetz ein Hindernis auf dem Weg nach Europa?’ JZ 1999, p. 637, 640.

can be found in almost all other Member States³⁵ : In Denmark the constitution entails as unalienable the requirement of sovereign statehood,³⁶ in France and Italy the republican form of government,³⁷ and in Austria the ‘establishing provisions of the Federal Constitution’ (Baugesetze der Bundesverfassung), in the form they were given by the Treaty of Accession of Austria of 1994.³⁸ In Greece, human rights and the foundations of the democratic order of the State are conceived as not to be affected by European integration (Article 28(2) and (3) of the Greek Constitution), as are the ‘presidential’ parliamentary democracy that is set out in Article 110(1) of the Greek Constitution, human dignity, equal access to public office, freedom of personal development, liberty of the person, or the separation of powers enshrined in Article 26 of the Greek Constitution.³⁹ The Swedish Instrument of Government refers to ‘the principles by which the State is governed’ as a limit to integration (Chapter 10, § 5), to which the legal literature attributes, above all, the Freedom of Press Act, transparency and access to documents.⁴⁰ In Spain, too, the Tribunal Constitucional has recognised a ‘core’ of ‘values and principles’ in the Spanish constitution that cannot be affected by integration, but has left open the question as to their precise delimitation so far.⁴¹ The only exception to this is the Netherlands, which, with regard to the transfer of sovereign rights, provides only for a procedural hurdle for the transfer of sovereign rights (Article 91(3) of the *Grondwet* (Constitution of the Kingdom of the Netherlands)).⁴²

35| Belgian Constitutional Court, Decision No 62/2016 of 28 April 2016.

36| Højesteret (Supreme Court), judgment of 6 April 1998, I 361/1997, EuGRZ 1999, pp. 49, 52, paragraph 9.8.

37| Article 89 of the French Constitution; CC Décision n° 2017-749 DC du 31 juillet 2017 - CETA; Flauss (footnote 107), p. 25, 79: ‘... le principe de la souveraineté du peuple français ou/et le principe démocratique ne pourraient être abrogés que par le corps électoral agissant non pas dans le cadre d’un acte de révision constitutionnelle, mais au moyen d’un acte constituant nullifiant la constitution préexistante’.

38| Grabenwarter, C., in: *Offene Staatlichkeit: Österreich*, IPE II, § 20, paragraphs 34, 55; Öhlinger, T., *Verfassungsrechtliche Aspekte des Vertrages von Amsterdam in Österreich*, in: Hummer, W., (ed.), *Die Europäische Union nach dem Vertrag von Amsterdam*, 1998, p. 297, 300 et seq.

39| Regarding the problems of interpretation, see Iliopoulos-Strangas, J., *Offene Staatlichkeit: Griechenland*, IPE II, 2008, § 16, paragraph 41 et seq.

40| Nergelius, J., *Offene Staatlichkeit: Schweden*, IPE II, § 22, paragraphs 19, 34.

41| STC 64/1991; DTC 1/2004; López Castillo, A., *Offene Staatlichkeit: Spanien*, IPE II, § 24, paragraphs 21, 63 et seq.

42| For greater detail, see the summary in Huber, P. H., *Offene Staatlichkeit: Vergleich*, in: IPE II, § 26, paragraph 85 et seq.

2.4.2. National reservations of review

It is self-evident that such constitutional limits to integration can be monitored and enforced only by the courts, which are in each case responsible for the integrity of the national constitution.

In accordance with settled case-law of the German Federal Constitutional Court, the first sentence of Article 23(1) GG contains a promise of effectiveness and implementation with regard to EU law,⁴³ which also includes the endowment of EU law with precedence of application over national law in the ratification law in accordance with the second sentence of Article 23(1) GG.⁴⁴ This, in principle, also applies with regard to conflicting national constitutional law and, in the event of a conflict, generally leads to the inapplicability of that law in the specific case.⁴⁵ However, the precedence of application of EU law exists only by virtue of and within the framework of the constitutional conferral of power.⁴⁶ Therefore, the limits to the opening of the German legal order to EU law, which is foreseen in the GG and is implemented by the integration legislature, reside not only in the integration programme laid down in the Treaties, but also in the identity of the constitution. This can, except by revolution, neither be changed, nor be affected by integration (third sentence of Article 23(1) in conjunction with Article 79(3) GG). The precedence of application exists only to the extent that the GG and the ratification law permit or provide for the transfer of sovereign rights.⁴⁷ Only to that extent is the application of EU law in Germany democratically legitimised.⁴⁸

43| See BVerfGE 126, 286 (302); 140, 317 (335, paragraph 37) – *Identitätskontrolle I*; 142, 123 (186 et seq., paragraph 117) – *OMT*.

44| See BVerfGE 73, 339 (375); 123, 267 (354); 129, 78 (100); 134, 366 (383, paragraph 24) – *OMT-Vorlage*; BVerfG, decision of 23 June 2021 – 2 BvR 2216/20 – paragraph 73 et seq. – e.A. *EPGÜ II*.

45| See BVerfGE 126, 286 (301) – *Honeywell*; 129, 78 (100); 140, 317 (335, paragraph 38 et seq.) – *Identitätskontrolle I*; 142, 123 (187, paragraph 118) – *OMT*.

46| See BVerfGE 73, 339 (375) – *Solange II*; 75, 223 (242) – *Kloppenburg*; 123, 267 (354) – *Lissabon*; 134, 366 (381 et seq., paragraph 20 et seq.) – *OMT-Vorlage*.

47| See BVerfGE 37, 271 (279 et seq.); 58, 1 (30 et seq.); 73, 339 (375 et seq.); 75, 223 (242); 89, 155 (190); 123, 267 (348 et seq., 402); 126, 286 (302); 129, 78 (99); 134, 366 (384, paragraph 26); 140, 317 (336, paragraph 40); 142, 123 (187 et seq., paragraph 120); 154, 17 (89 et seq., paragraph 109); BVerfG, decision of 23 June 2021 – 2 BvR 2216/20 – paragraph 74 – e.A. *EPGÜ II*.

48| See BVerfGE 142, 123 (187 et seq., paragraph 120); BVerfG, decision of 23 June 2021 – 2 BvR 2216/20 – paragraph 74 – e.A. *EPGÜ II*.

The German Federal Constitutional Court guarantees those limits through, in particular, judicial review of matters pertaining to identity and matters potentially involving *ultra vires* acts. Similar constitutional reservations do exist for the constitutional or apex courts of other Member States.⁴⁹

3. Identification of a common constitutional tradition

In its case-law on fundamental rights and on principles of general administrative law, the Court of Justice has established the principle that the identification of general legal principles, in general, and constitutional traditions common to the Member States, in particular, must be carried out by way of an evaluative legal comparison. A common constitutional tradition does not require that all Member States share it, but it must demonstrably exist in the majority of Member States, at least from a functional point of view. In view of the degree to which the spheres of Romance law and Germanic law have shaped EU law as a whole, a common constitutional tradition or a general legal principle can be assumed only if it demonstrably exists in both spheres of legal tradition and in a substantial number of Member States. The number of European Union citizens who are already subject to such a principle may also play a role in that respect. In accordance with the persuasive case-law of the Court of Justice, the same applies to international treaties of the Member States, in particular with regard to the protection of human rights.

A common constitutional tradition or a general principle of law, on the other hand, cannot be decreed in a decisionistic manner. Rather, new constitutional traditions or legal principles must grow bottom up. Institutions, bodies, offices and agencies of the European Union that disregard that principle act *ultra vires*; national courts that do so act unlawfully as well and, potentially – for example in cases where they assume an *acte clair* within the meaning of Article 267 TFEU – arbitrarily.

49| In that regard, see, for the Kingdom of Belgium: Constitutional Court, decision No 62/2016 of 28 April 2016, paragraph B.8.7.; for the Kingdom of Denmark: Højesteret, judgment of 6 April 1998 – I 361/1997, Section 9.8.; judgment of 6 December 2016, I 15/2014; for the Republic of Estonia: Riigikohus, judgment of 12 July 2012, 3-4-1-6-12, paragraph 128, 223; for the French Republic: Conseil Constitutionnel, decision No 2006-540 DC of 27 July 2006, paragraph 19; decision No 2011-631 DC of 9 June 2011, paragraph 45; decision No 2017-749 DC of 31 July 2017, paragraph 9 et seq.; Conseil d'État, decision No 393099 of 21 April 2021, paragraph 5; for Ireland: Supreme Court of Ireland, *Crotty v. An Taoiseach*, (1987), I.R. 713 (783); *S.P.U.C. (Ireland) Ltd. v. Grogan*, (1989), I.R. 753 (765); for the Italian Republic: Corte Costituzionale, decision No 183/1973, paragraph 3 et seq.; decision No 168/1991, paragraph 4; decision No 24/2017, paragraph 2; for Latvia: Satversmes tiesa, judgment of 7 April 2009, 2008-35-01, paragraph 17; for the Republic of Poland: Trybunał Konstytucyjny, judgments of 11 May 2005, K 18/04, paragraphs 4.1., 10.2.; of 24 November 2010, K 32/09, paragraph 2.1. et seq.; of 16 November 2011, SK 45/09, paragraphs 2.4., 2.5.; for the Kingdom of Spain: Tribunal Constitucional, declaration of 13 December 2004, DTC 1/2004; for the Czech Republic: Ústavní Soud, judgment of 31 January 2012, 2012/01/31 – Pl. ÚS 5/12, Section VII; for Croatia: Ustavni Sud, decision of 21 April 2015, U-VIIR-1158/2015, paragraph 60.

The question was addressed by the German Federal Constitutional Court in its decision in *Honeywell* of 6 July 2010, which concerned whether a general principle of prohibition of discrimination on grounds of age could be derived from the common constitutional traditions and the international treaties of the Member States, even though, at the time of the decision in *Mangold*⁵⁰ – which formed part of the subject matter of the proceedings in *Honeywell* – only 2 of the 15 constitutions of the Member States contained a specific prohibition of discrimination based on age.⁵¹ The Second Senate ultimately did not rule on the merits, because the general principle of the prohibition of discrimination on grounds of age, which was challenged with regard to its derivation from the constitutional traditions common to the Member States, neither established a new area of competence for the European Union at the expense of the Member States nor did it extend an existing competence, so that the criterion of structural significance required for *ultra vires* review was not met. Nevertheless, it can be surmised that the derivation of that principle from the common constitutional tradition might not have been entirely convincing.⁵²

4. Consequences

The constitutional traditions common to the Member States have enduring relevance not only for the area of fundamental rights, and the importance of that relevance has not yet been fully grasped. It forces all participants in the European network of courts (*Rechtsprechungsverbund*), but above all the European Court of Human Rights and the Court of Justice and also the national constitutional and apex courts, to make greater efforts with regard to constitutional comparison and to the development of robust methods for its identification and concretisation.

This requires – above all for the Court of Justice, which is charged with the task of practically implementing the unity in diversity prescribed by the Treaties – an institutionalised dialogue with the constitutional and apex supreme courts of the Member States when it comes to identifying common constitutional traditions or touching the respective constitutional identities. In such cases, the Court of Justice should not take the decision without a robust safeguard – unlike what happened in the *Egenberger* case.⁵³ The second paragraph of

50| Judgment of 22 November 2005, *Mangold*, C-144/04, [EU:C:2005:709](#).

51| Opinion of Advocate General Mazák in *Palacios de la Villa*, C-411/05, [EU:C:2007:106](#), point 88; Hölscheidt, S., in: Meyer, J., Hölscheidt, S., *Kommentar zur Charta der Grundrechte der EU*, 2nd Ed. 2006, Art. 21, paragraph 15.

52| BVerfGE 126, 296 (...) – *Honeywell*.

53| Judgment of 17 April 2018, *Egenberger*, C-414/16, [EU:C:2018:257](#).

Article 24 of the Statute of the Court of Justice already allows - one might also argue obliges it *de lege lata* to clarify this question *lege artis*. Ideally, this would take place by means of a request addressed to the court seized to interpret the constitution in a binding manner. *De lege ferenda*, however, the Treaty legislature should insert an Article 267a TFEU, which provides for such a reverse preliminary ruling procedure in detail and entitles and – in the areas listed in Article 4(2) TEU – obliges the Court of Justice to obtain a preliminary ruling from the respective constitutional or supreme courts of the Member States. This would be the keystone in the vault, so to speak, of the network of constitutional courts.⁵⁴

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54| See Grabenwarter, C., Huber, P. H., Knez, R., Ziemele, I., *The role of the constitutional courts in the European judicial network*, European Public Law, 27-1, 2021, pp. 43 (58 et seq.).

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H.E. Mr Egils Levits, President of the Republic of Latvia, and Mr Koen Lenaerts, President of the Court of Justice of the European Union



Ms Maria Georgiou

President of the Supreme the Supreme Civil
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Contribution de M^{me} Maria Georgiou, Cour suprême civile et pénale de la République hellénique

Alignement réciproque de la jurisprudence de la Cour de justice de l'Union européenne et des jurisprudences des ordres juridiques de chaque État membre

Cher Monsieur Koen Lenaerts et chère Madame Sanita Osipova, respectivement président de la Cour de justice de l'Union européenne et présidente de la Cour constitutionnelle de la République de Lettonie.

Chers collègues, puisque nos caractéristiques communes consistent en l'engagement à la science merveilleuse du droit, ainsi nous nous adonnons tous à l'étude des chemins de la pensée juridique, ce qui, au fil du temps, forge notre vie quotidienne.

Ma promotion au grade de Présidente de la Cour de Cassation a eu lieu le 1^{er} juillet 2021. Depuis lors, je me trouve constamment préoccupée par l'accomplissement des devoirs urgents qui m'incombent. Cependant, le sujet de cette conférence est à ce point important, que bien avant que je sois invitée à y participer, je pensais à la nécessité de sa réalisation. Ainsi, malgré le manque de temps pour me préparer de manière adéquate afin de participer activement, comme je l'aurais souhaité, j'ai toutefois choisi d'être présente, afin d'être informée sur toutes les questions abordées par vous tous lors de cette conférence. Toutefois, je tiens à vous exposer, de manière générale, la situation légale dans l'ordre juridique grec, en rapport avec les questions abordées à la conférence.

En Grèce, comme vous le savez peut-être, nous n'avons pas de Cour constitutionnelle. J'occupe depuis trente-huit ans déjà des fonctions de magistrate au sein de la justice civile et pénale, et la question de la nécessité de l'existence d'une Cour constitutionnelle ne se pose que depuis une dizaine d'années.

Plus précisément, en vertu de la disposition de l'article 93 paragraphe 4 de notre Constitution¹ qui stipule : « *Les tribunaux sont tenus de ne pas appliquer une loi dont le contenu est contraire à la Constitution* » (art. 93 para. 4). Ainsi, toutes les Cours et tous les Tribunaux, indépendamment de leur degré de juridiction, sont compétents, même d'office, et sous motivation fondée bien évidemment, pour juger qu'une disposition légale va à l'encontre de certaines dispositions constitutionnelles et par conséquent, est inapplicable.

De plus, en vertu de la disposition de l'article 100, paragraphe 1, cinquième alinéa de notre Constitution :

« Il est constitué une Cour suprême spéciale, dont la compétence comprend :

(e) Le règlement des contestations sur l'inconstitutionnalité de fond ou sur le sens des dispositions d'une loi formelle, au cas où le Conseil d'État, la Cour de cassation ou la Cour des comptes ont prononcé des arrêts contradictoires à leur sujet » (art. 100 para.1 sous-para. e).

En raison de cette articulation concernant cet enjeu fondamental, qui plus est, nécessaire pour la sérénité de l'ordre juridique, nombreuses sont les dispositions législatives jugées incompatibles avec certaines dispositions de notre Constitution. Il en est ainsi des dispositions concernant principalement les droits individuels et sociaux, et plus précisément l'égalité devant la loi article 4, paragraphes 1 et 2, et le respect du principe de proportionnalité conformément à l'article 25. Cet article stipule, entre autres, que : « Les restrictions de tout ordre qui peuvent être imposées à ces droits selon la Constitution doivent être prévues soit directement par la Constitution, soit par la loi, sans préjudice de celle-ci et dans le respect du principe de proportionnalité » (art. 4, para. 1 et 2). Il est évident que cette compétence des tribunaux, dénuée de garde-fou, doit être exercée avec la plus grande prudence et ce, dans des cas flagrants de lois inconstitutionnelles, afin que la sécurité juridique du pays n'en soit pas perturbée.

La situation décrite ci-dessus se réfère à une période qui remonte à presque dix ans. Mais ensuite, lorsque la Grèce a été confrontée à des problèmes sérieux, à savoir la crise économique, la mise en œuvre de cette compétence a perturbé l'ordre juridique, heureusement dans un petit nombre d'affaires seulement, et pour un laps de temps limité. Cependant, dans la situation actuelle de la pandémie, je suis préoccupée par l'idée qu'un tribunal puisse considérer comme inconstitutionnelles les dispositions légales déjà adoptées, ou qui seront incessamment adoptées, concernant le règlement de la situation des citoyens, qui travaillent principalement au sein des structures de santé ou dans la restauration, ainsi que celle des enseignants qui refusent de se faire vacciner.

1 | Parlement hellénique (1975), *Constitution de la Grèce*, révisée le 25 novembre 2019, Grèce.

En vue d'accomplir ce qui vient d'être exposé, il est important de continuer à renforcer le dialogue judiciaire entre la Cour de justice européenne et les Cours constitutionnelles des États membres. Pour la Grèce, qui n'a pas de Cour constitutionnelle, ce dialogue se fera entre la Cour de justice et les trois Cours suprêmes grecques. Je suis certaine que leurs présidents respectifs sont du même avis, à savoir en faveur de ce dialogue qui contribuera de toute évidence à l'application féconde, pour chaque État membre, du droit de l'Union européenne.

En ce qui me concerne, je suis présidente d'une des trois Cours suprêmes jusqu'au 30 juin 2023. Je peux donc vous assurer que je considère ce dialogue comme nécessaire, car il permettra de connaître les problèmes précis auxquels nous nous sommes confrontés. Je pourrai par conséquent contribuer à leur solution ou éviter leur création, dans des cas où ces problèmes appartiennent à la compétence des juridictions civiles et pénales.

Quant à la Cour de justice de l'Union européenne, je considère qu'il est important qu'elle puisse garantir, entre autres, que les institutions de l'Union européenne, lors de l'exercice de leurs compétences, ne violent pas les compétences conservées par les États membres. Je crois que le respect de cette règle préserve l'équilibre des ordres juridiques des États membres entre eux, ainsi qu'entre les États membres et les institutions de l'Union européenne.

En ce qui concerne la question, notamment dans le domaine de la protection des droits fondamentaux, de savoir, si le principe du droit de l'Union européenne pourrait être modéré par rapport aux dispositions nationales constitutionnelles, afin qu'une diversité subsiste concernant les Constitutions des États membres ou, au contraire, si une solution unique doit être adoptée lorsque les États membres appliquent le droit de l'Union européenne je suis d'avis - étant donné qu'au sein de l'Union européenne, la Charte coexiste avec les droits tels qu'ils résultent des traditions constitutionnelles communes aux États membres - que la première solution doit être adoptée, au moins pour une certaine période. Et ce, bien évidemment, en application du droit constitutionnel comparatif, sous réserve des éventuelles approches constitutionnelles différentes relatives à certains sujets importants, qui pourraient être mis au jour lors de cette conférence, dont le traitement différent n'est pas compatible avec le droit de l'Union européenne. Je considère que non seulement, cette solution ne va pas à l'encontre de la cohésion de l'Union européenne, mais qu'au contraire, elle sera bénéfique.

Cet avis, que j'exprime sous réserve, est fondé sur ma conviction que la sérénité requise pour l'ordre juridique, ne sera accomplie que si des solutions constitutionnelles appliquées depuis longtemps et ainsi élaborées sous tous leurs aspects sont mises en œuvre. En effet, les problèmes importants créés par la pandémie dans tous les domaines de la vie quotidienne des citoyens dans le monde entier, ainsi que des problèmes supplémentaires en Grèce, dus aux incendies récents ayant causé d'immenses dommages à la nature et aux humains et

du également à l'immigration clandestine, rendent nécessaire l'adoption immédiate de dispositions législatives, afin de surmonter ces dits problèmes.

Dans tous les cas, le rôle de la Cour de justice de l'Union européenne, comme celui des Cours constitutionnelles, est fondamental pour assurer la cohésion dans la diversité, lorsque cette dernière doit exister grâce à la conservation de l'identité nationale, ce qui constitue l'achèvement ultime dont bénéficient les citoyens des nations qui font partie de l'Union européenne, à savoir être des citoyens respectant le droit de l'Union européenne, tout en conservant tout ce qui forme leur identité nationale.

Je vous remercie d'avoir suivi mes réflexions, bien qu'elles n'étaient pas aussi approfondies que je l'aurais souhaité. Veuillez également m'excuser pour mes fautes de prononciation ainsi que pour mon niveau de connaissance de la langue anglaise et française. Ceci est la conséquence de mon dévouement à mon travail de magistrate, ce qui m'a empêché de cultiver mes connaissances pendant une longue durée (chose inexcusable). Je souhaite que cette conférence puisse, même à long terme, contribuer à la qualité de vie des citoyens de l'Union européenne, qui constitue entre autres mais principalement, le but de notre science.



Mr Frank Clarke, Chief Justice of the Supreme Court of Ireland, chair of the 1st panel session

2nd panel

**Fundamental rights:
scope of application,
competences and
harmonisation**



Mr Lars Bay Larsen

Vice-President of the Court of Justice
of the European Union

Contribution by Mr Lars Bay Larsen, Vice-President of the Court of Justice of the European Union

Introduction

Please allow me to thank the organisers for inviting us all to this conference and for receiving us so well and with such great hospitality. It certainly feels good to be back in Riga.

Further, I am honoured by and grateful for the invitation to introduce this second panel on fundamental rights – their scope of application, competences and harmonisation.

1. When is a right fundamental – and where do we find them?

Before turning to these issues, it seems fair to say a few words about the very basic terminology as well as where we may expect to find fundamental rights.

If you look in the Merriam Webster Legal Dictionary, a fundamental right is defined as follows:

‘a right that is considered by a court [...] to be explicitly or implicitly expressed in a constitution [...]’

So a right that is of constitutional rank and recognised as such by the (competent) courts. Whereas in the United States that would ultimately be decided by the United States Supreme Court, in the EU it would be decided at national level by the competent supreme or constitutional court of a Member State, and at the EU level by the Court of Justice of the European Union (‘the CJEU’) in Luxembourg.

Obviously, if we extend the circle to the Council of Europe, we have the European Convention on Human Rights and Fundamental Freedoms (‘the ECHR’) as interpreted by the European Court of Human Rights (‘the ECtHR’) in Strasbourg.

Although I have been a national judge at the Højesteret (Danish Supreme Court), I have for the last almost 16 years served as a judge at the CJEU in Luxembourg and accordingly I will

mainly focus on EU fundamental rights and largely in a perspective as seen from the Court in Luxembourg.

I trust that notably the other members of the panel will help broaden the perspective and secure a balance.

President Levits rightly reminded us that the EU is not a state and does not have a constitution. The attempt by the signed, but never ratified, Constitutional Treaty to partly remedy that situation failed. However, with the Lisbon Treaty and the Charter of Fundamental Rights of the European Union ('the Charter'), the EU does have something that comes fairly close to a constitution.

It was not always so. This was – not completely without reason – perceived as a problem.

As the Member States (6, 9, 10, 12, 15, 25 ...) gradually and collectively pooled and allocated some of their respective national competences to the EU via the Treaties (and the Treaty-revisions), this had in principle the effect that the fundamental rights protection previously secured by the respective national constitutions did not follow the competences transferred to the EU.

So it was argued that, contrary to when Stanley and Livingstone explored Central Africa and the large white areas of the maps gradually became smaller, here we were in a situation where the white areas of law not granting a full and proper fundamental rights protection grew bigger and bigger as time, intergovernmental conferences (IGCs) and successive Treaty revisions passed.

This led to a long debate among legal scholars, legal practitioners and politicians. How big was the problem, how could it be solved? Two main solutions were at the center of the discussion:

1. Either the EU should simply sign up to the ECHR next to 47 Member States (including all the EU Member States) of the Council of Europe, or
2. The EU should develop its own set of 'constitutional' rules providing a comparable protection of fundamental rights.

The first and most 'simple' of these solutions, to 'sign on the dotted line', was for many years not technically possible, as the ECHR was not legally open for international organisations like the EU to sign. Therefore, a 'dotted line' would have to be negotiated with all 47 Member States of the Council of Europe.

The second solution was not a simple one either as long negotiations on the content of such a set of EU fundamental rights would be difficult; also bearing in mind that revision of primary EU law requires unanimity among the Member States. It further raised the issue of securing the necessary harmony with the ECHR.

However, after the Maastricht Treaty (1992/1993) brought in the full and politically sensitive area of Justice and Home Affairs ('AFSJ') in the new largely intergovernmental Third Pillar of the Treaty, and work on the Amsterdam Treaty began, it became increasingly clear that a conclusion had to be reached.

Following the Amsterdam Treaty (2 October 1997) coming into force 1 May 1999, the European Council in Cologne on 3 to 4 June 1999 essentially pointed to the second solution. This decision was a few months later confirmed and elaborated by the special Jumbo European Council in Tampere during the first Finnish Presidency of the EU, which launched the work on drawing up the EU Charter of Fundamental Rights as a *politically* binding declaration.

The Charter was then drawn up and pronounced (2000) as a political declaration.

While the attempt to give the Charter full legal status as part of the Constitutional Treaty collapsed, the Charter survived (as a political declaration), and was finally made legally binding by the Lisbon Treaty coming into force on 1 December 2009, not as a formal part of the Treaty, but as a separate part of primary EU law, having the 'same legal effect as the Treaties', as it is said in Article 6(1) TEU.

Curiously, the EU Member States by the following paragraph of the same article, Article 6(2) TEU, took the political decision also to implement the other 'alternative', to 'sign on the dotted line', which meanwhile had been made possible, at least in principle, following the Laeken declaration of 2001.

These provisions of the Lisbon Treaty are certainly both important, but should not be read a contrario to imply that up to 1 December 2009 the protection of fundamental rights in EU law had been completely absent.

The EU did not go from zero (protection of fundamental rights) to 100 in a split-second on 1 December 2009. By then, the CJEU had in its jurisprudence largely assured that EU law complied both with the minimum protection granted (for national laws) by the ECHR and with other common constitutional traditions of the Member States, which were recognised as 'constitutional traditions common to the Member States' and as such constituting 'general principles of the Union's law'.

This had been a rather long development dating back at least to when the judgment of 12 November 1969, *Stauder v Ulm*, (Case 29/69, [EU:C:1969:57](#)) was delivered. In fact, the President of the Court, Koen Lenaerts, has just traced this development even further back to a judgment from 1957.

The judgment of 18 June 1991, *ERT*, (C-260/89, [EU:C:1991:254](#)) which recognised the relevance and importance of the constitutional traditions in the Member States and in particular affirmed the importance of the ECHR to which all the Member States adhered, marked a further step in this development.

The culmination in this pre-Charter development was when the CJEU in its judgment of 3 September 2008, *Kadi*, (joined cases C-402/05 P and C-415/05 P, [EU:C:2008:461](#)) annulled a general legal act of the Union because it violated fundamental rights of the Union.

In other words, my image of the ‘growing white areas on the fundamental rights map’ was not really accurate. The reality was much more complex, and not only the EU Charter acquiring legal effect, but also Article 6(3) TEU – on the constitutional traditions common to the Member States – represents to a large degree a codification, at constitutional level, of already existing rights. However, the codification at constitutional level remains a significant legal development.

2. Scope of application of the EU Charter of Fundamental Rights

I now turn to the question, when and where are the fundamental rights of the Charter applicable? The fathers and the mothers of the Charter addressed this issue in Article 51(1) of the Charter, which *inter alia* reads:

‘The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are *implementing* Union law. ...’ (My emphasis).

For the EU institutions and agencies (Council, Commission, Parliament, CJEU, Court of Auditors, Europol, the Food Agency in Parma, etc.) there is no doubt. The Charter applies.

There have been implications also that the legality of secondary EU legislation may be controlled by the CJEU on the basis of the EU Charter, and that it may be annulled fully or partially in case of non-compliance. This happened first in joined judgments of 9 November

2010, *Volker und Markus Schecke GBR*, (C-92/09 and C-93/09, [EU:C:2010:662](#)) with an amendment to the Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities. The cases were referred by a German court. It happened again with Article 5(2) of Council Directive 2004/113/EC on equal treatment of men and women in the area of insurance in another preliminary ruling case (judgment of 1 March 2011, C-236/09, *Test Achats*, [EU:C:2011:100](#)) referred from the Belgian Cour constitutionnelle (Constitutional Court).

When we turn to the Member States the wording of Article 51(1) is perhaps a little unfortunate in so far as it employs the word 'implementing' Union law. However, the CJEU has consistently given a broader interpretation of 'implementing' as 'applying' Union law, as illustrated *inter alia* by the joined judgments of 21 December 2011, *N.S. and others*, (C-411/10 and C-493/10, [EU:C:2011:865](#)) and judgment of 7 May 2011, *Åkerberg Fransson*, (C-617/10, [EU:C:2013:280](#)).

Occasionally the formulation of a specific fundamental right can lead to doubts concerning its scope of application. This has proven to be the case with Article 41(1) of the Charter on the principle of good administration:

'Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.' (My emphasis)

For a while, there was some doubt as to whether this provision also applies to the Member States when they are applying Union law, or alternatively, whether it (really) was the intention of the fathers and mothers of the Charter to wipe out the principle of good administration *vis-à-vis* the Member States in this situation.

This doubt was for a while also reflected in the case-law of my court which was not fully consistent. However, a more recent and by now constant case-law has made it clear that Article 41 applies *only* to the EU bodies and institutions, but that 'the principle of good administration' continues to apply to the Member States, as it did before the Charter, as a general principle of Union law, in conformity with Article 6(3) TEU.

3. Competences and obligations – some short points

- The Charter does not affect the allocation of material competences between the Member States and the Union – or between different Union bodies.

Members States and their constitutional/supreme courts may control that the national competences conferred by the Treaties to the Union have been conferred

in accordance with their national constitutional requirements, as inter alia the Bundesverfassungsgericht (German Federal Constitutional Court) and my former colleagues in the Danish Supreme Court have reminded us on several occasions. The latter reached - with eight votes against one - in the *Ajos/Danish Industry* case (judgment of 6 December 2016, Danish legal journal, UfR 2017.842 H) the conclusion that the Danish Parliament amending the national law on accession to the European Union had failed to confer a part of the powers needed for a proper ratification of the Lisbon Treaty. My point here is that this is clearly the competence of a national supreme or constitutional court. Whether I am personally convinced by the majority of eight or rather the dissenting former colleague is another matter.

But Member States may not – generally or case by case – exercise themselves the competences that they have conferred upon the Union, when they are unhappy with the way the Union exercises these conferred powers. This goes also for national supreme and constitutional courts. In my opinion, the Danish Supreme Court did not do that.

In my view Article 4(2) TEU, about inter alia the respect of national identity and constitutional structures, does not alter this. Article 4 is (also) a two way street about loyal cooperation and mutual respect, as we are united in our diversity. However, it is not a free card to disregard the fundamental values listed in Article 2 TEU or the fundamental rights listed in Article 6 TEU, including the EU Charter.

It is important to see the writing on the wall. Not least, when you are sitting, like I do, facing the wall in this impressive historic hall with its old pictures and inscriptions. Looking right now at one of the German words of wisdom written in Gothic letters on the wall, it reads: 'Zeit, Wind, Frauen und Glück verändern sich im Augenblick'. In English, it would be something like 'time, wind, women and luck can change in the blink of an eye'. It is probably a safe presumption that these words were written by a male author, but please note that national identity is not included in the list (of items that may change with the (political) wind of the moment).

- Whenever Member States are applying EU law, i.e. by transposing a directive or applying national legislation transposing a directive, they must respect the relevant EU fundamental rights. This obviously includes the competent national courts, who may make preliminary references according to Article 267 TFEU when in reasonable doubt as to the interpretation or validity of EU law. Courts of last instance are obliged to make a reference under Article 267 TFEU.

- Such references on fundamental rights may concern not only the Charter, but all the elements referred to in Article 6 TEU:

(1) EU Charter;

(2) ECHR (when relevant);

(3) Common constitutional traditions of the Member States as general principles of Union law.

When a provision of the Charter is applicable, but corresponds to a right of the ECHR, it is the provision of the Charter that the CJEU will interpret. The CJEU will do so in conformity with Article 52(3) of the Charter, in harmony with the parallel provision and in such a way that at least the minimum protection of the ECHR is provided.

- As is the case with other obligations flowing from EU law, a Member State that applies EU law without respecting obligations flowing from EU fundamental rights including the EU Charter may be the subject of an infringement procedure initiated by the Commission.
- However, fundamental rights are not per se without exceptions. This is clearly recognised by Article 52(1) of the Charter:

'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.'

- Nevertheless there are conditions and limits to be respected in this regard.

Sometimes the CJEU has to balance two fundamental rights against each other – such as the right to industrial action vis-à-vis the freedom of services or the free movement of workers.

- It is also worth recalling that the EU Charter – as well as the ECHR – sets a minimum level of protection.

The EU Charter may provide a higher level of protection than that which flows from the ECHR.

The EU legislator may likewise be more generous in secondary EU law than what is guaranteed by the EU Charter.

- Nothing in the Charter prevents the Member States from providing a higher level of protection of fundamental rights. However, other parts of primary Union law or secondary Union law may well, notably when they seek to achieve complete harmonisation in a particular area, *set such limits* for the national protection of fundamental rights.

This may for example be the case when the effectiveness of the internal market with its fundamental freedoms is at stake, or when the aim is to secure the necessary preconditions for effective mutual recognition.

The judgment of 26 February 2013, *Melloni*, (C-399/11, [EU:C:2013:107](#)) where the preliminary reference was made by the Tribunal Constitucional (Spanish Constitutional Court), confirmed that the Framework Decision 2002/584 had made an exhaustive list of possible reasons for refusing a European arrest warrant and that the Spanish court(s) would therefore have to set aside a constitutional provision aiming at giving persons, who had received a sentence in absentia in another Member State, a better protection against surrender (extradition) than what followed from Framework Decision 2002/584.

One might say that the ECHR establishes the basic foundation of the legal construction, whereas the EU Charter has to be placed on top – at the same level, just above or somewhat higher. Then the Member States may place their national rules at an even higher level, provided that the EU has not aimed at a complete harmonisation of certain aspects (like with the Framework Decision 2002/584). Such harmonised aspects will – due to the primacy of EU law – set a mandatory ‘ceiling’ (a maximum) for how high the national constitutions can go in providing additional protection.

I shall mention two other situations different from the *Melloni* case:

- The Member State decides to transpose a directive in such a way that it widens the area, where the national implementing legislation is applicable. Here the Charter will apply only in the area covered by the directive. In the area of the national extension, only the national fundamental rights and the ECHR will apply.
- If the national area of application is only what is covered by the directive, but the Member State in this area gives a better protection than required by the directive, then that is OK, provided that no maximum level of protection has been prescribed in the directive. In this situation (which differs from the judgment in *Melloni*) the EU Charter applies to the full implementing law.

Other speakers will no doubt address and further develop several of the points that I have highlighted. I welcome this, and not only because the time allocated to me is by now largely exhausted.

Thank you for your time.



Mr Tamás Sulyok

President of the Constitutional Court of Hungary

Contribution by Mr Tamás Sulyok, President of the Constitutional Court of Hungary

Ladies and Gentlemen,

Dear Colleagues,

First of all, please allow me to express my gratitude to the Latvijas Republikas Satversmes tiesa (Latvian Constitutional Court), Mrs. President Osipova, the Court of Justice of the European Union ('the ECJ') and President Lenaerts for organising this conference. Perhaps it would not be an overstatement to say that there has never been and perhaps will never be a more appropriate time than now to address the key issues raised during this conference.

As suggested by the title of this conference, the core values that can unite the European nations are respect for our common constitutional traditions and national identities. If we regard the European legal system as the body of the European integration process, then the common constitutional traditions and national identities of the sovereign Member States are considered as the soul of integration. By respecting them, we cannot only achieve unity but also protect diversity in Europe.

I think we all agree that engagement in a constructive dialogue has been difficult during the pandemic, even though it is undoubtedly one of the most important ways to achieve the right balance between unity and diversity. The pandemic has prevented us from sitting down at the table in person and exchanging our views face to face. (Nothing better illustrates this than the fact that I have to communicate my present thoughts to you virtually.) However, it is precisely the coronavirus pandemic that has highlighted the dangers of isolation: not only from friends or relatives, but also from colleagues. I would go further than that: in addition to personal and social isolation, isolation from other states or countries, especially from other Member States of the EU can be harmful. Isolation hampers communication, which is essential, because we can only reconcile differences of opinion through debate and dialogue.

1. Introduction

1.1. The message

To start with, let me summarise the main points of my presentation, which reflects the approach of the Alkotmánybíróság (Hungarian Constitutional Court) to the dilemma of the compatibility of unity and diversity.

I am convinced that, first and foremost, the key to the solution to the dilemma is to be engaged in a dialogue in order to preserve the EU.

The Hungarian Constitutional Court has been among the first national constitutional courts to declare in a binding decision that 'the [Hungarian] Constitutional Court considers the constitutional dialogue within the European Union to be of primary importance [...]' CC Dec. 22/2016. (XII. 5.)

1.2. Structure

My presentation will consist of three parts:

1. In the first section I will try and answer a simple question, which is the following: who is in charge of the interpretation of national constitutions, or to use a more profane idiom: who is in the driving seat? I will examine the concept of absolute interpretative primacy, which is at the heart of the matter, and also offer an alternative solution.
2. The next part will be dedicated to national identities, and I will explain why the concept of national identities is important and relevant to our subject.
3. Finally, in the closing part of my lecture I will present our solution: the institutionalisation of constitutional dialogue.

2. Who is in charge?

The first problem that we have to address now is 'who is in charge of the interpretation of national constitutions?' Is it Luxembourg (Luxembourg), Karlsruhe (Germany) or Budapest (Hungary)? Is there a straightforward and unambiguous answer to this question?

Currently two different courts are claiming primacy and authority to decide on sensitive constitutional issues.

To borrow terms from sports: it is the ECJ against national constitutional courts.

The question that we have to answer is whether this is an irreconcilable conflict.

If we would like to answer this question, we have to clarify and understand the nature of the collision or conflict between the ECJ and the constitutional courts, and then consider the possible approaches.

There are two main areas of conflict: one concerns cases related to national identity, and the other is the conflict of authority (*Kompetenz-Kompetenz*), in other words, the question of who has the authority to decide where the borders of EU authority lie.

There are three possible positions or approaches to the problem, which are the following:

1. The first is that decisions on matters related to national identity fall within the exclusive competence of the Member States.
4. The second one is that in case of decisions on such matters the absolute interpretative primacy of the ECJ prevails over national courts.
5. The third one is that the resolution of conflicts should be based on dialogue and composite constitutionality.

2.1. First approach: Member States as the exclusive arbiters of decisions on national identity

The advocates of the first approach insist that the Member States must have the last and final word in questions related to their national identities. To support their argument they refer to Article 4(2) TEU as the firm legal ground of their position, which states that

‘The Union shall respect the equality of Member States before the Treaties as well as their national identities.’

On the other hand, we cannot ignore the fact that the EU has 27 Members States, and for this reason, this approach may be acceptable only in exceptional cases, and should be interpreted restrictively.

In general, it can be established that this approach is too rigid, does not stimulate harmonisation and may cause a stalemate.

2.2. Second approach: Absolute interpretative primacy of the ECJ

The essence of the second approach is that the only authentic interpretation of the term ‘national identity’ can be given by the ECJ, which also vindicates *Kompetenz-Kompetenz* for itself.

Those who support this approach point out that the legal ground for the primacy of the ECJ is laid down in Article 19(1) TEU which stipulates that

‘The Court of Justice of the European Union [...] shall ensure that in the interpretation and application of the Treaties the law is observed.’

It can be seen that in practice the ECJ seems reluctant to guarantee national identity against the excesses of the EU, and is prejudiced in *Kompetenz-Kompetenz*- questions.

This approach is undoubtedly one-sided, does not stimulate dialogue and may result in a cul-de-sac.

2.3. Third approach: Resolution of conflicts based on dialogue and composite constitutionality

Now, we have come to the third approach which I would summarise as follows: resolution of conflicts based on dialogue and composite constitutionality. To put it simply: this is the so called golden mean or golden middle way.

I strongly believe that we have to put these problems into a global context, and understand that the challenges (for example, mass migration, climate change) that we are facing nowadays cannot be addressed exclusively in Luxembourg, Karlsruhe or Budapest.

If we want to handle this conflict successfully, a multi-level and network-based approach is needed instead of a hierarchical relationship between the ECJ and the constitutional courts of the Member States, and a respectful dialogue must be developed between the ECJ and the constitutional courts of the Member States (Verfassungsgerichtsverbund).

This idea was first proposed by Dr Andreas Voßkuhle, the ex-president of the Bundesverfassungsgericht (German Federal Constitutional Court).

3. Why are national identities important?

In this part of my talk I want to underline again the importance of national identities, and explain in what way national identities are relevant to the resolution of the conflict between the ECJ and the Member States.

Previously the concept and the interpretation of national identity were based on sovereignty, and were defined in terms of sovereignty.

However, we also have to admit that excessive and unreasonable reliance on the concept of sovereignty may lead to undesirable consequences and futile debates due to the high number of the Member States – as I pointed out in the description of the first approach.

Here is my new proposal, which could be the starting point and give momentum to progress towards a viable approach.

My theory is that the legal foundation of national identity should rest on the individual human being with equal dignity.

It cannot be argued that equal human dignity is self-evident in terms of individual human rights, and is inherent in the concept of individual human rights.

Equally, this principle should also apply to the concept of ‘national identity’, which means that national identity must be based on the equal human dignity of each and every human being.

Human beings are born into a given geographical, ethnical, religious and historical environment, partly independently from their own will or decision.

These basic attributes are also protected under individual human rights regimes, and should equally be respected through the protection of national identity.

Based on this reasoning we have to accept that the principle of equality and human dignity of each and every human being dictates that each person must have the right to participate in democratic decision-making processes which establish and shape those norms that affect their ethnical, religious and historical attributes.

If these issues are addressed by an absolutist interpretation as the second approach demonstrates, the ECJ may harm the human dignity of its own citizens.

4. The institutionalisation of constitutional dialogue

In the final part I will outline the main conclusions of my presentation and the steps the Hungarian Constitutional Court has taken so far to resolve this dilemma.

The first conclusion is that the absolute interpretation of the ECJ may harm human dignity through the erosion of national identity and alienates the citizenry from the EU project.

The second observation is that participation in the EU cannot result in depriving people of the control of public power, especially in cases related to national identities.

The third is that real constitutional dialogue is a *must*, and accordingly the Hungarian Constitutional Court transformed this scholarly abstraction into binding law.

True to its commitment, the Hungarian Constitutional Court has established a working group in order to survey constitutional jurisprudence of other Member States to facilitate constitutional dialogue.

Thank you very much.



Ms Danutė Jočienė, President of the Constitutional Court of the Republic of Lithuania, chair of the 2nd panel session



Ms Claire Bazy Malaurie

Member of the Constitutional
Council of the French Republic

Contribution de M^{me} Claire Bazy Malaurie, Membre du Conseil constitutionnel de la République française

La France est un État moniste. L'intégration du droit international ne lui pose donc, par principe, aucune difficulté. Mais rien n'est jamais aussi simple, surtout lorsqu'on parle de cette organisation particulière qu'est l'Union européenne. L'UE, telle que nous la connaissons, est intégrée dans l'ordre juridique français par ce qui est aujourd'hui le titre XV de la Constitution composé de sept articles, issus du traité de Lisbonne de 2007.

Trois cas peuvent être distingués qui rendent indispensable une révision de la Constitution pour intégrer les termes d'un accord européen, communautaire, quel qu'il soit : les engagements souscrits ou contiennent une clause contraire à la Constitution, ou remettent en cause les droits et libertés constitutionnellement garantis, ou portent atteinte aux conditions essentielles d'exercice de la souveraineté nationale.

Mais les risques de conflits sur l'application des règles européennes y compris les principes de la Charte des droits fondamentaux (ci-après « la Charte »), appellent des approches aujourd'hui clairement dessinées.

La première question qui se pose alors vis-à-vis de l'Union européenne concerne l'exercice des compétences transférées ou partagées, et les modalités de leur contrôle.

Un nouveau traité inclut-il des matières nouvelles, sont-elles incluses, ou s'agit-il de prévoir des modalités nouvelles d'exercice de compétences déjà transférées ? Dans les deux cas, le Conseil recherchera si ces dispositions concernent des « **compétences inhérentes à l'exercice de la souveraineté nationale** », et si c'est le cas, la Constitution devra l'avoir rendu possible ou le prévoir au terme d'une révision. Ce fut le cas pour l'approbation de l'accord de Lisbonne.

Le contrôle du Conseil constitutionnel est alors un contrôle en amont, sur les traités eux-mêmes. La question a été posée, par exemple, en matière de règles de décision au sein de l'UE en matière budgétaire, ce fut le cas aussi en matière de justice et de contrôle aux frontières.

Si les stipulations de l'accord relèvent d'une compétence exclusive de l'Union européenne, il revient au Conseil constitutionnel de veiller à ce qu'elles ne mettent pas en cause **« une règle ou un principe inhérent à l'identité constitutionnelle de la France »**. « En l'absence d'une telle mise en cause, dit-il, il n'appartient qu'au juge de l'Union européenne de contrôler la compatibilité de l'accord avec le droit de l'Union européenne ».

Cette affirmation se décline pour le droit dérivé. Face à des dispositions législatives françaises, le Conseil constitutionnel exclut par principe de son contrôle celles qui correspondent à des dispositions précises et inconditionnelles et se bornent alors à tirer des conséquences nécessaires d'une directive qu'il ne contrôlera donc pas. Très récemment, ces principes de contrôle ont été étendus aux dispositions correspondant à un règlement européen, alors même que celui-ci est d'effet direct. En tant que tel, les dispositions de mise en application du Règlement ne donneront lieu à aucun contrôle par le Conseil constitutionnel, et les juridictions devront se tourner vers la CJUE. Les deux ordres sont et restent bien séparés.

À ce stade, il paraît nécessaire de souligner que le fait que le Conseil constitutionnel ne s'empare pas du contrôle de conventionalité, ce qui est très critiqué par certains, reste un principe de base. D'aucuns ont cru voir dans un renvoi préjudiciel effectué par le Conseil constitutionnel à l'occasion de la QPC 2013-314 du 4 avril 2013 (« Jeremy F ») une ouverture aux perspectives alléchantes. La question portait sur un article du code de procédure pénale et appelait une interprétation des règles sur les recours en matière de mandat européen. Mais il faut répéter que le renvoi n'a été possible que parce que les règles relatives au mandat d'arrêt européen ont été en quelque sorte constitutionnalisées par l'article 88-2 de la Constitution : « La loi fixe les règles relatives au mandat d'arrêt européen en application des actes pris par les institutions de l'Union européenne. » Le Conseil constitutionnel a donc considéré que le rôle d'interprète de ces règles revenait à la seule CJUE. C'est un cas qui devrait rester très exceptionnel.

Il arrive cependant que les deux types de contrôle se télescopent. Le Conseil d'État a pu ainsi refuser de transmettre au Conseil une question de constitutionnalité, pourtant prioritaire, au motif que la disposition relevant d'une directive devait d'abord être interprétée par la CJUE avant de pouvoir fonder éventuellement une mise en cause de constitutionnalité. Le premier cas de ce genre apparaît dans l'arrêt dit « *Technicolor* » du 15 décembre 2014 sur le régime fiscal des sociétés mères et leurs filiales et montre comment le « désordre » institutionnel peut se résoudre grâce à des schémas procéduraux respectueux des hiérarchies constitutionnelles.

La position du Conseil constitutionnel, partagée par le Conseil d'État, est alors claire : il ne peut y avoir de conflit de normes qui ne puisse être résolu dans le respect de chaque ordre juridique, en recourant au dialogue entre interprètes authentiques.

La seconde question porte sur les droits fondamentaux de l'Union et leur compatibilité avec les droits et libertés garantis en France.

Dans sa décision sur ce qui était et aurait pu devenir la Constitution pour l'Europe, en 2004¹, le Conseil constitutionnel a rappelé les principes en matière de droits fondamentaux auxquels il a ensuite renvoyé dans sa décision sur le traité de Lisbonne, en citant le paragraphe 1 de l'article 6 du TUE². Le Conseil constitutionnel a alors pointé un certain nombre de droits qui pouvaient poser problème, mais il a résolu les éventuelles difficultés en se référant aux travaux préparatoires. Il a conclu que dans la mesure où la Charte reconnaît des droits fondamentaux tels qu'ils résultent des traditions constitutionnelles communes aux États membres, « ces droits doivent être interprétés en harmonie avec lesdites traditions ». En l'occurrence, en réponse à des arguments soulevés par les parlementaires qui l'avaient saisi, le Conseil relève **des domaines dans lesquels il aurait pu exister des ambiguïtés**. Il s'est alors agi pour lui de rappeler le refus français de reconnaître des droits collectifs à quelque groupe que ce soit, défini par une communauté d'origine, de culture, de langue ou de croyance ; de rappeler le principe de laïcité « reconnu par plusieurs traditions constitutionnelles nationales » et notamment la large marge d'appréciation nationale (reconnue par la Cour européenne des droits de l'Homme) pour concilier la liberté de culte avec le principe de laïcité ; d'exclure les poursuites administratives et disciplinaires du champ d'application du principe ne bis in idem en matière pénale ; enfin la possibilité de limiter les droits dans certains domaines dès lors que l'Union respecte « les fonctions essentielles de l'État, notamment celles qui ont pour objet d'assurer son intégrité territoriale, de maintenir l'ordre public et de sauvegarder la sécurité nationale ».

Le Conseil constitutionnel a alors conclu, en retenant que la Charte comporte des droits directement invocables ainsi que des objectifs « ne pouvant être invoqués qu'à l'encontre des actes de portée générale relatifs à leur mise en œuvre », que la Charte n'appelait pas de révision de la Constitution, ni par le contenu de ses articles, ni par ses effets sur les conditions essentielles d'exercice de la souveraineté nationale. Conformément à sa jurisprudence en matière de traités, l'identité constitutionnelle n'est pas citée.

1 | Décision n° 2004-505 DC du 19 novembre 2004.

2 | L'Union reconnaît les droits, les libertés et les principes reconnus dans **la Charte** des droits fondamentaux du 7 décembre 2000, telle qu'adaptée le 12 décembre 2007 à Strasbourg, **laquelle a la même valeur juridique que les traités**. Les dispositions de la Charte n'étendent en aucune manière les compétences de l'Union telles que définies par les traités.

La Charte n'apparaîtra ensuite dans une décision du Conseil constitutionnel qu'en 2018, dans la décision relative à la loi sur le secret des affaires qui avait pour objet de transposer une directive européenne³ qui était critiquée comme portant atteinte à la liberté d'entreprendre.

Un point mérite d'être rappelé : la Charte protège les citoyens à l'égard de l'Union européenne, alors que les droits fondamentaux nationaux protègent les citoyens à l'égard des États membres. Cette affirmation brutale d'un juge à la Cour constitutionnelle allemande en 2016⁴ correspond exactement à la portée de la Charte, telle que décrite à l'article 6 du TUE et reprise de manière encore plus littérale à l'article 51, art. 1 de la Charte : les dispositions « s'appliquent lorsque [...] ils mettent en œuvre le droit de l'Union ». Elle signe la différence fondamentale avec la Convention européenne des droits de l'homme.

Certes, il a existé une tentation d'étendre l'emprise de la Charte, ceci apparut brièvement dans l'arrêt *Akerberg Fransson* qui portait sur le droit fiscal, mais il s'agissait là plus de résoudre une lacune qu'un conflit. Cependant, il est vrai que l'extension du droit dérivé et plus généralement de l'effet direct de nombreuses règles rend **la frontière plus poreuse** qu'on ne peut le penser pour les juridictions nationales, surtout quand est reconnue une marge d'appréciation pour l'application de certaines normes.

La simplicité n'est de toute façon pas au rendez-vous. **L'exclusivité que détient chacun se double aussi d'une certaine complémentarité.** Dans la décision que j'ai citée sur le secret des affaires, il fallait conjuguer liberté d'entreprise de l'article 16 de la Charte des droits fondamentaux, et la liberté d'entreprendre protégée par l'article 4 de la Déclaration des droits de l'homme et du citoyen (au titre de la liberté contractuelle). Le Conseil constitutionnel a pu emboîter les deux contrôles sur le secret des affaires : « Sans dispenser les États membres de l'Union européenne de leur obligation de transposer les dispositions résultant de cette directive, cet article 1^{er} [de cette dernière] leur confère une marge d'appréciation pour prévoir des dispositions complémentaires renforçant la protection du secret des affaires⁵ ». Sans contrôler la directive, il exerce alors un contrôle entier sur ce qui relève de la marge d'appréciation du législateur national.

3 | Décision n° 2018-768 DC du 26 juillet 2018.

4 | Masing, J., Revue de droit public - RDP n°2 - 2016.

5 | Il ajoute qu'il redevient alors compétent pour « se prononcer sur le grief tiré de ce que le législateur aurait méconnu la liberté d'entreprendre en ne prévoyant pas de telles dispositions complémentaires, s'ajoutant à celles tirant les conséquences nécessaires des dispositions inconditionnelles et précises de la directive ».

Mais d'autres exemples sont plus représentatifs de difficultés que seul le temps pourra contribuer à résoudre. Comment appliquer les règles en matière de mandat d'arrêt européen et comment protéger les droits y afférents ? L'affaire Jeremy F était relativement simple. Elle a été l'occasion pour la CJUE d'affirmer, d'une part, que les États peuvent prévoir des garanties supplémentaires à celles qu'exigeaient les normes européennes en matière de mandat d'arrêt européen, d'autre part, que, ce faisant, les États doivent toutefois respecter certaines obligations : en l'occurrence, un recours supplémentaire ne doit pas mettre en péril l'objectif d'accélération de la coopération judiciaire entre membres de l'UE. Le cas Melloni de la même année 2013 est évidemment plus compliqué puisqu'il soulève la question de la comparaison entre États des protections au fond, et non plus seulement en matière de procédure, et des exigences réciproques qu'il est possible de faire valoir entre États au regard de la primauté du droit de l'Union⁶. Ce type de problématique, qui peut être inspirée de la question de la réciprocité en matière d'application des traités internationaux, n'est pas encore parvenu au Conseil constitutionnel.

Si l'espace de liberté et de justice est un domaine à part, puisqu'il met directement en cause des normes européennes⁷, il reste que l'interprétation des principes fondamentaux posés par la Charte pourrait être une **source de difficulté, voire de confusion, au niveau national**. Ce que d'aucuns ont pu appeler le « **chaos des interprétations** » est une réalité. Ainsi, une controverse est née à propos d'arrêts de la Cour de cassation sur l'utilisation du principe de non-discrimination et du principe d'égalité⁸ pour résoudre un conflit éloigné en l'occurrence de la compétence de l'UE puisque devant être appliqué dans des rapports de droit privé. Dans ce cas précis, ni le Conseil constitutionnel ni la CJUE ne sont intervenus. Or, la discussion théorique est loin d'être épuisée et ouvre un champ de dialogue éventuel assez vaste notamment en droit du travail qui recèle de très nombreuses spécificités dans les États membres et qui n'est pas inconnu de l'UE, loin s'en faut, le titre IV de la Charte sur la solidarité en témoigne.

6 | Arrêt *Melloni* C-399/11 du 26 février 2013 et arrêt *Aranyosi- Caldaru* C-404/15 et C-659/15 du 5 avril 2016.

7 | Bonichot, J.C., et M. Aubert, M., *Revue universelle des droits de l'homme - RUDH* juin 2016.

8 | Les deux principes sont nettement séparés dans la Charte, à l'article 21 et à l'article 23, ce dernier étant réservé à l'égalité hommes femmes, le principe d'égalité étant le principe unique reconnu par la Déclaration des droits de l'homme et du citoyen et la Constitution.

Ainsi, le dialogue en matière de droits fondamentaux est indispensable, et c'est un dialogue à multiples voix. Comme le disait un auteur pour la France⁹ dans un article intitulé « Cinq cours suprêmes, une apologie mesurée du désordre [...] : il est de l'intérêt bien compris de tous et de chacun que rien ne soit entrepris sans que l'on ait réfléchi à ce que les autres juges seront susceptibles de faire sur le même sujet ».

Reste entière aujourd'hui en France la question **de la place de l'identité constitutionnelle dans ce dialogue entre juges**, puisque le concept, certes cité comme je l'ai dit, n'a jamais été défini et n'a jamais servi en France, contrairement à l'Allemagne, par exemple, qui en a fait usage pour s'opposer à la décision Melloni. Qu'est-ce que l'identité constitutionnelle de la France ? Nous serions en peine de le dire, faute de décision du Conseil constitutionnel en ce sens. Même les théoriciens ne se mettent d'accord que sur une chose : elle ne se résume certainement pas à des règles propres au pays concerné ; il faudrait qu'elle soit définie matériellement et liée à l'importance des principes qui la composent. Vaste sujet. Le seul élément qui pourrait faire consensus en France est le principe de laïcité, dont la définition y est effectivement très particulière et bornée par de nombreuses décisions juridictionnelles. Heureusement, le port du foulard qui a été le sujet de controverse le plus significatif ces dernières années en matière de laïcité en France n'a pas suscité de difficulté à la CJUE. Notre Charte de l'environnement et la reconnaissance d'un objectif constitutionnel de protection de l'environnement, qui peut faire écho à l'article 37 de la Charte des droits fondamentaux de l'UE¹⁰, que l'on retrouve dans des décisions du Conseil constitutionnel à maintes reprises ces dernières années, appliquée comme un exigence universelle pourrait-elle être une composante de cette identité constitutionnelle¹¹ ?

Comme le remarquait Michel Troper dans un article de 2008 sur le sujet¹², l'identité constitutionnelle ne sert pas au Conseil constitutionnel pour se défendre contre le constituant, mais pour se défendre contre une suprématie absolue du droit européen. À ce titre, le Conseil s'est servi en revanche de la référence à la souveraineté, renvoyant donc les difficultés éventuelles au niveau des traités eux-mêmes et il a reporté sur le constituant la charge de déclarer ou de refuser la possibilité d'appliquer les règles européennes (ceci en concordance parfaite avec le fait qu'il ne fait pas de contrôle ultra vires). D'où les formules

9| de Béchillon, D., Cinq cours suprêmes, apologie mesurée du désordre, Pouvoirs, n°137 - 2011.

10| Art. 37 de la Charte : Un niveau élevé de protection de l'environnement et l'amélioration de sa qualité doivent être intégrés dans les politiques de l'Union et assurés conformément au principe du développement durable.

11| Décision n°2019-823 QPC : « Il en découle que la protection de l'environnement, patrimoine commun des êtres humains, constitue un objectif de valeur constitutionnelle. »

12| Michel Troper, in 50^e anniversaire de la Constitution française, Dalloz 2008.

dont use le Conseil constitutionnel lors de son contrôle qui ont été rappelées plus haut. Peut-être le silence que le Conseil constitutionnel a gardé sur l'identité est-il aussi le résultat du contenu des interpellations auxquelles il a répondu, et plus généralement, à ce jour, d'une conjonction de l'adhésion aux valeurs communes et du respect des principes d'équivalence de protection des droits fondamentaux, de confiance mutuelle et de bonne foi qui a été considérée comme suffisante au niveau national pour ne pas entraîner de controverse avec l'UE.

Je ne peux pas terminer cette brève présentation sans évoquer les récents échanges entre la CJUE et le Conseil d'État sur la question non pas de l'identité constitutionnelle de la France mais de la conciliation entre les règles européennes et les exigences constitutionnelles françaises, parmi lesquelles, comme je vous l'ai dit au début de cet exposé, l'exercice de la souveraineté française. Il s'agissait des données de trafic et de données de localisation conservées par les opérateurs de télécommunication. Il était prévisible que ce sujet soulèverait de nouvelles questions après les arrêts de la CJUE *Droits numériques et Tele2 Sverige*. Ce point avait déjà été abordé lors d'un précédent colloque ici à Riga en 2018 sur ... le monde du numérique et les relations entre juridictions. Nous y sommes. Pour faire court, la Cour de justice de l'UE a strictement limité la possibilité d'exiger des opérateurs qu'ils conservent les données de connexion. En réponse à une saisine du Conseil d'État, la Cour a donné des précisions sur les limites qui, selon elle, sont fixées par le cadre législatif de l'Union. Donnant alors sa réponse définitive aux associations qui ont formé des recours devant lui, le Conseil d'État rappelle d'abord que la Constitution reste en France la norme suprême et confronte ensuite le droit de l'Union, tel qu'il est considéré par la Cour, aux exigences constitutionnelles, censées alors ne pas être garanties de manière équivalente. Je ne vais pas rentrer dans les détails. La décision mélange accord avec certaines parties de la décision de la CJUE, et même dans un cas une injonction au gouvernement français, interprétation de certaines parties du jugement et explications sur certaines règles françaises. La décision est intéressante. Certains ont dit que c'était subtil, d'autres ont dit que c'était ingénieux, et d'autres ont dit qu'elle était à la limite de l'infraction. Je me garderai bien d'augurer de la suite.

Pourrions-nous cependant voir dans ces arrêts un exemple fructueux du « dialogue des juges » devenu obligatoire dans l'UE ? Je pourrais dire oui. Mon opinion personnelle est que le dialogue est toujours préférable à la guerre. Et mon expérience de ces dernières années en Europe me rend encore plus convaincue de cette position.



Mr Koen Lenaerts

President of the Court of Justice
of the European Union

Dinner speech by Mr Koen Lenaerts, President of the Court of Justice of the European Union

Dear colleagues, distinguished guests,

Allow me to share with you some thoughts on the constitutional moment we are currently facing, before we continue enjoying this delicious dinner.

Courts in democratic societies do not have the power of the purse, nor that of the sword. They are, as Alexander Hamilton famously said in the *Federalist* no 78, the 'least dangerous branch'. And yet, they are entrusted with the most noble of missions, that of pursuing justice by upholding the rule of law.

As guardians of the rule of law, courts guarantee that both public authorities and private citizens respect the rules of the game. In particular, they guarantee that the majority of the moment does not become the tyranny of tomorrow by oppressing individual rights. When required, courts must uphold the rights of the few against the will of the many, even if that means adopting unpopular rulings. Courts must deliver their judgments without fear nor favour.

Formally, the power of courts is grounded in a basic text, be it a Constitution or a Treaty. However, it is ultimately a society's firm commitment to respecting the rule of law, democracy and fundamental rights that gives force to that document and in so doing, to judicial decisions. Without respect for those values, a Constitution or a Treaty is no more than a piece of paper and judges no more than paper tigers.

Therefore, individuals must be convinced and constantly reminded that in order for them to enjoy liberty and justice for all, judicial decisions must be respected, notably by the losing party. That is why I welcome it when high-ranking officials say to the media that, although they do not agree with the outcome of a particular case, it is their duty to respect a court's judgment and to enforce it. On the contrary, when those officials state that courts are biased simply because they did not rule in their favour or – worse – call them the enemy of the people, those statements weaken the rule of law, and send the wrong message to all citizens.

To some extent, the same damaging effect may be produced by courts themselves when they no longer respect each other and replace dialogue with open confrontation. This is particularly true in the EU legal order which has established a judicial network between the Court of Justice and national courts, and amongst national courts themselves.

In order for that network to operate properly, both the Court of Justice and national courts must respect the division of jurisdiction laid down in the Treaties. It is undoubtedly for the Court of Justice to have the last word when saying what EU law is, just as national constitutional courts have the last word when interpreting their own constitution. Whilst there are 27 constitutions interpreted by the 27 constitutional or supreme courts of the Member States, there is only one EU law. Uniformity and equality before the law require one court – and one court only –, the Court of Justice, to say what the law of the EU is.

It is therefore very damaging for the EU judiciary as whole when a court – and notably a constitutional court – second-guesses the interpretation of EU law put forward by the Court of Justice, even more so after making a preliminary reference. The same applies when a court openly refuses to implement faithfully a judgment of the Court of Justice. When a constitutional court defies the interpretation of an EU law provision put forward by the Court of Justice, such a court may trigger a chain reaction in other Member States whose courts may also feel entitled to depart from the Court's findings. That chain reaction calls into question the very existence of a European project built on the rule of law. Integration through the rule of law took seventy years to be built. However, it may be destroyed sooner rather than later if such dangerous path is chosen.

The Court of Justice is not the new kid on the block. Even if the Treaties have been amended on several occasions giving EU law an evergreen appearance, the Court of Justice, including the basic principles concerning its jurisdiction, is as old as the first constitutional courts established in Europe after WWII. As its case law reveals, the Court's commitment to upholding the rule of law, democracy and fundamental rights is beyond doubt. The Court of Justice has incorporated many constitutional traditions common to the Member States into the constitutional fabric of the EU, thereby ensuring that EU law and national constitutional laws are deeply intertwined. Recently, in *Repubblika*,¹ the Court of Justice sent the clear message that authoritarian tendencies have simply no room in the EU legal order and in so doing, it protects the very principle of democracy that national constitutional courts are called upon to uphold. This shows that the Court of Justice and the Constitutional courts of the Member States are allies.

1 | Judgment of 20 April 2021, *Repubblika*, C-896/19, [EU:C:2021:311](#).

Dear colleagues, distinguished guests, this is a constitutional moment.

Paraphrasing the famous words of the late US Supreme Court Justice Benjamin N. Cardozo, if one lesson is to be drawn in order for Europeans to overcome the challenges ahead, it is that the entire European enterprise is 'framed upon the theory that the [courts] of the several [European Member States] must sink or swim together, and that in the long run prosperity and salvation are in union and not division'.²

Thank you very much.

2| Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935).

3rd panel

The level of fundamental rights protection



Ms Sacha Prechal

President of Chamber at the Court of Justice
of the European Union

Contribution by Ms Sacha Prechal, President of Chamber at the Court of Justice of the European Union

National standards of fundamental rights and the Charter

1. Introduction

This contribution is devoted to the margin of discretion left to the Member States, with regard to the system of protection established by the Charter of Fundamental Rights of the European Union ('the Charter'), to apply their own national standards for the protection of fundamental rights.

The central provision is Article 53 of the Charter, entitled 'Level of protection', which states:

'Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by [EU] law and international law and by international agreements to which the [EU] or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.'

The scope of this provision as well as its interpretation are not immediately obvious. The 'Explanations relating to the Charter' are remarkably unhelpful.¹

1 | Explanations relating to the Charter (OJ 2007 C 303, p. 17): 'This provision is intended to maintain the level of protection currently afforded within their respective scope by [EU] law, national law and international law. Owing to its importance, mention is made of the ECHR.' Cf. on this and on Article 53 of the Charter in general, de Witte, B., Peers, S., Hervey, T., Kenner, J. and Ward, A. (eds), 'Article 53 – Level of Protection', *The EU Charter of Fundamental Rights – A Commentary*, Oxford, Hart Publishing, 2014, pp. 15231538.

Article 53 of the Charter seems to have been inspired by similar provisions in other treaties and conventions in the area of fundamental rights, and specifically Article 53 of the European Convention for the protection of Human Rights and Fundamental Freedoms ('the ECHR') :

'Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.'

The European Court of Human Rights ('the ECtHR') interpreted this provision essentially as meaning that the contracting parties are entitled to provide for a higher level of protection of the rights guaranteed under the ECHR, on condition that this does not result in a violation of other ECHR provisions.

Article 53 of the Charter seems to make a twofold statement:

- on the one hand, the Charter aims to offer an additional protection of fundamental rights without replacing the existing protection systems;
- on the other hand, the Charter may not be used as a pretext to restrict those existing protection systems.

I will leave aside general international law (including the ECHR) and focus on the relationship between the Charter and national constitutions.

2. Measures outside the scope of application of the Charter

To paraphrase what was already stated above, the Charter is not to be interpreted in such a manner as to restrict the protection of fundamental rights recognised by national constitutions in their respective fields of application.

This statement does not seem problematic in situations that are fully within the scope of the Member States' law and outside of the scope of EU law. In such situations, Member States are free to apply their own fundamental rights standards by virtue of Article 51(1) of the Charter :

'The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the [EU] with due regard for the principle of subsidiarity and to the Member States only when they are implementing [EU] law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the [EU] as conferred on it in the Treaties.'²

2| On the scope of application of the Charter, see also the contribution by Lars Bay Larsen on page 83.

Interestingly, in certain situations the matter may seem to be covered by EU law, but upon closer examination it may appear that certain aspects of the national provisions are nevertheless outside the scope of EU law. The judgment in *TSN and AKT*³ is a good example in this context. In this case, the Court ruled that Member States are allowed to grant workers a right to a period of paid annual leave longer than the minimum period of four weeks laid down in Article 7(1) of Directive 2003/88,⁴ and yet exclude the right to carry over all or some of the days of paid annual leave which exceed that minimum period, where the worker has been incapable of working due to illness during all or part of a period of paid annual leave. In other words, Member States are free to exclude the right to carry over provided that workers enjoy at least a period of four weeks of paid annual leave.⁵

More importantly, this national rule could not be in contradiction with the Charter, as the latter was not applicable by virtue of its Article 51(1):

‘53. Where the provisions of EU law in the area concerned do not govern an aspect of a given situation and do not impose any specific obligation on the Member States with regard thereto, the national rule enacted by a Member State as regards that aspect falls outside the scope of the Charter and the situation concerned cannot be assessed in the light of the provisions of the Charter.

54. Accordingly, by adopting national rules or authorising the negotiation of collective agreements which, like those at issue in the main proceedings, grant workers rights to days of paid annual leave which exceed the minimum period of 4 weeks laid down in Article 7(1) of Directive 2003/88 and lay down the conditions for any carrying over of such additional rights in the event of the worker’s illness, the Member States are not implementing that directive for the purposes of Article 51(1) of the Charter.’⁶

The *TSN and AKT* case illustrates a situation in which the measures taken are partly covered by EU law, but in so far as Member States exercise their ‘retained powers’⁷ by legislating outside the regime established by a piece of EU legislation, these last measures fall outside the reach of EU law and the Charter is inapplicable. In this respect, there is no problem of parallel application of national fundamental rights standards.

3 | Judgment of 19 November 2019, *TSN and AKT* (C-609/17 and C-610/17, [EU:C:2019:981](#)).

4 | Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9).

5 | Judgment of 19 November 2019, *TSN and AKT* (C-609/17 and C-610/17, [EU:C:2019:981](#), paragraph 39).

6 | Judgment of 19 November 2019, *TSN and AKT* (C-609/17 and C-610/17, [EU:C:2019:981](#), paragraphs 53 to 54).

7 | Whether a Member State may exercise its retained powers is a matter of interpretation of the EU legislation at issue.

3. Where national and EU law overlap

However, it is obvious that many situations fall within the scope of both systems of law: more often than not, EU law and national law overlap. In such situations, the question arises as to whether Member States retain the possibility to apply their national standards of fundamental rights protection when these standards go beyond the Charter.

According to a first reading of Article 53 of the Charter, inspired by Article 53 ECHR, the Charter provides for a minimum threshold of protection and national constitutions are fully permitted to offer a higher level of protection. Under such a reading, a Member State could block the application of EU law provisions, even if those provisions are in conformity with the Charter, provided that its national standards offer a higher level of protection of fundamental rights.

The principle of the primacy of EU law precludes such an interpretation. As a matter of fact, it would be difficult to reconcile with the Court's settled case-law since the judgment in *Internationale Handelsgesellschaft*, according to which EU law cannot be overridden by any kind of rule of national law, including constitutional rules:

'Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the [EU] would have an adverse effect on the uniformity and efficacy of [EU] law. The validity of such measures can only be judged in the light of [EU] law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as [EU] law and without the legal basis of the [EU] itself being called in question. Therefore the validity of a [EU] 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.'⁸

Therefore, it is hardly surprising that the Court rejected such a reading of Article 53 of the Charter. The space offered to Member States for applying higher standards of protection had to be reconciled with the principle of primacy of EU law.⁹ The Court adopted an interpretation where fundamental rights protection under national law is complementary to the Charter system.

8 | Judgment of 17 December 1970, *Internationale Handelsgesellschaft* (11/70, [EU:C:1970:114](#), paragraph 3).

9 | See, among others, judgment of 26 February 2013, *Melloni* (C-399/11, [EU:C:2013:107](#), paragraphs 56 to 60).

In a nutshell, the room for applying higher national standards of protection depends on the margin of discretion enjoyed by Member States under the relevant EU law provisions. It is important, in this respect, to distinguish two situations. As I explained above, in situations falling *outside* the scope of EU law, Member States are entirely free to apply their own national standards of fundamental rights, by virtue of Article 51(1) of the Charter. By contrast, in situations falling *within* the scope of EU law, their margin of discretion will be determined by the relevant EU law provisions. A comparison of the judgments in *Melloni* and *Åkerberg Fransson*, rendered on the same day by the Grand Chamber of the Court, nicely illustrates this point.¹⁰

The *Melloni* case concerned the execution of a European arrest warrant issued by the Italian authorities for the execution of a prison sentence handed down by a judgment in *absentia*. Mr Melloni, who had been arrested in Spain, opposed his surrender to the Italian authorities on the grounds that his conviction *in absentia* in Italy could not be reviewed, in violation of his right to a fair trial as guaranteed by the Spanish Constitution.

However, Article 4a of Framework Decision 2002/584¹¹ expressly governs the case of a conviction *in absentia* in the Member State issuing the European arrest warrant. More specifically, Article 4a(1) identifies four situations in which the executing Member State is obliged to surrender a person sentenced *in absentia*.¹²

The practical question put to the Court was therefore: Is it permissible for a Member State, under Article 53 of the Charter, to make the execution of a European arrest warrant issued for the purposes of executing a sentence rendered *in absentia* subject to the condition that the conviction is open to review in the requesting State (in that case Italy)? This protection derived from Spanish constitutional law and was broader than the protection offered by the framework decision on the European arrest warrant.

10| Judgments of 26 February 2013, *Melloni* (C-399/11, [EU:C:2013:107](#)), and *Åkerberg Fransson* (C-617/10, [EU:C:2013:105](#)).

11| Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision (OJ 2002 L 190, p. 1).

12| Judgment of 26 February 2013, *Melloni* (C-399/11, [EU:C:2013:107](#), paragraphs 40 to 46).

The Court answered in the negative, in the light of the principle of primacy of EU law:

'58. That interpretation of Article 53 of the Charter would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution.'

Next, the Court explained:

'60. It is true that 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*.' (My emphasis).

Article 4a(1) of Framework Decision 2002/584 effected a full harmonisation of the conditions of execution of a European arrest warrant in the event of a conviction rendered *in absentia*, which could not be made dependent on other conditions. In other words, the action of the Member States is entirely determined by EU law. In such a situation, relying on national standards would undermine the primacy of EU law.¹³

I should also emphasise that the Court had previously found, in the same judgment, that Article 4a(1) of Framework Decision 2002/584 does not disregard either the right to an effective judicial remedy and to a fair trial or the rights of the defence guaranteed by Articles 47 and 48(2) of the Charter respectively.¹⁴

In the *Åkerberg Fransson* case, the Court was asked whether the *ne bis in idem* principle laid down in Article 50 of the Charter should be interpreted as precluding criminal proceedings for tax evasion from being brought against a defendant where a tax penalty has already been imposed upon him or her for the same acts of providing false information.

As the tax penalties and criminal proceedings to which Mr Åkerberg Fransson had been subject were connected, in part, to breaches of his obligations to declare VAT, the Court decided that they constituted 'implementation' of the EU VAT legislation and of Article 325 TFEU, for the purposes of Article 51(1) of the Charter.¹⁵

13| Judgment of 26 February 2013, *Melloni* (C-399/11, [EU:C:2013:107](#), paragraphs 61 to 63).

14| Judgment of 26 February 2013, *Melloni* (C-399/11, [EU:C:2013:107](#), paragraphs 47 to 54).

15| Judgment of 26 February 2013, *Åkerberg Fransson* (C-617/10, [EU:C:2013:105](#), paragraphs 24 to 28).

Nevertheless, in contrast with the *Melloni* case, the relevant EU law provisions did not effect a full harmonisation of the penalties in the area of VAT. Here, Member State action was not entirely determined by EU law, so that Member States enjoyed an (ample) margin of discretion to apply their national standards of protection of fundamental rights – provided that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not thereby compromised:

‘29. ... where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by EU law, implements the latter for the purposes of Article 51(1) of the Charter, 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 European Union law are not thereby compromised ...’ (My emphasis).

As regards the threshold of protection established by the Charter, the Court then provided the elements of interpretation necessary to verify the conformity of the national legislation with Article 50 of the Charter.¹⁶

4. The 'provisos' under consideration

It should be obvious from the above that the relationship between the Charter system, on the one hand, and national systems of fundamental rights protection, on the other hand, raises a number of issues.

The first issue relates to the obligation to respect the floor of protection established by the Charter. Accordingly, in a concrete case, it must be examined whether the level of protection guaranteed by the Charter is compromised.¹⁷ The answer is not always obvious, especially in situations where several fundamental rights are in conflict and have to be balanced.¹⁸

If national law does indeed offer a higher level of protection, the second issue is the presence of discretion and its scope. In concrete cases, it is necessary to determine whether or not Member States enjoy discretion at all, and the extent of that discretion under the relevant EU law provisions. This is particularly important in relation to the conditions that the 'primacy, unity and effectiveness of EU law' may not be compromised. As observed by Advocate General Bobek, the wider the discretion available to Member States, the lower the risk for the primacy, unity and effectiveness of EU law:

'... The less harmonisation there is, the less likely it is that the primacy, unity and effectiveness of EU law could by definition be undermined. Certainly, the application of a national standard of protection means diversity, as opposed to uniformity. However, in the absence of harmonisation, the national standard of protection only applies to the – more or less wide – margin of discretion that is left to the Member States by EU law itself. It is therefore national action, as opposed to EU action, that is measured against the more stringent yardstick of the national constitution.

17] See, among others, judgment of 29 July 2019, *Funke Medien NRW* (C-469/17, [EU:C:2019:623](#), paragraph 31).

18] By way of illustration, with regard to copyright, see, for instance, judgment of 29 July 2019, *Funke Medien NRW* (C-469/17, [EU:C:2019:623](#), paragraph 57): 'As follows from recitals 3 and 31 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10)., the harmonisation effected by that directive aims to safeguard, in particular in the electronic environment, a *fair balance* between, on the one hand, the interest of the holders of copyright and related rights in the protection of their *intellectual property rights guaranteed by Article 17(2) of the Charter* and, on the other hand, the protection of the interests and fundamental rights of users of protected subject matter, in particular their *freedom of expression and information guaranteed by Article 11 of the Charter*, as well as of the public interest ...' (My emphasis).

In other words, the wider the Member States' margin of discretion, the less risk there is to the primacy, unity and effectiveness of EU law.¹⁹

In practice, the identification of the margin of discretion offered to Member States will often be decisive in deciding whether a Member State can legitimately grant a higher level of protection of fundamental rights than that provided in the Charter. The process of identifying this margin of discretion requires a precise analysis of the applicable EU law provisions.

In most cases, the analysis required does not focus on a piece of EU legislation as a whole, but rather on specific provisions. Indeed, it may occur that certain provisions entirely determine Member State action, whereas other provisions of the same piece of legislation do not – as illustrated by *Funke Medien NRW*.²⁰

This case concerned the publication of classified military reports, designated as the Afghanistan Papiere (the Afghanistan papers), on the website of the German daily newspaper *Westdeutsche Allgemeine Zeitung*. The Federal Republic of Germany took the view that the publication infringed its copyright on the military reports and brought an action for an injunction against the website operator, Funke Medien. The referring court wondered whether Funke Medien could rely on the derogations relating to reporting current events or quotations, as laid down in Article 5(3)(c) and (d) of Directive 2001/29 on copyright,²¹ or on the freedom of information and the freedom of the press, enshrined in Article 11 of the Charter.

19| Opinion of Advocate General Bobek in *Dzivev* (C-310/16, [EU:C:2018:623](#), point 95).

20| Judgment of 29 July 2019, *Funke Medien NRW* (C-469/17, [EU:C:2019:623](#)).

21| Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10).

The Court clarified the scope of the test established in *Melloni* and *Åkerberg Fransson*:

'32. ... where, in a situation in which action of the Member States is not entirely determined by EU law, a national provision or measure implements EU law for the purposes of Article 51(1) of the Charter, 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. Thus, it is consistent with EU law for national courts and authorities to make that application subject to the condition, emphasised by the referring court, that the provisions of a directive "*allow [some] discretion* in terms of implementation in national law", provided that that condition is understood as *referring to the degree of the harmonisation effected in those provisions*, since such an application is conceivable only in so far as those provisions *do not effect full harmonisation.*' (My emphasis).

In application of this test, the Court found that Article 2(a) and Article 3(1) of Directive 2001/29, which govern the author's exclusive rights, constitute measures of full harmonisation, thus precluding any possibility of further intervention by the Member States.²² By contrast, Article 5(3)(c), second case, and (d) of Directive 2001/29 do not effect full harmonisation of the scope of the relevant exceptions or limitations, so that Member States retain a margin of discretion for applying national standards of fundamental rights.²³ Nevertheless, this margin of discretion is circumscribed by the existence of several limits.²⁴ These limits imply, inter alia, that Member States may not establish a further derogation, in addition to the exceptions or limitations provided for in Article 5(2) and (3) of Directive 2001/29, based on the freedom of information and the freedom of the press.²⁵

22| Judgment of 29 July 2019, *Funke Medien NRW* (C-469/17, [EU:C:2019:623](#), paragraphs 35 to 38).

23| Judgment of 29 July 2019, *Funke Medien NRW* (C-469/17, [EU:C:2019:623](#), paragraphs 39 to 44).

24| Judgment of 29 July 2019, *Funke Medien NRW* (C-469/17, [EU:C:2019:623](#), paragraphs 45 to 53).

25| Judgment of 29 July 2019, *Funke Medien NRW* (C-469/17, [EU:C:2019:623](#), paragraphs 55 to 64).

5. The margin left to the Member States

It has been argued that the requirement laid down by the Court in *Melloni* and *Åkerberg Fransson*, that the primacy, unity and effectiveness of Community law must not be compromised, would in fact nullify the possibility of applying national standards of fundamental rights protection.²⁶ In other words, what the Court has given with one hand, it takes away with the other.

I do not agree with such a reading. As I have just pointed out, much, if not everything, depends on the margin of discretion left to the Member States – and that margin can be very wide indeed. Three examples from the Court’s recent case-law will illustrate this point. They do not concern, as such, Article 53 of the Charter. However, they illustrate the flexible approach of the Court as to the scope for manoeuvre of the Member States.

The ‘Taricco saga’, namely *Taricco and Others*,²⁷ followed by *M.A.S. and M.B.*,²⁸ provides a first illustration.

Mr Taricco and his accomplices were accused of having set up a VAT carousel fraud in relation to bottles of champagne. However, the Italian Criminal Code had been amended in 2005, on the initiative of the Berlusconi government, in order, in effect, to shorten the statute of limitations. In particular, Article 160 of the Italian Criminal Code provided for the limitation period to be extended by only a quarter following interruption, which made the conviction of Mr Taricco and his accomplices highly unlikely given the complexity and duration of the criminal proceedings.

Asked about whether this limitation period interruption regime is compatible with EU law, the Court restated the obligation of Member States, inter alia under Article 325 TFEU and the Convention on the protection of the European Communities’ financial interests (‘the PFI Convention’),²⁹ to ensure that such cases of serious fraud are punishable by criminal penalties which are, in particular, effective and dissuasive.³⁰ Furthermore, this requirement is not satisfied

26| Millet, F.-X., ‘Why Article 53 of the Charter Should Ground the Application of National Fundamental Rights in Fully Harmonised Areas’, Bobek, M. and Adams-Prassl, J. (eds), *The EU Charter of Fundamental Rights in the Member States*, Oxford, Hart Publishing, 2020, pp. 441-463, at p. 450.

27| Judgment of 8 September 2015, *Taricco and Others* (C-105/14, [EU:C:2015:555](#)).

28| Judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, [EU:C:2017:936](#)).

29| Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities’ financial interests, signed in Luxembourg on 26 July 1995 (OJ 1995 C 316, p. 49).

30| Judgment of 8 September 2015, *Taricco and Others* (C-105/14, [EU:C:2015:555](#), paragraphs 36 to 44).

where national limitation rules have the effect that, in a considerable number of cases, the commission of serious fraud escapes criminal punishment.³¹

As regards the practical consequences, which are of particular importance in the *Taricco* saga, the national court had the obligation to ensure that EU law was given full effect, if need be by disapplying the national limitation rules.³² In that case, the national court must also ensure that the fundamental rights of the persons concerned are respected. The Court noted that the principle of legality of criminal offences and penalties, *as enshrined in Article 49 of the Charter*, could not be violated in this context. Indeed, disapplying limitation rules would not lead to a conviction of the accused for an act or omission which did not constitute a criminal offence under national law at the time when it was committed, nor to the application of a penalty which, at that time, was not laid down by national law.³³

However, about a year after the judgment in *Taricco and Others* was handed down, a second reference on this matter, this time from the Corte costituzionale (Italian Constitutional Court), revealed the existence of a problem of national constitutional law. The referring court explained that disapplying the national limitation rules could result in a breach of the principle of legality of criminal offences and penalties, *as enshrined in the national legal order*. This was a new element of which the court had not been informed in the *Taricco and Others* case.³⁴

In *M.A.S. and M.B.*, the Court added two important qualifications to the *Taricco and Others* ruling.

First, the Court emphasised the primary responsibility of the national legislature to lay down rules on limitation that enable compliance with the obligations under Article 325 TFEU. According to the Court, an extension of a limitation period by the national legislature and its immediate application, including to alleged offences that are not yet time-barred, do not, in principle, infringe the principle that offences and penalties must be defined by law.³⁵

Second, the Court pointed out that, at the material time for the main proceedings, the limitation rules applicable to criminal proceedings relating to VAT had not been harmonised by the EU legislature. In such a context, the national authorities and courts remain free to apply national standards of protection of fundamental rights, under the conditions laid down in

31 | Judgment of 8 September 2015, *Taricco and Others* (C-105/14, [EU:C:2015:555](#), paragraph 47).

32 | Judgment of 8 September 2015, *Taricco and Others* (C-105/14, [EU:C:2015:555](#), paragraphs 49 to 52).

33 | Judgment of 8 September 2015, *Taricco and Others* (C-105/14, [EU:C:2015:555](#), paragraphs 53 to 57).

34 | Judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, [EU:C:2017:936](#), paragraphs 27 to 28).

35 | Judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, [EU:C:2017:936](#), paragraphs 41 to 42).

Melloni and Åkerberg Fransson.³⁶ Therefore, if the national court found that the obligation to disapply the national limitation rules at issue conflicts with the principle that offences and penalties must be defined by law, it would not be obliged to comply with that obligation.³⁷

As mentioned above, the Taricco saga is revealing of the potentially wide margin of appreciation left to Member States for applying their national fundamental rights standards. It is also illustrative of some legitimate concerns of national constitutional courts, which may be sidestepped when a reference is made by another national court. In such cases, the Court may only be partly informed of constitutional law arguments, or there may be tensions among national courts.³⁸ As shown by *M.A.S. and M.B.*, the appropriate solution is a new reference from the constitutional court concerned.

The *Centraal Israëlitisch Consistorie van België and Others* case³⁹ is a second example of the wide margin of appreciation enjoyed by the Member States in relation to fundamental rights. The case concerned a decree of the Flemish region (Belgium) requiring, in the case of ritual slaughter, prior stunning which is reversible and cannot cause death. The Court was asked, in essence, whether such a requirement was compatible with Article 26(2) of Regulation No 1099/2009⁴⁰ (which allows Member States to adopt national rules aimed at ensuring more extensive protection of animals at the time of killing), read in the light of Article 13 TFEU (animal welfare) and Article 10(1) of the Charter (freedom of religion).

The Court found that, under Article 26(2) of Regulation No 1099/2009, Member States may impose an obligation to stun animals prior to killing which also applies in the case of slaughter prescribed by religious rites, subject, however, to respecting the fundamental rights enshrined in the Charter.⁴¹ According to the Court, such an obligation does entail a restriction on the exercise of the right of Jewish and Muslim believers to freedom to manifest their religion, as

36| Judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, [EU:C:2017:936](#), paragraphs 43 to 47).

37| Judgment of 5 December 2017, *M.A.S. and M.B.* (C-42/17, [EU:C:2017:936](#), paragraphs 58 to 62).

38| By way of illustration, I refer to the apparent tensions between the Bundesarbeitsgericht (Federal Labour Court, Germany) and Bundesverfassungsgericht (Federal Constitutional Court, Germany) as they transpire from the judgment of 17 April 2018, *Egenberger* (C-414/16, [EU:C:2018:257](#)).

39| Judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others* (C-336/19, [EU:C:2020:1031](#)).

40| Council Regulation (EC) No 1099/2009 of 24 September 2009 on the protection of animals at the time of killing (OJ 2009 L 303, p. 1).

41| Judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others* (C-336/19, [EU:C:2020:1031](#), paragraph 48).

guaranteed by Article 10(1) of the Charter.⁴² However, this restriction on the freedom of religion, imposed in the interest of animal welfare, satisfied all requirements set out in Article 52(1) of the Charter and was accordingly permissible as a matter of EU law.⁴³ The Court emphasised that account should be taken of the specific social context of each Member State and that Member States enjoy a 'broad discretion in the context of the need to reconcile Article 13 TFEU with Article 10 of the Charter, for the purposes of striking a fair balance between, on the one hand, the protection of the welfare of animals when they are killed and, on the other, respect for the freedom to manifest religion'.⁴⁴

A third illustration of the margin of discretion enjoyed by Member States can be found in the *WABE and MH Müller Handel* judgment.⁴⁵ This case was introduced by two references from German courts concerning the problem of so-called 'policies of neutrality' implemented by certain employers, which effectively prevents observant Muslim women from wearing a headscarf in the workplace.

The Court ruled that such a policy of neutrality imposed by an employer could be justified under Article 2(2)(b) of Directive 2000/78⁴⁶ if certain conditions were met. Interestingly enough, the Court was asked whether national constitutional provisions protecting the freedom of religion could be taken into account as more favourable provisions within the meaning of Article 8(1) of Directive 2000/78, in examining the appropriateness of a difference of treatment indirectly based on religion or belief under Article 2(2)(b) of that directive. The Court pointed out the need to strike a fair balance between the various fundamental rights at issue:

'84. ... when several fundamental rights and principles enshrined in the Treaties are at issue, such as, in the present case, the principle of non-discrimination enshrined in Article 21 of the Charter and the right to freedom of thought, conscience and religion guaranteed

42| Judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others* (C-336/19, [EU:C:2020:1031](#), paragraphs 51 to 55).

43| Judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others* (C-336/19, [EU:C:2020:1031](#), paragraphs 59 to 81).

44| Judgment of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others* (C-336/19, [EU:C:2020:1031](#), paragraphs 67 to 74, in particular paragraph 71).

45| Judgment of 15 July 2021, *WABE and MH Müller Handel* (C-804/18 and C-341/19, [EU:C:2021:594](#)).

46| Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16). Article 2(2)(b) provides: 'indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless: (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary ...'

in Article 10 of the Charter, on the one hand, and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions recognised in Article 14(3) of the Charter and the freedom to conduct a business recognised in Article 16 of the Charter, on the other hand, the assessment of observance of the principle of proportionality must be carried out in accordance with the need to reconcile the requirements of the protection of those various rights and principles at issue, striking a fair balance between them ...'

Next, the Court underlined the scope left by the directive to take into account the diversity of approaches among Member States as regards the place of religion and beliefs within their respective systems. Accordingly, a margin of discretion was afforded to the Member States in achieving the necessary reconciliation of the different rights and interests at issue, in order to ensure a fair balance between them. In such a context, national provisions protecting the freedom of religion could be taken into account as more favourable provisions, within the meaning of Article 8(1) of that directive, in examining the appropriateness of a difference of treatment indirectly based on religion or belief.⁴⁷

6. Final remarks

From the above, it may be obvious that the case-law on the level of protection of fundamental rights, and the margin of discretion granted to Member States in this respect, is still very much evolving. Nevertheless, I believe that it is well in keeping with an older line of case-law concerning the grounds for justifying restrictions on free movement. Indeed, the Court has long accepted justifications based on the protection of fundamental rights, leaving substantial room for action to national constitutional law.⁴⁸ The combination of these two lines of case-law confirms that there is real space for diversity and difference in the level of protection of fundamental rights within the EU.

47] Judgment of 15 July 2021, *WABE and MH Müller Handel* (C-804/18 and C-341/19, [EU:C:2021:594](#), paragraphs 86 to 90).

48] By way of illustration, See, among many others, judgment of 14 October 2004, *Omega* (C-36/02, [EU:C:2004:614](#)): the prohibition to operate 'laserdromes' (games involving the simulation of acts of homicide) corresponded to the level of protection of human dignity guaranteed by the German constitution (paragraph 38); judgment of 22 December 2010, *Sayn-Wittgenstein* (C-208/09, [EU:C:2010:806](#)): Austrian law removing titles of nobility (such as 'Fürstin von') from surnames amounted to a restriction ('serious inconvenience') to free movement, but it was justified by the principle of equality as conceived by the Austrian legislator ('margin of discretion'); judgment of 12 May 2011, *Runevič-Vardyn and Wardyn* (C-391/09, [EU:C:2011:291](#)): a requirement that names on certificates of civil status comply with the spelling of the official national language amounts to a restriction on free movement, but can be justified by the legitimate objective of protecting that language (part of national identity).

Nowadays, when the EU and EU law makes inroads into rather sensitive areas or areas that became sensitive, such as the environment and the climate. Here, the divisions – political, social, cultural, legal – become more visible, are sharper and are situated on a more fundamental level. Precisely here some room should be left for national choices.

When dealing with these questions, indeed, the Court is interpreting EU law. However, this interpretation often comes very close to finding the middle road between different national conceptions, in a way ‘negotiating between the Member States’. For instance, there is the deeply entrenched idea of laicity in France, while in other Member States, like Germany or the Netherlands, the tradition is much more permissive to and inclusive of religious expression also in public life. Similarly, views on the protection of private life and the limits to this protection differ considerably between the Member States. In some cases, it is possible to leave the final balancing to the Member State and its courts, as happened in the cases of *Centraal Israëlitisch Consistorie van België* or in *Wabe and Müller Handel*, discussed above. In relation to protection of privacy, such an approach is less obvious, because of the ‘free movement of data’.

In any case, in order to deal with the issues I have addressed in the present contribution and to shed further light on several questions, which will – no doubt – arise, the Court needs appropriate preliminary references. The problems should be sorted out in and through dialogue and not by unilateral action. The constitutional courts and the Court of Justice of the European Union should act as allies in the protection of fundamental rights.



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In search of a more horizontal approach that would (at the same time) strengthen the integration processes within the EU¹

Part I

1. Introduction

There are, generally speaking, three (levels of) legal systems that interact within the Member States, namely international law, EU law, and national legal systems. Rights and duties arise from all of them. However, when it comes to their operationalisation, different rules apply. The application of primary and secondary EU law, even soft law, differs from the application of international conventions. This is to a large extent related to the exercise of rights and the performance of duties in relations between individuals, between individuals and the Member States, as well as between the Member States themselves.

When it comes to human rights, which are also closely associated with principles and even values, the sensitive question arises as to who shall define their exact content and their limits (this, however, is not only an issue as regards human rights provisions). The question is sensitive because all three abovementioned levels of legal systems are involved; I am referring in particular to the case-law of the European Court of Human Rights ('the ECtHR') and the Court of Justice of the European Union ('the CJEU'), the primary law of the EU together with the Charter of Fundamental Rights of the European Union ('the Charter'), and the highest national legal acts, that is the constitutions. When interpreting these sets of rules, the highest

1 | Introductory explanation: I have divided this article into two parts. The first one was prepared before the conference, and it contains the viewpoints that I presented. The second part is about the pro and contra replies obtained. The latter prevailed. It is fair and transparent to present both parts in the article.

European courts step into the foreground. In my view, a more horizontal approach should be applied, and a more genuine judicial dialogue between the highest courts likewise seems indispensable to me. The latter is the topic that will be in the foreground of my presentation. Namely, judicial dialogue is not merely a cliché. Quite the contrary, I see it as a cornerstone of European integration. As is true of other branches of state power, the judicial branch can also provoke dissatisfaction among the people and with regard to other states.

2. Including the highest national courts in judicial dialogue

2.1. Judicial dialogue with the CJEU

The dialogue between national courts and the CJEU is different to the former's dialogue with the ECtHR.² By way of the preliminary ruling procedure (Article 267 TFEU), the dialogue is one-sided to a certain extent; it is a part of national procedures, which national courts have to stay until the judgment of the CJEU is rendered. When the CJEU interprets EU law, especially the highest provisions of primary law and the Charter, it might encounter similar national provisions in constitutions as well as provisions of the ECHR that regulate the same subject matter. I am not referring to the relationship between the ECHR and EU law, although that is also very important for the national courts, both regular and constitutional courts (and doctrines, such as the *Bosphorus presumption* of equivalent protection, confirmed and further developed also in *Avotiņš*,³ are very helpful). Instead, I am focusing primarily on the relationship between constitutional or other highest national courts and the CJEU.

2| The subsidiary approach of the ECtHR in its case-law is rather clear and firmly established. When the ECtHR only guarantees the minimum level of protection, the margin of appreciation accorded to Member States leaves them a certain leeway for their dialogue with the ECtHR.

3| ECtHR, 23 May 2016, *Avotiņš v. Latvia*, CE:ECHR:2016:0523JUD001750207.

A dialogue between individual constitutional courts and the CJEU has been established, according to my information, in most Member States. However, as mentioned, it is perhaps too one-sided to constitute a genuine dialogue. The constitutional and other highest national courts can use the preliminary ruling procedure in only one way, to obtain the interpretation of EU law from the CJEU. The CJEU does not turn to the national courts, i.e. national apex courts, for the interpretation of the highest national legal rules in the light of EU rules when it is faced with the core questions of European integration (such as values, principles, national identity, competences and ultra vires issues, etc.).⁴

Let us stop here for a while and add viewpoints that look beyond the domain of pure law. Europe is a unique continent comprising many states with different historical developments, cultures, religions, customs and attitudes, values, etc. We, Europeans, are and always will be different. Sometimes rather considerably. I have already lived in a federal state with different nations, religions, beliefs, and cultures in the past. My experiences from that time are far from good. It is not my intention to speak about it, but I would like emphasize that I have because of this experience learned how not to act to overcome such differences. I have learned that the bigger the differences, the greater the investments in democratic procedures and the legitimacy of the decisions adopted by authorities must be. The differences have to be recognized, internalised, and also tended to. Struggling to be united despite differences and disagreements, I think, has its limits.

4| Consequently, and since the CJEU is in more frequent dialogue with regular courts, which also have to apply EU law (including the principles of the Charter) as well as national constitutional rules and the ECHR, the question of the applicability of the apex rules, including the rules on human rights, naturally arises. These rules include national, international, and EU rules, and perhaps also principles and values. What is more, the foundations whereon EU law is based, namely the general principles of EU law, may be derived from common legal principles of the various EU Member States or the general principles found in international law or EU law (Preamble to the Charter). Of course, the question I raise here is much broader and deeper, e.g. does national law entail part of the factual or of the legal framework of a CJEU decision etc. See in this respect Prerk, M., Lefèvre, S., 'The EU courts as "national" courts: national law in the EU judicial process', *Common Market Law Review*, 2017, 54: 369–402.

These differences were not so much at stake during the Community era. Differences are easier to overcome with visions and goals to pursue. These goals were clearly visible, striving for economic prosperity and freedom of movement, which were in the foreground when the European (Economic) Community developed.⁵ In general, visions give individuals something that they can be inspired to struggle for. Just recall Europe in 1950, the world being in ruins and insecurity and poverty reigning. The vision that these problems could be overcome was so powerful that it encouraged states to cooperate and integrate. In other words, to join the European club.

The EU can be proud of its achievements. The EU's development so far has assured peace, stability, prosperity, security, human rights protection, growth and many other positive developments. The achievement of bringing together such a colourful continent is vast. What is more, in certain areas, the EU even assumed the role of a global leader. However, there is a particular uncertainty in the air nowadays. The last decade has been a decade of disintegration. I note with regret that the power of this community as such is decreasing.

I still see the internal market (where the EU has been successful and which remains firmly in place) more as a 'community' and the Union more as a 'family'. A family is a more profound and firm unit. Nevertheless, it requires more adjustments. (Sometimes family members have to reconcile with the unpleasant actions of other family members. This involves a lot of consideration. Emotional reactions should also be limited). The move away from the purely internal market to a union, from the three pillars of the EU to one, creating the monetary union, etc., has affected our relations, and these are now put to an even greater test. The enlargement of the Union bringing together parts of Europe with different historical developments where, consequently, certain values are understood differently is also essential to understanding the current state of affairs. A lot has changed since the first *Solange* case.

5| There was little space for differences when dealing with plans to rebuild the devastated Europe in the aftermath of the Second World War, when the people of Europe were struggling for economic prosperity this was seen in the emerging European features of the customs union, the internal market, the four freedoms, and later on the free movement of person, also including persons who are not economically active, the 'invention' of the derivative rights, the abolishing of the internal national borders, etc. Nowadays all these somehow seem less important (although they in fact still remain crucial), and what was previously a (European) 'community' (i.e. a *community* is, according to its definition, *a group of people sharing the same values and visions*) wherein all the common visions and goals were widely accepted, is being replaced with a 'union' – entailing a further step towards unification, transfer of competences to the EU, ever fewer national areas of activities not being influenced or, indeed, ever more of them even heavily regulated by EU institutions, etc. Already before the economic crisis and banking union, I asked myself the question of whether we should go on; or rather take a step back to the community level of integration. There was no, at least to my knowledge, serious discussion in the latter direction.

2.2. Granting exceptional standing to the highest national courts before the CJEU or asking them for an interpretation of the highest national rules (constitutions)

To tackle issues like values and principles, the main stakeholders should be heard. These are not only the states (i.e. governments), the Commission, etc. Although regular courts initiate proceedings in most cases before the CJEU, the dialogue could be further strengthened by including the apex courts of the Member States, which have the final word in a system of separation of powers (*trias politica*) regarding the interpretation of values and principles. Having been entrusted with the final interpretation of law, especially of the principles and values underlying it, they balance (i.e control) the national legislative and executive branches.

I am aware that any new form of preliminary ruling procedure would require an amendment of the TFEU (and that such amendments are nowadays difficult to achieve and require long-lasting procedures, potentially also involving referendums). Therefore, what I have in mind is not so much a 'vice versa' preliminary ruling procedure, but rather a kind of involvement of the *highest (constitutional)* courts of the Member States that would enable them to submit their opinions (to be heard) in proceedings before the CJEU. For instance, the CJEU could ask a national court for an opinion on how to interpret a specific constitutional provision. This would strengthen the legitimacy of the final decision (that is the interpretation provided by the CJEU) and the legitimacy of the rules (newly) established through case-law. Furthermore, it would give national courts, and the Member States and their citizens, a sense of greater involvement in EU decision-making processes regarding the core questions of European integration.

Granting exceptional standing in CJEU proceedings in which the highest national courts could contribute to the interpretation of European core principles and values (also the ones reflecting the national identity under the second paragraph of Article 4 TEU⁶) should not apply to all preliminary ruling proceedings (also due to the risk of overburdening the CJEU and affecting its effectiveness). Instead, it should apply only to certain cases in which the CJEU deems the questions raised to be essential (crucial) for strengthening the (shared) European values which stem from national constitutions. I call them fundamental dilemmas. In my opinion, such would have the following effects:

- I believe that the present situation is one of conflict. I have noticed the tendency that the highest national courts would like to be heard both in cases commenced by other (lower) courts from their Member State as well as in essential cases initiated by the courts of other Member States (cases like judgments of 26 February 2013, *Melloni*, C-399/11, [EU:C:2013:107](#) and of 19 April 2016, *Ajos*, C-441/14, [EU:C:2016:278](#), and of 8 September 2015, *Taricco*, C-105/14, [EU:C:2015:555](#), and of 11 December 2018, *Weiss*, C-493/17, [EU:C:2018:1000](#), and of; 18 May 2021, *Romanian SIIJ*, C-83/19, C-127/19 C-195/19, C-291/19, C-355/19, C-397/19, [EU:C:2021:393](#), etc.). One should be aware that conflicts within the judiciaries, not only among other (political) branches of state power, might be transferred to other (political) spheres and produce consequences beyond the application of the law. I still remember criticism from the United Kingdom regarding decisions of the ECtHR before the Brexit process had begun. What I would like to put an emphasis on is that, in the broader picture, tensions among courts can also result in political consequences. I am also not suggesting that there should be any other court to take over the role of the CJEU,⁷ but simply that the highest national courts should be heard in certain ground-breaking cases involving common European values or other vital issues for coexistence (community) in the EU and its Member States;

6| These questions cannot be defined *ex ante*. The possibility that national apex courts will have to decide a greater number of new issues should also be considered.

7| I am aware of a proposal to establish a subsidiary court. I think, however, that it is better not to change the competences of the CJEU or to establish a controlling court. An EU subsidiarity court would demand an amendment of the EU Treaties, taking advantage of the increasing support across Europe for EU reform. This institution would be composed of the presidents of the constitutional courts of the Member States. None of the reasons listed above would support the establishment of such a court. On the contrary, a genuine dialogue should be established. The same is true with regard to a proposal dating from several years ago concerning a reverse infringement procedure against the Commission.

- The law shall have the function of an *ethos*, acting as a kind of glue that enables people and states to live together at a certain level of harmony. The application of rules with this goal in mind shall be first and foremost entrusted to the judiciary. We shall avoid a message from the courts that a particular court is deciding against a specific other court. Courts are not governments, and judges are not politicians. People's trust is located in the judiciary, the *modus operandi* of which is not the pursuit of specific interests as is the case with other branches of power. To avoid such situations, the courts should have the possibility to enter into an official dialogue. Of course, the result of such dialogue might still be subject to criticism, but it will have been decided on in a procedure that empowered all main stakeholders – i.e. the courts, the Member States, the Commission etc., to highlight their arguments. The decision will be a result of discourse, it will not be perceived as one-sided, its legitimacy will have been reinforced, etc. The highest courts of the Member States, which are in the eyes of the people still the last resort and harbour of the rule of law 'at home', will be able to participate and will not be disregarded. This will minimize the negative echo of disputes among the courts.
- We must strive to prevent disputes among the courts, which are the backbone of the European system. The EU is faced with Member States that are in (political) turmoil. At least the geographical part of Europe where I grew up has always been considered a synonym for insolvability. From a historical point of view, the problems of a few states flooded the entire continent. There was a snowball effect. This is nothing new. We have been in the same situation several times. It is worth remembering that these experiences are not that far and distant. The degradation of a system always starts with (political) turmoil. Therefore, we need to be several steps ahead. The law should not play a passive role in changing society, and the courts have to be the ones that will, as much as possible, contribute to the use of law as an *ethos*. On the other hand, precisely the values and principles are also the *ethos* of the EU.⁸

8 | Decisions regarding a certain value or principle are, therefore, always very sensitive, especially if there is no unanimous answer to the question whether a certain value or principle is shared among Europeans, i.e. a shared value of the EU, or not. This leads us to the question of the limits of possible action – there is a margin of appreciation, i.e. a level playing field, or are we concerned with a fixed limit that does not allow for any deviations? A look into the history of the E(E)C and EU raises the question whether the values created by or taken over from the (constitutional) traditions of the Member States are still respected.

- The rule of law is necessary for a democracy. Democratization processes demand the best (*aristoi*) in all spheres, including an official dialogue among the highest courts in societal and community-related issues. It is not always easy to understand and interpret the values (*les valeurs*). Likewise is true of democracy itself. It is complex, difficult to understand, requires lengthy decision-making processes, etc. It is a slow process involving different stakeholders, the public etc. With three peaks (international, EU, and national highest courts), the judiciary is on the same path. For the European judiciary to function as smoothly as possible, the conflicts need to be resolved through dialogue (we must not ignore problems but solve them).⁹
- Questions of courts' competences and their limits always derive from the substance of the matters at issue. They are especially likely to arise in connection with value-based questions (because these are abstractly regulated, on the one hand, and sensitive, on the other hand). Therefore, who shall be competent to decide on a question is closely connected to the values, i.e., the 'content' of the question. Thus, contributing to the decision-making process and having control over its development and a sense of inclusion are essential. It is also about inspiration. It is in the function of forming a connection.
- Trust in the CJEU would increase, as is always the case when all interested parties are heard.
- Involving opinions of the national apex courts on how the highest national rules should be interpreted would also help the CJEU in making legal syllogisms.

As I would not like to comment on existing issues, I propose an imagined scenario: In 2011, a draft directive was proposed regarding the award of concessions for drinking water¹⁰ (subsequently changed also due to civil movements like *Europe's Right2Water movement*¹¹). In the draft, the EU took a liberal approach to public-private projects (PPP). Imagine that such or a similar provision had been adopted. The Slovenian Constitution does not ban public-private partnerships in the supply of drinking water. However, it determines that drinking water is a public good and not a commodity. Therefore, the state's supplying of drinking

9| In this respect, the mentality of the EU is, I am afraid, not the same as it used to be before 2004. Since that time I have observed more turmoil, disintegration processes, a certain degree of reluctance in applying (respecting) EU and international law, attacks on the rule of law, questioning of the principle of primacy, etc.

10| Proposal for a Directive of the European Parliament and the Council of the 16 August 2011 on the award of concession of contracts COM(2011) 187 final.

11| Compare: <http://pr.euractiv.com/pr/concessions-directive-european-commissioner-renounces-transparency-and-equity-public-water> (16.8.2021).

water and water for household use shall be ensured directly through self-governing local communities and not for profit (precisely this latter condition is crucial because it limits the interest of private capital, being an obstacle for liberalization). Clearly, it would be questionable if the Slovenian constitutional rule could have been aligned with the proposed EU rule if such had been adopted. Such a possible collision calls for dialogue wherein the Ustavno sodišče (Constitutional Court, Slovenia) should have a word on the (final) interpretation of a constitutional rule.¹²

3. Important externality for a more horizontal approach

The above discourse on a more advanced two-sided dialogue, in some cases, could be a (further) step towards a more solid and deeply-rooted integration. It is also noteworthy that this could be done by the judiciary, whose approach, as opposed to politics, is not based on specific interests (being its *modus operandi*). On the contrary, the judiciary is not about the (weighing of) interests (*iudex non calculat*), but instead uses the rule of law as the most powerful *ethos* among the citizens and states across Europe, giving them a sense of a safe harbour.

I am using the term 'horizontal approach' because the inclusion of the national apex courts would bring the debate on the core issues of European integration onto a more equal footing. It would correspond more closely to the third paragraph of Article 4 TEU which demands sincere cooperation. The need for such collaboration is even greater as regards questions of the mentioned core issues than as regards other questions. To build an ever closer Union, we must act inclusively. This is especially true for the judiciary, which would require more time and more discussion. Of course, there would still be a hierarchy in the sense that the decision of the CJEU would be the final one. However, the procedure to achieve the end result would be more horizontally oriented.

12| The right to water is not only a right, an individual human right. It is much more. It can make corporations very wealthy and individuals very poor, struggling for life. How deeply such a right is embedded into our consciousness was shown by the abovementioned initiative *Right2Water* in 2011. One can easily say that the right to water as a public good (not a commodity) is an important value in Slovenia. See also *Main basse sur l'eau* by Jérôme Fritel.

The CJEU should remain the final guardian of the established peace, stability, prosperity, and human rights protection. What the media calls '*guerre des juges*'¹³ is not only unnecessary, it is not a path to be followed if we wish to achieve a functioning (and ever closer) Union. This is especially true for the judiciary, which the public perceives as a safe harbour, the backbone of the legal system. If anybody, then the (apex) national courts shall light the path forward with solutions. To reach them, an (apex) dialogue 'in Kirchberg' would be a positive option (i.e. only procedures under the preliminary rulings procedure initiated by ordinary (not apex) courts facing the CJEU with *core questions* of European integration (values, principles, national identity, competencies and *ultra vires* issues, etc.).

Part II.

I believe that my call for a greater involvement of the highest courts in EU law and in providing assistance in the interpretation of the national apex rules was rightly understood as reinforcing the integration and as a further development in its evolution rather than a step back. This is my impression of the discussion that ensued after my presentation. However, along with some positive and supporting thoughts, some dissenting opinions were also expressed. These remarks can be divided into pragmatic and systemic ones. Among the arguments raised was the fear that the procedure will become more complex and will last longer, becoming more complicated procedurally. A question that remains open is whether to include the highest courts of all Member States or only the one from the country whose court submitted the preliminary procedure. The proposed change would also entail that the national apex courts will be additionally burdened. Another open question is whether the constitutional courts even possess the competence, according to national law, to give opinions on the interpretation of constitutional provisions or whether providing interpretations of national law is the task of the agents of the State etc. I can nod to certain remarks and I understand that support from other apex courts from across the EU for the idea presented is rather limited. It would be essential to gain greater support before developing the idea further. At the moment, this is obviously not the case and I accept it. However, it means that the concern¹⁴ was nevertheless expressed and recognized.

13| See <https://www.brusselsreport.eu/2021/06/10/primacy-of-eu-law-is-being-undermined-because-of-the-eus-own-actions/> (19.8.2021).

14| The concern, inter alia, can also be called '*a fear of being disregarded*' – when ordinary courts pose a question in the preliminary ruling procedure, which is one of the core elements of European integration, and the CJEU renders a judgement, the apex courts, having national jurisdiction to deal with such issues, are left to watch from the bench.





Mr Gunārs Kusiņš

Justice of the Constitutional
Court of the Republic of Latvia



Contribution by Mr Gunārs Kusiņš, Justice of the Constitutional Court of the Republic of Latvia

Since the topic proposed for this panel is 'The level of fundamental rights protection' and since the topic of the entire conference is related to the interaction between the Court of Justice of the European Union ('the CJEU') and national constitutional courts, the first question to be answered is whether, with regard to the level of fundamental rights protection, we have reached the best possible situation and there is no room for improvement of the EU-national interaction. If the answer is 'yes', we can all be happy that the desired goal has been achieved.

Unfortunately, it appears that a possibility for improvement, perhaps even a problem, does exist. What I will from now on call 'the problem' is related to a difference in the standard of protection of fundamental rights. In other words, there can be situations where the answer to the question 'have fundamental rights been violated' will depend on whom you ask. The CJEU might tell you that no violation of, for example, the principle of legal certainty has taken place, while a national constitutional court will consider otherwise. Or vice versa. If the European Court of Human Rights ('the ECtHR') becomes involved in the matter, a third different answer might be provided.

If we stay on the level of a dialogue between the CJEU and national constitutional courts, the problem of a different level of protection of fundamental rights can manifest itself in two ways – the level of protection on the level of EU law may be higher or the level of protection on the level of EU law may be lower. However, the first of these situations is not really a problem or at least not a pressing problem. If there were a situation in which a national constitutional court was aware that the level of protection of a specific fundamental right in EU law is higher than in the domestic law, a good faith approach of such a constitutional court would be to apply the higher standard deriving from the EU law.

A situation where, at the first glance, a higher level of protection of fundamental rights is provided by international law has been encountered by the Latvijas Republikas Satversmes tiesa (Latvian Constitutional Court). In such situations, for instance with regard to the interaction between the European Convention on Human Rights and Fundamental Freedoms ('the Convention') and the Latvijas Republikas Satversme (Constitution of the Latvian Republic), the Latvian Constitutional Court has frequently reiterated that 'if it follows from the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms and their interpretation in the case-law of the European Court of Human Rights that the corresponding human rights enshrined in the Convention pertain

to the particular situation, then this situation will usually also fall within the scope of the respective fundamental rights enshrined in the Constitution'.¹ In other words, and to put it even more bluntly, 'provisions of international human rights law constitute the minimum standard of human rights. The fundamental rights enshrined in the Constitution are either identical [to this standard] or provide for more extensive guarantees'.²

In short, it is difficult to imagine a situation where the fact that EU law provides for a higher level of fundamental rights protection than the national law would be a source of any problems. In states committed to good faith application of international law, including Article 27 of the Vienna Convention on the Law of Treaties,³ constitutional courts should not see any obstacles to 'raising' the national level of protection of fundamental rights in order to adjust to the internationally agreed-upon standard. In conclusion, in this regard the EU-national interaction functions without any self-evident problems.

The problem arises in the second situation – when the level of protection of fundamental rights is lower in the EU law, as compared to national law. With respect to 'ordinary' international human rights law, this is not a problem at all. For instance, the Latvian Constitutional Court has repeatedly stated in respect of the Convention that 'the Convention provides for the minimum standard of protection of human rights and fundamental freedoms, yet the state may provide for a broader scope of these rights and a higher standard of protection in its laws [and] first of all in the constitution of the state. When the Constitutional Court is interpreting the provisions of the Constitution, it ought to take into account the Convention and the case-law of the European Court of Human Rights; however, this does not prohibit the Constitutional Court to conclude that the Constitution provides for a higher level of protection of fundamental rights, as compared to the Convention'.⁴

Before reaching the description of the problem that I have identified, it appears necessary to point out the obvious – there is an increasing *field* of areas of human rights law in which the jurisdictions of the CJEU and national constitutional courts overlap to a certain extent. It goes without saying that the functions and tasks of national constitutional courts and the CJEU are different. National courts have the right and even a duty to maintain the unity and integrity

1 | Judgment of the Constitutional Court of the Republic of Latvia of 10 February 2017 in the case No 2016-06-01, paragraph 29.2.

2 | Separate opinion of judges of the Constitutional Court of the Republic of Latvia Sanita Osipova and Ineta Ziemele with regard to the judgment of 29 April 2016 in the case No 2015-19-01, paragraph 5.

3 | 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty ...'

4 | Judgment of the Constitutional Court of the Republic of Latvia of 12 November 2020 in the case No 2019-33-01, paragraph 12.2.

of their constitutional system, while the CJEU has the task to ensure a uniform application of EU law and it has the right and even a duty to ensure the primacy of EU law. The Charter of Fundamental Rights of the European Union ('the Charter') becomes applicable in more and more areas following the CJEU's ruling in *Åkerberg Fransson*⁵ and its successors. As a result, both the CJEU and national constitutional courts tackle the same fundamental rights related issues (what is 'provided by law'? what is 'proportionality'?). They frequently come to identical answers; however, they also may come to different answers.

The problem of a lower level of protection of fundamental rights on the level of EU law is nothing new – the Bundesverfassungsgericht (German Federal Constitutional Court) has touched upon it in *Solange I*⁶ and *II*⁷, it was a hot potato in *Melloni*⁸, as well as in *Taricco I*⁹ and *II*,¹⁰ In short, the CJEU has insisted that in certain situations the principle of mutual trust between the Member States as well as other considerations related to the primacy and uniform application of EU law require that the fundamental rights protection guaranteed by the legal systems of certain individual Member States be lowered. This may create a difference of opinions or even a tension that is not imaginary and cannot be expected to 'heal itself'. Until now the solutions for resolving such a tension have been sought on a case-by-case basis, and not systematically. For instance, in *Taricco II* the CJEU was responsive to the invitation of the Corte costituzionale (Italian Constitutional Court) to reconsider the importance of statutory limitations in the Italian legal system,¹¹ while in *Melloni* the Spanish Constitutional Tribunal 'agreed to lower the degree of protection afforded by the Spanish Constitution in line with EU law'.¹²

5| Judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, [EU:C:2013:105](#).

6| Judgment of the Second Senate of 5 May 2020 - 2 BvR 859/15, DE:BVerfG:2020:rs20200505.2bvr085915.

7| Judgment of 6 May 1982, *Wünsche*, 126/81, [EU:C:1982:144](#).

8| Judgment of 26 February 2013, *Melloni*, C-399/11, [EU:C:2013:107](#).

9| Judgment of 8 September 2015, *Taricco and Others*, C-105/14, [EU:C:2015:555](#).

10| Judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, [EU:C:2017:936](#).

11| 'Article 325(1) and (2) TFEU must be interpreted as requiring the national court, in criminal proceedings for infringements relating to value added tax, to disapply national provisions on limitation ..., **unless** that disapplication entails a breach of the principle that offences and penalties must be defined by law ...', judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, [EU:C:2017:936](#), paragraph 62.

12| García, M., 'STC 26/2014: The Spanish Constitutional Court Modifies its case law in response to the CJEU's Melloni judgment', European Union Blog, 2014; <https://europeanlawblog.eu/2014/03/17/stc-262014-the-spanish-constitutional-court-modifies-its-case-law-in-response-to-the-cjeus-melloni-judgment/>.

However, the best way to solve this tension is by means of a respectful and genuine dialogue – which does not necessarily have to take place by means of exchanging judicial decisions – between the national constitutional courts and the CJEU. The Riga Conference provides for the perfect opportunity to exchange our opinions and to hear out the concerns of all parties to the dialogue.

The resistance of Member States to a solution where the CJEU insists on lowering the level of fundamental rights protection is understandable both intuitively and legally. It is one thing to accept something that may be perceived by sceptical observers as an outside ‘dictate’ of a higher standard of protection of fundamental rights but applying a lower standard does not feel right. As for the legal perspective, there are many issues that could be discussed at length, such as the scope and limits of the principle of mutual trust between the Member States; however, due to the limited amount of time for this intervention I will focus only on one potential legal aspect – the issues related to national identity (Article 4(2) TEU). One can easily imagine a situation in which Member States would feel obliged to resist the CJEU’s conclusion that a lower standard of fundamental rights protection is applicable if the higher national standard formed part of their national identity. In this situation the principal issue to be addressed is who has the last word with respect to defining the scope and contents of national identities.

I want to start out by saying that I do not intend to doubt that the last word should belong to the CJEU. Any other solution would mean that the Member States would have the right to impose their view on what their respective national identities are, which would inevitably lead to a fragmented, unstable and unpredictable system of fundamental rights protection in Europe which is something that is much less desirable than whatever problems we are facing now.¹³ My second premiss is that, despite what I said a minute ago, Member States, and in particular the constitutional courts of Member States, are undoubtedly in the best position to know what their respective national identities are (this was also emphasised by President E. Levits in his intervention during the first panel of this conference). Therefore it appears obvious that the final say on the scope and contents of national identities should belong to the CJEU but only after it has given a genuine chance for the Member States concerned (including the constitutional courts of such Member States) to be heard and has genuinely listened to what the Member States have to say.

13] Compare with judgment of 5 June 2018, *Coman and Others*, C-673/16, [EU:C:2018:385](#), paragraph 44: ‘the concept of public policy as justification for a derogation from a fundamental freedom must be interpreted strictly, with the result that its scope cannot be determined unilaterally by each Member State without any control by the EU institutions.’

It appears – and the colleagues from Luxembourg can correct me if I am missing something – that currently the gains knowledge of legal systems of the Member States through four principal channels, some of which have a formal legal basis, while the others are more a matter of a custom. First, within the context of preliminary rulings, the referring courts will describe the legal context of the dispute. This angle has been emphasised by the CJEU itself. The system set up by Article 267 TFEU therefore establishes between the CJEU and the national courts direct cooperation as part of which **the latter are closely involved** in the correct application and uniform interpretation of European Union law and also in the protection of individual rights conferred by that legal order.¹⁴

Second, according to Article 23 of the Statute of the CJEU, Member States may intervene in cases before the CJEU. Third, the judge from the respective Member State is able to provide the necessary information to his or her colleagues on the bench. Fourth, and this is not to be underestimated, the CJEU undoubtedly makes good use of its very competent research staff.

However, each of these sources of information individually is not without its problems and sometimes even the information obtained when combining all four of them might not be sufficient. The national court which makes a reference to the CJEU cannot always predict with sufficient precision the line of reasoning that the CJEU is going to take. Indeed, if the CJEU's reasoning were clearly foreseeable, the national court might have no need or no obligation to make the reference. Therefore situations might occur in which the ruling of the CJEU – unexpectedly for the referring court – directly or indirectly touches upon issues related to the respective Member State's national identity.

The possibility for Member States to intervene in cases before the CJEU is a powerful tool which is frequently employed by the Member States. Nevertheless, as I have mentioned with respect to national courts that make preliminary references to the CJEU, at the stage of their intervention the Member States might not be aware of the reasoning that will be followed by the CJEU and hence cannot predict the possible implications of the eventual ruling of the CJEU on their national identities. Second, it appears that most of the time the intervention is carried out by representatives of the Member States that belong to the executive branch. Taking into account the principle of separation of powers, such representatives cannot have an obligation to ask for the opinion of their national constitutional courts or to take such an opinion into account.

14| Opinion 1/09 (Agreement creating a Unified Patent Litigation System) of 8 March 2011, [EU:C:2011:123](#), paragraph 84.

Even if it were assumed that the judge from the respective Member State provides to their colleagues on the bench full information about the national identity of the respective Member States, the principle of judicial independence necessarily means that the CJEU has no binding obligation to take this information into account. What is more, since the publication of separate opinions is not allowed at the CJEU, an impression cannot be avoided that the opinion of a judge from the respective Member State might remain not only a minority opinion but might also remain unheard outside the Court.

Lastly, with regard to internal research reports of the CJEU, like the information provided by the judge from the respective Member State, such research reports are usually not made public and are only very infrequently, if at all, referred to in the rulings of the CJEU. Therefore, the Member States have no possibility to ascertain that their concerns with regard to their national identities have in fact been taken into account and addressed by the CJEU.

It is important to avoid ‘surprise judgments’ in which the constitutional courts in particular and Member States in general are suddenly faced with the CJEU’s final judgment on what their national identity is. One way to avoid such ‘surprises’ is for the CJEU to adopt its rulings on as extensive information as it can possibly obtain as well as to reflect upon that information in the rulings itself. Taking into account that, as indicated previously and by President E. Levits yesterday, national constitutional courts are certainly the best qualified bodies to make an assessment of what the national identity of the respective Member State is, in my opinion a mechanism should exist where the CJEU and national constitutional courts are ‘forced to talk’, at least in cases where issues of national identities are of a central importance.

The proposals which I will outline are not meant to represent final and fully elaborated mechanisms which will once and for all resolve all issues relating to the level of protection of fundamental rights within the European Union. They are intended to be thought experiments that might serve as a starting point for a discussion today or in the weeks and months to follow the Riga Conference. There certainly are other proposals worthy of a discussion; however, the most important criterion to retain in mind is that the medicine should not be more harmful than the disease – the reform should bring more good than destruction.

One proposal has been recently mentioned by a group of eminent authors (President Christoph Grabenwarter, judges Peter Huber and Ineta Ziemele who spoke to us yesterday, as well as President Rajko Knez whom I am happy to have as my fellow member on this panel). Their proposal is the idea of a ‘reverse preliminary ruling procedure’.¹⁵ It is certainly a proposal which would benefit from an extensive discussion.

15| Grabenwarter, C., Huber, P.M., Knez, R., Ziemele, I., ‘The Role of the Constitutional Courts in the European Judicial Network’, (2021), *European Public Law*, 27(1), 2021, pp. 58-60.

Nevertheless, it seems clear that the CJEU giving national constitutional courts the possibility to state their opinions would have to be not only a formally regulated possibility; in certain situations (for instance, in cases where the CJEU becomes aware or is made aware that an issue of the national identity of a particular Member State is at stake) the CJEU would have to have an obligation to formally consult the respective constitutional court. This could be implemented in various ways. One idea of how this could happen is that the CJEU would prepare a document setting out its understanding of the scope and contents of the national identity of the respective Member State, in so far as it is relevant for the case to be examined, and the constitutional court of that Member State would be given an opportunity to comment on the opinion of the CJEU. However, in order to maintain the proper balance between the CJEU and national constitutional courts, it would be important that any comments provided by the national courts would concern *lex lata* with respect to national identities and not attempt to engage in the formulation of *lex ferenda*.

It goes without a question that such a new mechanism could only be incorporated by means of a formal amendment of, if not the Treaties, then at least the Statute of the CJEU. However, this is by no means problematic. First, a formal procedure for amendment would allow the Member States to properly reflect upon not only the substance but also on procedural aspects of the proposed new procedure. Second, this would give the Member States a possibility to adequately prepare any necessary amendments of their internal legislation.

However, the starting point of any reforms will have to be a genuine discussion between the actors most directly involved in the procedure. I wish for us a fruitful discussion on this and many other pertinent issues during the remainder of the Riga Conference and beyond.



Mr Johannes Schnizer

Member of the Constitutional Court
of the Republic of Austria

Contribution by Mr Johannes Schnizer, Member of the Constitutional Court of the Republic of Austria

Level of protection of fundamental rights in the judicial network composed of the Court of Justice and the constitutional courts

Ladies and gentlemen,

It brings me great pleasure to be able to speak at this conference, which is dedicated to such an important topic and is attended by such high-level participants; I thank the Latvijas Republikas Satversmes tiesa (Latvian Constitutional Court) for holding this event. Perhaps the Austrian perspective can make a contribution with regard to the problems surrounding the level of protection of fundamental rights, particularly with regard to the differences between the case-law of the Court of Justice of the European Union ('the ECJ') and that of the constitutional courts of the Member States in that regard.

First of all, I must point out an Austrian particularity that must be taken into account in order to be able to understand the position of the Verfassungsgerichtshof (Austrian Constitutional Court; 'the VfGH'):

The European Convention on Human Rights ('the ECHR') has constitutional status in Austria; the rights guaranteed by it are to be applied by the VfGH as if they were national fundamental rights. It is therefore for the VfGH to establish when law and administrative acts infringe them. This is attributable above all to the fact that Austria does not have a comprehensive catalogue of fundamental rights. Written fundamental rights do of course exist, however, but they are composed of different historical strata and, until the constitutional adoption of the ECHR in 1964, they were limited, in essence, to rights of freedom. Therefore, the ECHR has become the most quantitatively important source for the case-law of the VfGH in the area of fundamental rights.

This naturally raises the question of what value the VfGH attaches to the case-law of the European Court of Human Rights ('the ECtHR'). Summarised in one sentence: in general, it proceeds on the basis of that case-law, but may well arrive at divergent conclusions in individual cases, due to national particularities.

It is well known that the content of the Charter of Fundamental Rights of the European Union ('the Charter') overlaps with that of the ECHR in key areas. In Austria, however, EU law has in principle the status of ordinary law, with the result that the Charter would have been excluded from the jurisdiction of the VfGH per se: the specialised courts rule on infringements of statutory subjective rights enshrined in ordinary law, while the VfGH rules only on constitutionally guaranteed rights.

In a judgment (*Erkenntnis*, as it is referred to in Austria) from 2012, which was ground-breaking from the perspective of Austrian jurisprudence, the VfGH stated that it applies the Charter in the same way as it applies nationally guaranteed fundamental rights, in so far as they are similar in terms of their content and structure. In summary, the VfGH justified this on the basis of the principle of equivalence under EU law, because, in this way, it is possible to ensure legal protection equivalent to that afforded in the case of domestic fundamental rights: in principle, only the VfGH rules on infringements of such rights ('constitutionally guaranteed rights', according to Austrian terminology); otherwise, such judicial protection would not exist. (The other national courts do, of course, take fundamental rights into account in their interpretation of ordinary legislation, however).

The VfGH therefore treats the Charter and the ECHR in the same way, provided that the facts of the case are related to EU law in that regard. In its case-law, the ECJ has now given the scope of application of the Charter a broad interpretation in comparison with the wording of Article 51 – which very narrowly refers to the implementation of Union law – with differentiations in individual cases; the VfGH regards the scope of application of the Charter as being similarly broad, although that matter is certainly still being addressed in detail by both courts. Therefore, the VfGH's protection of the Charter and that of the ECHR run largely in parallel in the overlapping area of those two catalogues of fundamental rights.

However, in that fundamental decision, the VfGH also stated that it proceeds on the basis of the Charter only if comparable fundamental rights are not guaranteed by the ECHR or national provisions of constitutional law. In such cases, it therefore rules only on infringements of the ECHR or another national fundamental right, on the basis of its own case-law and taking into account, above all, of the case-law the ECtHR. In passing, and in anticipation of the next panel, it should be mentioned that we attribute to the requirement that limitations be provided for by law, as laid down in Article 52(1) of the Charter, the same importance as we do to the same such requirements contained in the individual articles of the ECHR.

In such a case, that is to say, where the Charter and the Austrian Constitution guarantee the same rights, the VfGH will not request a preliminary ruling from the ECJ, because it is thus a matter of national constitutional law, on which it alone rules – as it held in the aforementioned decision.

This principle does not apply in fully harmonised areas; in those areas, the VfGH has ruled, in accordance with the case-law of the ECJ, that secondary law is not to be assessed against the standard of national constitutional law. In that vein, it should be noted that the VfGH by no means shies away from referring questions of interpretation and questions concerning the validity of EU law to the ECJ.

Of course, the question that now arises is presumably that which is of general interest here – the question as to how that case-law fits into EU law and thus also into the case-law of the ECJ.

In the first place, consideration must be given to the *acte clair* doctrine: in my view, the question as to whether there is an *acte clair* according to the criteria of the case-law of the ECJ must also be considered in the light of the case-law of the Strasbourg Court, in so far as an equivalent fundamental right is guaranteed by the ECHR. This would fit into the dynamics of the ECJ's case-law on *acte clair* in so far as it has recently become more differentiated (at least as I understand it).

The general jurisprudential basis for that case-law lies, in my view, in Article 52(4) of the Charter: in so far as the Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights are to be interpreted in harmony with those traditions. That provision builds, in turn, on Article 52(3) of the Charter, in accordance with which the meaning and scope of those rights under the Charter which correspond to rights under the ECHR are to be the same as those laid down by the ECHR. Similarly, Article 6(3) TEU also declares fundamental rights and the constitutional traditions common to the Member States to be general principles of EU law, and thus codifies the case-law of the ECJ that existed before it.

The constitutional traditions common to the Member States, however, are largely derived from the case-law of the Member States courts of last instance that exercise functions of constitutional jurisdiction. The area of fundamental rights in particular – which guarantees that rights enshrined in constitutional charters are generally worded similarly – is decisively shaped by the national courts.

Thus, the case-law of the national constitutional courts is also relevant, albeit indirectly, for the ECJ in the area of fundamental rights, as is that of the ECtHR. This is the case irrespective of when the European Union accedes to the ECHR, as promised by Article 6(2) TEU. It is not possible to determine what constitutional traditions common to the Member States are without having regard to the case-law of their courts; however, such constitutional traditions will continue to be shaped by the constitutional courts in the future.

Consequently, to take a different view would require the ECJ to disconnect itself from the dynamics of the development of fundamental rights in the Member States; however, EU law cannot be assumed to contain a merely static reference to the constitutional traditions of the Member States – a ‘freeze’, so to speak.

Otherwise, the consequence would be that the ECJ would monopolise for itself the further development and expansion of the content of fundamental rights, an approach which would not be compatible with the requirement to respect the respective national identities and constitutional structures of the Member States, as laid down in Article 4(2) TEU. On the one hand, it is legally required for the ECJ to ensure the preservation of the constitutional traditions of the Member States. On the other hand, however, it is also for the constitutional courts of the Member States to ensure that protection, on the basis of the principle of conferral (Article 5(2) TEU) and the international-law origin of EU law.

It is effectively the constitutional courts and the other highest courts of the Member States that decide on the scope of the constitutional delegation of sovereignty. Jurisprudentially, that consequence may have different origins: under international law, from the ultra vires doctrine, and, domestically in Austria, from the rule that a deviation from the fundamental principles of the constitution requires a referendum. According to the case-law of the VfGH, the fundamental rights belong, in their entirety, to that core area – and so does the role of the VfGH.

Of course, friction can arise in the course of that interaction. However, such friction has hitherto always been resolved satisfactorily in the European network of courts composed of the ECJ and national constitutional courts, and I am sure that this will also be the case in future conflicts.

This brings me to the second part of my remarks – addressing possible differences in the level of protection of fundamental rights. In the multifocal system of protection of fundamental rights described above, it is inevitable that there may be differences in the level of protection. On the whole, however, mechanisms are in place that guarantee – if not coherence – at least convergence, in the direction of a higher level of protection.

As a starting point, Article 53 ECHR states that nothing in it may be interpreted as restricting or curtailing any of the human rights and fundamental freedoms applicable in or to the Member States (this includes the Charter incidentally!). In the same way, the identically numbered article of the Charter contains the same provision and thus links back to the ECHR. That principle of the best level of protection should in any event also form the basis of the case-law of all constitutional courts of the Member States; this is the case in Austria in any event. In that respect, there is a European one-way street towards greater protection of fundamental rights.

(Since, as mentioned at the beginning, the VfGH must apply fundamental right guarantees composed of different historical strata, it has always been faced with this problem. Minor differences arise in isolated cases in the context of scope of protection, and to a greater extent due to different requirements under which limitations must be provided for by law. In particular, the constitutional provisions from the time of the monarchy and from the beginning of the Republic generally do not contain any such requirements (or, if they do, only ones that have been given substance by the VfGH) or a merely formal requirement in that regard.).

It might be of interest to know how the VfGH deals with such conflicts. Since, with regard to the ECHR as it pertains to Austria, with the ECtHR and the VfGH there are two courts which have the final say – two courts which, according to their respective understandings, are not in a hierarchical relationship – there are decisions which, at first glance, are not compatible with each other.

Such divergences are not frequent – as mentioned, the VfGH follows, in principle, the case-law of the ECtHR. They are most likely brought about by special situations that lead the VfGH to divergent decisions, aside from the point in time at which the respective decisions are adopted.

For example, one of those situations consists in national particularities in factual terms, whereby the VfGH has assumed responsibility for assessing the importance to be attached to those particularities. Some examples of this: whereas the ECtHR considered that the right of landowners to prohibit hunting on their land for ideological reasons is protected by the right to property, the VfGH took the view that there are sufficient public interests in the specific alpine topography of Austria and the associated hunting-related ecological interests (in particular the protective function of forest in a mountainous country) to justify the interference with the right to property.

In the case concerning the incompatibility of a headscarf ban at school with Article 9 ECHR, specific risks of discrimination in view of the real social conditions in Austria were ultimately decisive for the VfGH. This is a circumstance that a national court can assess with better knowledge than a European court.

The decision on euthanasia is provided as a third example: whereas the ECtHR found that both a criminal-law prohibition of euthanasia and the exemption from that prohibition were compatible with Article 8 ECHR and that the decision thus lay with the national legislature, the VfGH came to the conclusion that a criminal-law prohibition of all euthanasia was incompatible with the right to self-determination. The decisive factor in that case was the embedding of Article 8 ECHR in the ‘autochthonous’ constitutional situation, which must be

assessed autonomously. In terms of fundamental rights, the case concerned the intersection between the protection of life, the protection of freedom and the equality of all people, which are mentioned in the same breath and interwoven with each other by a constitutional provision from the beginning of the Republic – to a certain extent, the essence of democratic State obligation.

That example in particular shows that decisions relating to fundamental rights, which are very close to the essence of fundamental right guarantees, cannot be viewed in isolation from the general social framework of values and the constitutional self-image of the community that forms the State. I am thus inclined to the view that such questions are better left to the national constitutional court than to European courts. Europe does not have a homogeneous society and the EU respects this, as shown by Article 4(2) TEU.

This brings me to a sensitive point, with which I would also like to conclude my remarks: the EU is a community of values (as proclaimed in Article 2 TEU). This finds legal expression precisely in the constitutional traditions common to the Member States, the European catalogues of fundamental rights and the case-law of the ECJ. However, those values are embedded in societies with different histories, different living conditions, different priorities and different needs. This is most likely the deeper-lying reason why the European Union is a separate legal entity consisting of independent States. Its democratic legitimacy guarantees that State control is exercised in a way that is beneficial – or at least tolerable – for society. All European constitutional courts have democratic legitimacy due to the appointment of judges by democratically elected bodies; they are in any event representative of societal values. It is in keeping with the nature of the European Union that, in accordance with the concept of this 'network of courts', there is no central court ruling at final instance, but that the optimum balance in terms of fundamental rights is to be found in cooperation between the ECJ and the national constitutional courts. Conferences like this one make an important contribution to that interaction, so thank you again.



Ms María Encarnación Roca Trías, Vice-President of the Constitutional Court of the Kingdom of Spain, chair of the 3rd panel session

4th panel

**Limitations
on the exercise
of fundamental rights**



Mr Maciej Szpunar

First Advocate General of the Court of Justice
of the European Union



Contribution by Mr Maciej Szpunar, First Advocate General of the Court of Justice of the European Union

Limitations on the exercise of fundamental rights in the case-law of the Court of Justice

1. Introduction

In the EU legal order, the question of limitations on the exercise of fundamental rights is, in essence, regulated in Article 52(1) of the Charter of Fundamental Rights of the European Union ('the Charter'). This provision stipulates that:

'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.'

There is a number of issues that could be discussed in connection with this provision. In this paper I will focus on the essence of fundamental rights as referred to in the first sentence of Article 52(1) of the Charter, in particular, in relation to the application of the principle of proportionality pursuant to the second sentence thereof.

In order to address this issue properly, it is necessary to look at the doctrinal concepts underlying limitations on the exercise of fundamental rights as well as at the relevant case-law in order to see if and how these concepts are reflected in judicial practice. For obvious reasons I will restrict my analysis to the case-law of the Court of Justice of the European Union ('the CJEU').

In the first part of my paper I will briefly present basic doctrinal concepts explaining how the issue under consideration is understood in legal writings. It is obvious that a thorough discussion of the entire academic debate and all its accompanying threads would be impossible. I will therefore only refer to a few – somewhat randomly selected – publications that illustrate the most relevant issues related to the essence of fundamental rights that may have an impact on the application of Article 52(1) of the Charter in judicial practice.

PART I

2. Doctrinal remarks

The concept of the essence of fundamental rights in the EU legal order was developed by the President of the CJEU, Koen Lenaerts, in his article 'Limits on Limitations: The Essence of Fundamental Rights in the EU'.¹ As the author puts it, the essence of a fundamental right defines a sphere of liberty that must always remain free from interference; this sphere of liberty cannot be subject to any limitations.

Koen Lenaerts further explains that the concept of the essence of a fundamental right is not new but can be traced back to the 1949 German Basic Law and the notion of "Wesensgehalt" used therein,² which, in turn, influenced the constitutions of other Member States, who subsequently incorporated similar concepts³. Some scholars have suggested that the recognition of this concept in EU Law stems from constitutional traditions common to the Member States. Although, the obligation to respect the essence of a fundamental right is not expressly recognized in the European Convention on Human Rights ('the ECHR'), it can nevertheless be found in the case-law of the European Court of Human Rights ('the ECtHR').⁴

What does the essence of a fundamental right precisely mean?

As an absolute limit on limitations, the essence of a fundamental right defines a sphere of liberty that must always remain free from interference. In the case of fundamental rights that are absolute – such as the prohibition of inhuman or degrading treatment – the content of such rights is 'all essence', meaning that the exercise of such a right should not be subject to limitations. Regarding fundamental rights whose exercise may be subject to limitations,

1 | Lenaerts, K., 'Limits on Limitations: The Essence of Fundamental Rights in the EU', *German Law Journal* 20, no. 6, 2019, pp. 779-793.

2 | Article 19(2) of the German Basic Law: In no case may the essential content (Wesensgehalt) of a basic right be encroached upon. See, in particular, Häberle, P., *Die Wesensgehaltsgarantie des Art. 19 Abs. 2 GG*, 3rd ed., C.F. Müller, Karlsruhe, 1983.

3 | Regarding article 33, paragraph 3, of the Polish Constitution, see Wojtyczek, K., *Granice ingerencji ustawodawczej w sferę ochrony praw człowieka w Konstytucji RP*, Cracovie, 1999, p. 203 à 214.

4 | Lenaerts, K., evokes in his article, inter alia, the following judgments of the ECtHR: of 23 June 2016, *Baka v. Hungary*, CE:ECHR:2016:0623JUD002026112, § 121; of 8 November 2016, *Naku v. Lithuania and Sweden*, CE:ECHR:2016:1108JUD002612607, §95; of 29 November 2016, *Lupeni Greek Catholic Parish and Others v. Romania*, CE:ECHR:2016:1129JUD007694311, § 20.

measures that respect the essence of such rights do not call these rights into question as such. It follows from the case-law of the CJEU that the essence of a fundamental right is not compromised where the measure in question limits the exercise of certain aspects of such a right, leaving others untouched, or applies in a specific set of circumstances with regard to the individual conduct of the person concerned. Conversely, in order for an EU or national measure to compromise the essence of a fundamental right, such a measure must constitute a particularly intense and broad limitation on the exercise of such a right.

It is true that there is some overlap between the concept of the essence of a fundamental right and the principle of proportionality in the sense that a measure that respects the essence of a fundamental right may still violate the principle of proportionality. However, in an ideal scenario, the CJEU should first examine whether the measure in question respects the essence of the fundamental rights at stake and then carry out a proportionality assessment only if the answer to that first question is in the affirmative. The application of that method of analysis is not simply empty formalism, but rather seeks to emphasize the point that the essence of a fundamental right is absolute and not subject to a balancing exercise.

The case-law of the ECtHR has not always followed this method of analysis, but has rather incorporated the concept of the essence of a fundamental right into a proportionality assessment. Koen Lenaerts submits that this manner of proceeding is not correct in EU Law, as it reflects neither the absolute nature of the essence of fundamental rights, nor the logic underpinning Article 52(1) of the Charter.

Some authors question the utility of the concept of the essence of fundamental rights, in particular as regards its implications on the scope of application of the principle of proportionality pursuant to Article 52(1) of the Charter.

A critical analysis of this concept has been presented by Aharon Barak in his book 'Proportionality. Constitutional Rights and their Limitations'.⁵

The author analyses the concept of the protection of a fundamental right's core as being absolute within the context of the application of the proportionality test as a tool designed to provide solutions to conflicts between fundamental rights and other rights and interests.⁶ He recalls again that this concept, present in a number of constitutions, has its origins in Article 19(2) of the German Basic Law. According to this concept, each constitutional right consists of the right's core (or its nucleus) and its penumbra. Nothing within the core of a

5| Barak, A., *Proportionality. Constitutional Rights and their Limitations*, Cambridge: Cambridge University Press, 2012.

6| Chapter 19. Alternatives to proportionality, pp. 493-527.

fundamental right can be subject to limitations; therefore, proportionality applies only to what is not included in the core.

In this context the question arises whether the test of the limitation is subjective, in other words, determined from the viewpoint of the victim – the limited person, or objective, that is, determined from the viewpoint of the legal system as a whole. The author indicates that according to some authors no comprehensive answer should be given to this question: rather an objective test should determine the core of some rights and a subjective test determine the core of others..

Concerning the relation between the proportionality and the limitation of the right's core, the author notes that there are two opposing views. According to some authors, the restriction imposed on limiting a right's core creates an 'absolute' constraint on the possibility of limiting that right. Proportionality thus plays no role in determining the nature of this limitation. Others believe that the restriction on limiting the right's core is not 'absolute' but rather 'partial', depending on its context. Aharon Barak is of the view that the difference in opinions between these two approaches is largely artificial. It seems that those who favour the 'absolute' approach to the notion of the right's core find it difficult to define the exact contours of that 'core'. At the end of the day, they may consider a limitation of the right's core only when such a limitation is disproportional.

Aharon Barak is rather critical of the idea of the concept of the right's core being protected as absolute. He underlines that legal systems have difficulties defining the 'core' of fundamental rights. At the end of the day, the 'core' is best understood in terms of proportionality. Why not simply determine that the rules of proportionality should apply to limitations on every part of the right, core and penumbra alike? The difference between a *limitation* on the right's core and its penumbra is determined through the rules of proportionality, in particular proportionality *stricto sensu*.

There are also other authors who defend the use of the absolute theory of fundamental rights. Take for example the article of Maja Brkan 'The concept of essence of fundamental rights in the EU legal order: peeling the onion to its core'.⁷

The author admits that there are some difficulties in the application of the concept of the right's core. Admittedly, it is easy to picture an inner circle of a fundamental right that should not be affected, under any circumstances. Yet, a closer look into the concept reveals its complexity, given the difficulties in defining it, including the lack of appropriate tools for

7| Brkan, M., 'The concept of essence of fundamental rights in the EU legal order: peeling the onion to its core', *E.C.L. Review*, 14(2), 2018, pp. 332-368.

such a definition and difficulties of delimitation between an interference with the essence of fundamental right and the unjustified ordinary or particularly serious interference with that right.

Concerning the correlation between essence and proportionality the author references to the relative theory and the absolute theory, which have their origins in German doctrine. Pursuant to the relative theory, the notion of essence should have merely a declaratory nature as all interferences with fundamental rights can be assessed through the principle of proportionality and can hence be potentially justified. The proponents of the absolute theory build upon a premise that the core of a right can under no circumstances be limited, meaning that the potential justifications for such an interference do not exist, so the principle of proportionality does not apply. The absolute theory distinguishes between two parts of every fundamental right: a nucleus, being the essence of this right, and a peripheral part of that fundamental right.

This author defends the view that that the absolute theory should be followed in the EU legal order. In particular, since the notion of essence – and its predecessor ‘very substance’ – had, from early jurisprudence onwards, undeniable practical value in the case-law of the CJEU.

Maja Brkan and Šejla Imamović in their article ‘Article 52: Twenty-Eight Shades of Interpretation’⁸ consider that the concept of the essence of fundamental rights experienced a certain degree of revival with its inclusion in the Charter. This concept, which seems to play a minor role in the national jurisprudence, especially in Germany where it originates from, gained in importance in the CJEU case-law. The concept seems to be, in the eyes of the CJEU, a test distinct from a proportionality test. At the same time, the analysis of the national reports on the application of the Charter in the Member States effectuated in the article demonstrates that the concept of essence seems to have either received much less attention in the national case-law or is perceived as not having much additional value to proportionality. The German report, for example, mentions that the national courts sometimes refer to the concept of essence when citing Article 52(1) of the Charter, but that this notion does not have any significance in national jurisprudence. This could be due to the fact that in German constitutional law the equivalent notion of ‘Wesensgehalt’ is not considered as having independent value, but rather as forming part of the proportionality analysis.

8 | Brkan, M., and Imamović, Š., ‘Article 52. The Role of the EU Charter in the Member States’, *The EU Charter of Fundamental Rights in the Member States*, Hart Publishing, Oxford, 2020, pp. 421-439.

PART II

3. Remarks inspired by the case-law of the CJEU

Let me now turn to practical implications of the concepts described above and to illustrate them in the case-law of the CJEU. I should recall once more the wording of Article 52(1) of the Charter:

'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.'

For the CJEU none of the words used in this article are superfluous or redundant. Nor is their order accidental. In particular, as Koen Lenaerts put it in his article, which I previously presented, 'Limits on limitation' that the CJEU in its analysis of a given limitation of a fundamental right will first examine whether the measure in question respects the essence of the fundamental rights at stake and will only carry out a proportionality assessment if the answer to that first question is in the affirmative. In other words, the CJEU has to proceed to a two-step analysis consisting of two distinct tests. The first, concerning the respect of the essence and the second, the respect of the principle of proportionality.

3.1. *Schrems* (C-362/14)

The first illustrative example of the application of the above approach in practice by the CJEU is the seminal judgment of *Schrems*.⁹ This decision shows that the concept of the essence of a fundamental right is far from theoretical.

This case concerned the legality of Directive 95/46¹⁰ and Decision 2000/520¹¹ to the extent that they excluded the examination of the claim concerning the protection of the rights and

9 | Judgment of 6 October 2015, *Schrems* (C-362/14, [EU:C:2015:650](#)).

10 | Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

11 | 2000/520/EC: Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC of the European Parliament and of the Council on the adequacy of the protection provided by the safe harbour privacy principles and related frequently asked questions issued by the US Department of Commerce.

freedoms of the claimant. The claim concerned in particular the processing of personal data, which was transferred from a Member State to a third country, that is to the United States. The claim was based on the fact that the law and practices in force in the United States did not ensure an adequate level of protection of the claimant's fundamental rights.

In this judgment, the CJEU dealt with three fundamental rights: the right to respect for private life (Article 7 of the Charter), the right to effective judicial protection (Article 47 of the Charter) and the right of protection of personal data (Article 8 of the Charter). As far as the two first rights were concerned, the CJEU found that their essence was compromised by the measures in question and therefore it did not pass on to the second step of the analysis, that is, to the proportionality assessment of the measure in question.

In particular, the CJEU stated that the legislation which permitted the public authorities to have access on a generalised basis to the content of electronic communications must be regarded as compromising the essence of the right to respect for private life, as guaranteed by Article 7 of the Charter.¹²

Likewise, the legislation in not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him or her, or to obtain the rectification or erasure of such data, did not respect the essence of the right to effective judicial protection, as enshrined in Article 47 of the Charter. The first paragraph of Article 47 of the Charter requires every individual, whose rights and freedoms guaranteed by European Union law are violated, to have the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article. The very existence of effective judicial review designed to ensure compliance with provisions of EU law is inherent in the existence of the rule of law.¹³

Accordingly, having reached that conclusion the CJEU did not proceed to the analysis of proportionality of measures as it was not pertinent anymore. Thus, without there being any need to examine the content of the safe harbour principles, it was to be concluded that Article 1 of Decision 2000/520 failed to comply with the requirements laid down in Article 25(6) of Directive 95/46, read in the light of the Charter, and that it was accordingly invalid.¹⁴

But how deeply is the CJEU committed to the above two-step analysis?

12| See judgment of 6 October 2015, *Schrems* (C-362/14, [EU:C:2015:650](#), paragraph 94). The Court made here a reference to judgment of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, [EU:C:2014:238](#), paragraph 39).

13| See judgment of 6 October 2015, *Schrems* (C-362/14, [EU:C:2015:650](#), paragraph 95).

14| See judgment of 6 October 2015, *Schrems* (C-362/14, [EU:C:2015:650](#), paragraph 98).

In this regard, on the one hand, admittedly, in the post-*Schrems* years there were examples of cases where the CJEU, when confronted with the question of the legality of a given limitation on the exercise of a fundamental right, first, took a clear and express position on whether the essence of the right was compromised and only where it was not the case proceeded to the proportionality assessment.¹⁵

On the other hand, there were also examples of cases where, in the same context of the legality of limitation on the exercise of a fundamental right, after having quoted the essential part of Article 52(1) of the Charter, the CJEU did not proceed to a separate analysis of the essence of the rights in question.¹⁶

As regards the first group of cases, it should also be noted that – after the judgment in *Schrems* – for a relatively long time the CJEU did not find that measures imposing limitations on the exercise of fundamental rights compromised the essence of the rights in question. In reality, for both groups of cases the outcome of the analysis carried out pursuant to Article 52(1) of the Charter depended in the end on the result of the proportionality assessment. This renders the determination of the boundaries of the essence of a fundamental right difficult. One may have the impression that the reference to the essence of a fundamental right is a mere formality without practical consequences.

3.2. État luxembourgeois (Right to bring an action against a request for information in tax matters) (C-245/19 and C-246/19)

It seems that any potential doubts in this regard should have disappeared after the CJEU's recent judgment in *État luxembourgeois (Right to bring an action against a request for information in tax matters)*,¹⁷ rendered exactly five years after the judgment in *Schrems*.

15| See, to that effect, in particular: judgments of 21 December 2016, *Tele2 Sverige and Watson and Others* (C-203/15 and C-698/15, [EU:C:2016:970](#), paragraph 101); and of 21 December 2016, *AGET Iraklis* (C-201/15, [EU:C:2016:972](#), paragraphs 84 and 88); and of 13 June 2017, *Florescu and Others* (C-258/14, [EU:C:2017:448](#), paragraph 55); and of 20 March 2018, *Menci* (C-524/15, [EU:C:2018:197](#), paragraph 43).

16| See, to that effect, in particular: judgments of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation* (C-664/15, [EU:C:2017:987](#), paragraphs 90-91); and of 25 January 2018, *F* (C-473/16, [EU:C:2018:36](#), paragraphs 55-56); and of 21 May 2019, *Commission v Hungary (Usufruct over agricultural land)* (C-235/17, [EU:C:2019:432](#), paragraphs 88-89).

17| Judgment of 6 October 2020, *État luxembourgeois (Right to bring an action against a request for information in tax matters)* (C-245/19 and C-246/19, [EU:C:2020:795](#)).

Almost as if it to celebrate the fifth anniversary of the *Schrems* judgment, on 6 October 2020, the CJEU, sitting in Grand Chamber, issued a ruling that not only confirms the importance of the concept of the essence of fundamental rights but that can also be used as a manual for the two-step analysis of the legality of a limitation on the exercise of a fundamental right.

The case concerned disputes between the tax authorities of the Grand Duchy of Luxembourg and several individuals who contested decisions ordering them to provide these authorities with certain information. The information had been requested by the authorities of another Member State, in which the procedure concerning one of these individuals (a taxpayer) was pending.

In this case, the referring court asked in essence, whether Article 47 of the Charter, read in conjunction with Articles 7, Article 8 and Article 52(1) thereof, precluded legislation of a Member State implementing the procedure for the exchange of information on request established by Directive 2011/16¹⁸ from excluding the possibility of contesting a decision whereby the competent authority of that Member State request to provide it with that information. This decision was challenged by three categories of individuals: (i) persons holding the information ('the holder of the information on the taxpayer'), (ii) the taxpayer concerned, in that other Member State, by the investigation giving rise to that request ('the taxpayer'), and (iii) third parties concerned by the information in question ('the third party').

The fundamental rights at issue were the same as in the *Schrems* Case: the right to respect for private life (Article 7 of the Charter), the right to effective judicial protection (Article 47 of the Charter) and the right of protection of personal data (Article 8 of the Charter).

The CJEU first examined the relationship between the abovementioned rights. In this regard it noted that the three fundamental rights involved were not liable to be at odds with each other but were complementary in their application. In other words, the CJEU was not dealing with conflicting fundamental rights since all three rights 'went into the same direction', that is, to protect the interest of the individuals challenging the decisions adopted by the tax authorities. Moreover, the CJEU rightly noted that the effectiveness of the protection that Article 47 of the Charter was intended to confer on the holder of the right guaranteed thereby cannot be expressed or assessed other than in relation to substantive rights, such as those referred to in Articles 7 and Article 8 of the Charter.¹⁹

18| Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.

19| See judgment of 6 October 2020, *État luxembourgeois (Right to bring an action against a request for information in tax matters)* (C-245/19 and C-246/19, [EU:C:2020:795](#), paragraph 52).

What were the steps taken by the CJEU in its analysis?

In the first step of its analysis of the limitation in question the CJEU noted that the essence of the right to an effective remedy enshrined in Article 47 of the Charter includes, among other aspects, the possibility, for the person who holds that right, of accessing a court or tribunal with the power to ensure respect for the rights guaranteed to that person by EU law and, to that end, to consider all the issues of fact and of law that are relevant for resolving the case before it. In addition, in order to access such a court or tribunal, that person cannot be compelled to infringe a legal rule or obligation or to be subject to the penalty attached to that offence.²⁰

The CJEU then verified whether the essence of the right to an effective remedy was compromised in case of the individuals belonging to each category.

As regards the holders of the information on the taxpayer, it concluded that the national legislation did not respect the essence of the right to an effective remedy guaranteed by Article 47 of the Charter and, consequently, that Article 52(1) of the Charter precluded such legislation.²¹ Concerning the taxpayer concerned, it reached a different conclusion. It held that the national legislation such as that at issue in the main proceedings must have been regarded as not adversely affecting the essence of the right to an effective remedy guaranteed to the taxpayer concerned.²² As far as the third parties were concerned, the CJEU held that respect for the essence of the right to an effective remedy did not require that the third parties have the possibility of bringing a direct action against the decision ordering that the information on the taxpayer be provided.²³

Only after having examined the essence of the fundamental right in question, did the CJEU move to the second step, that is to proportionality assessment. This part of the CJEU's analysis, however, concerned exclusively the second and third categories mentioned above. For, having already found that the essence of the fundamental right of the holders of the information on the taxpayer was compromised, the proportionality assessment as regards this category was not necessary and therefore was not carried out.

20| *Ibid*, paragraph 66).

21| *Ibid*, paragraph 69).

22| *Ibid*, paragraph 84).

23| *Ibid*, paragraph 102).

The proportionality assessment was thus justified only in relation to the second and to the third category of individuals. In this regards the CJEU first verified whether an objective of general interest recognised by the Union was met by the legislation in question. Having responded in the affirmative, it examined whether the limitation in question complied with the principle of proportionality. For both the second and the third category of individuals the CJEU concluded that the legislation in question was suitable for achieving the objective of combating international tax fraud and tax evasion pursued by Directive 2011/16 and was necessary to achieve it.²⁴ As a result it held in the end that the legislation was proportionate.

In the judgment of *État luxembourgeois (Right to bring an action against a request for information in tax matters)* (C-245/19 and C-246/19), the CJEU found then that the legislation in question violated the essence of the right enshrined in Article 47 of the Charter as regards persons holding the information what meant that the proportionality assessment was redundant. Conversely, it did not violate the essence of the right of the taxpayer concerned nor that of the third parties. These CJEU's findings triggered the proportionality assessment only as regards the second and the third category of individuals. In both cases the limitation was found to be proportionate.

3.3. General look at CJEU case-law.

Can we then say that the fifth anniversary of the *Schrems* judgment was used by the CJEU to stress its consequence in promoting a certain clear-cut methodology in the application of Article 52(1) of the Charter? It does not seem to be that obvious given three other decisions of the Grand Chamber pronounced on the same day. In all three the issue of limitation on the exercise of fundamental rights was at stake but whether the two-step analysis was effectuated is not that evident as in the *État luxembourgeois* judgment.

First, on that day, the CJEU rendered also two judgments concerning Directive 2002/58,²⁵ and the respect of rights guaranteed in Article 7, Article 8 and Article 11 of the Charter by measures providing for the retention and transmission of traffic and location data: cases *Privacy International*²⁶ and *La Quadrature du Net and Others*.²⁷ In both judgments, after having quoted Article 52(1) of the Charter, the CJEU did not present any stance on the respect of the essence

24| The necessity not being expressly explained, but only indirectly in paragraphs 89 to 90.

25| Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

26| Judgment of 6 October 2020, *Privacy International* (C-623/17, [EU:C:2020:790](#)).

27| Judgment of 6 October 2020, *La Quadrature du Net and Others* (C-511/18, C-512/18 and C-520/18, [EU:C:2020:791](#)).

of fundamental rights in relation of the measures concerned. Admittedly, this approach could have been justified by the fact that these judgments form part of existing case-law in the field of data retention where the question of respecting the essence of fundamental rights by the measures concerned had already been dealt with in the affirmative, in the judgments of *Digital Rights Ireland and Others*²⁸ and *Tele 2 Sverige*.²⁹ The CJEU held therein already that 'So far as concerns the essence of the fundamental right to privacy and the other rights laid down in Article 7 of the Charter, it must be held that, even though the retention of data required by Directive 2006/24 constitutes a particularly serious interference with those rights, it is not such as to adversely affect the essence of those rights given that, as follows from Article 1(2) of the directive, the directive does not permit the acquisition of knowledge of the content of the electronic communications as such'.³⁰ Whether this conclusion closed the debate on the essence of the right to privacy and the other rights laid down in Article 7 of the Charter is nevertheless in my opinion disputable.

Second, in judgment *Commission v Hungary (Higher education)*,³¹ rendered in the procedure on the failure of a Member State to fulfil its obligations, concerning a national legislation of a Member State imposing conditions for the supply of higher education services within its territory and its admissibility in the light of Articles 13, Article 14(3) and Article 16 of the Charter, the CJEU didn't take any stance on the issue of the respect of the essence of these rights but proceeded with the proportionality assessment.

Why is that? We can assume that in these three cases the CJEU considered that the measures in question did not compromise the essence of rights enshrined in the respective articles of the Charter. Nonetheless, by not carrying out the distinct analysis of the essence of these rights and presenting it clearly as a separate test, the CJEU seems not to have sufficiently underlined the particular status of the rights' core.

Perhaps there are other reasons that the essence of the fundamental rights in question was not the centre of the analysis of these three judgments? Maybe in the case of some rights determining what is the core of a fundamental right is just not an easy task.

28| Judgment of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, [EU:C:2014:238](#)).

29| Judgment of 21 December 2016, *Tele2 Sverige and Watson and Others* (C-203/15 and C-698/15, [EU:C:2016:970](#)).

30| See judgment in of 8 April 2014, *Digital Rights Ireland and Others* (C-293/12 and C-594/12, [EU:C:2014:238](#), paragraph 39) referred to in paragraph 101 of the judgment in *Tele2 Sverige and Watson and Others*.

31| Judgment of 6 October 2020, *Commission v Hungary (Higher education)* (C-66/18, [EU:C:2020:792](#)).

This brings me to the issue of determination of the boundaries of a fundamental right's core. The problem is that in most cases the CJEU limits itself to declaring that a given limitation does not affect the essence of the right, very often by simply putting forward that the essence is not compromised since the right is 'not called into question as such'.³² In consequence, determining the boundaries of the rights' core in a positive way may turn out to be extremely complicated.

In order to be able to determine what constitutes the essence of each fundamental right one needs more comparative material on one particular right. Since it does not seem to be possible to devise a universal definition more precise than the one cited above. The more universal the definition, the less useful it is in practice.

But, there is one fundamental right that is very often referred to in recent years and one of the two rights where the CJEU expressly held that measures imposing its limitations compromised its essence. I am thinking of the right to effective judicial protection enshrined in Article 47 of the Charter. Admittedly, the question of the essence of this right does not necessarily appear in the CJEU case-law in the context of the legality of limitations of fundamental rights as determined by Article 52(1) of the Charter. But, there should be no doubt that in the following context the term essence is used to describe the same notion, that is the absolute protection of the core of a fundamental right.

In this regard, in cases on the rule of law and judicial independence the CJEU repeated a number of times that the 'requirement that courts be independent, which is inherent in the task of adjudication, forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial'.³³ In the context of the asylum rights, the CJEU held in particular that 'national legislation which does not guarantee any judicial review of the lawfulness of an administrative decision ordering the detention of an applicant for international protection or an illegally staying third-country national ... undermines the essential content of the right to effective judicial protection, guaranteed in Article 47 of the

32| See to that effect, judgments of 13 June 2017, *Florescu and Others* (C-258/14, [EU:C:2017:448](#), paragraph 55); and of 20 March 2018, *Menci* (C-524/15, [EU:C:2018:197](#), paragraph 43); and of 12 July 2018, *Spika and Others* (C-540/16, [EU:C:2018:565](#), paragraph 39); and of 14 January 2021, *Stichting Varkens in Nood and Others* (C-826/18, [EU:C:2021:7](#), paragraph 66).

33| Phrase repeated in a series of judgments given recently, like: judgments of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)* (C-824/18, [EU:C:2021:153](#), paragraph 116); and of 20 April 2021, *Repubblika* (C-896/19, [EU:C:2021:311](#), paragraph 51); and of 18 May 2021, *Asociația 'Forumul Judecătorilor din România' and Others* (C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, [EU:C:2021:393](#), paragraph 195); and of 15 July 2021, *Commission v Poland (Disciplinary regime for judges)* (C-791/19, [EU:C:2021:596](#), paragraph 58).

Charter'.³⁴ And in a more general context the CJEU held that 'national legislation which results in a situation where the judgment of a court remains ineffective because that court does not have any means of securing observance of the judgment fails to comply with the essential content of the right to an effective remedy enshrined in Article 47 of the Charter'.³⁵

It follows from the above that the essence of the right to effective judicial protection contains at least three elements: 1) the independence of courts, 2) the right to a judicial review of administrative decisions, 3) effectivity of judicial decisions. It shows that for some rights it is possible to determine elements constitutive of their essence. Is it however possible for all the fundamental rights?

4. Conclusion

If I were to attempt to make some concluding remarks, I would start with one fundamental observation. Following the wording of Article 52(1) of the Charter, the case-law of the CJEU is – in principle – based on the approach that in the first place one has to analyse the scope of the essence of a given fundamental right in order to identify whether the limitation in question respects this essence. Only if this essence is respected can we move on to analysing the question of whether the limitation is proportionate.

This 'ideal approach' is, however, much more complicated in practice. This is so for two reasons.

First, with regard to many fundamental rights, it is very difficult to identify their essence. In fact, the CJEU – in its case-law – identified the essence of two, maximum three, fundamental rights. In other cases, the CJEU either proceeded directly to the analyses of proportionality without entering into the issues of the essence or limited its analysis to a simple observation that the essence of the fundamental right in question was respected.

34| See, to that effect, judgment of 14 May 2020, *Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* (C-924/19 PPU and C-925/19 PPU, [EU:C:2020:367](#), paragraph 290).

35| See, to that effect, judgments of 19 December 2019, *Deutsche Umwelthilfe* (C-752/18, [EU:C:2019:1114](#), paragraph 35) and of 29 July 2019, *Torubarov* (C-556/17, [EU:C:2019:626](#), paragraph 72).

Second, the question must be asked whether it is at all possible to identify the essence in relation to each fundamental right. Perhaps there are fundamental rights whose essence cannot be identified and any restriction of them can be analysed from the point of view of proportionality? The “freedom to conduct a business” (Article 16 of the Charter) or the ‘right to intellectual property’ (Article 17(2) of the Charter) come to mind in this context. Can we imagine a restriction that would in all circumstances violate the ‘freedom to conduct a business’ or the ‘right to intellectual property’? In my view, that would be difficult. However, one must be aware that this would mean nothing more than assuming that certain fundamental rights do not have an ‘essence’. To paraphrase George Orwell, we could say that ‘all fundamental rights are equal but some are more equal than other’.

There are also other challenges facing the CJEU which are related to the interpretation of Article 52(2) of the Charter.

In the first place, I would mention the relation between the concept of the essence of a fundamental right employed in this provision and the concept the substance of that right. The latter concept is used in the case-law in relation, for example, to the rights stemming from European citizenship.³⁶

Moreover, we are still waiting for the clarification in our jurisprudence of the concept of the essence of fundamental rights in the context of the need to strike a balance between several conflicting fundamental rights. One can imagine a situation in which the limitation of the exercise of a fundamental right results from the need to protect the essence of another fundamental right. In other words, how one should reconcile conflicting ‘essences’ of two fundamental rights. Perhaps the Charter should be interpreted in such a way that the essence of one fundamental right can never affect the essence of another fundamental right? All this leads us to the need for an in-depth analysis of the extent to which the essence of a fundamental right can be relative.

I have no doubt that, in order to meet these challenges, both the CJEU and the constitutional courts of the Member States should look at each other’s jurisprudence with appropriate goodwill. We should learn from each other.

36| Judgments of 8 March 2011, *Ruiz Zambrano* (C-34/09, [EU:C:2011:124](#)), of 13 September 2016, *Rendón Marín* (C-165/14, [EU:C:2016:675](#)) and of 13 September 2016, *CS*, C-304/14, [EU:C:2016:674](#).



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Contribution de M. André Alen, Président de la Cour constitutionnelle du Royaume de Belgique

Limitations de l'exercice des droits fondamentaux dans le contexte du pluralisme constitutionnel¹

L'objet principal du présent exposé est de démontrer que l'article 52(1) de la Charte des droits fondamentaux de l'Union européenne n'est pas une disposition isolée. Premièrement, cette disposition ne saurait être dissociée des critères de limitation contenus dans la Convention européenne des droits de l'homme et dans les constitutions nationales. D'où le titre de mon exposé. Et deuxièmement, l'article 52(1) de la Charte est indissociablement lié à l'article 53 de celle-ci². La combinaison de ces deux points d'attention peut avoir pour effet que les juges nationaux sont confrontés avec une mission extrêmement difficile lorsqu'ils doivent contrôler une mesure nationale qui relève du champ d'application du droit de l'Union européenne au regard d'un droit fondamental protégé tant par la constitution nationale que par la Charte et par la Convention européenne des droits de l'homme.

Compte tenu de cette préoccupation, je voudrais me pencher sur les deux points d'attention précités. Je commencerai par comparer les trois systèmes de limitations (I), pour démontrer ensuite le lien indissociable entre l'article 52(1) et l'article 53 de la Charte (II). Puis j'illustrerai, d'une part, la grande ouverture de la Cour constitutionnelle vis-à-vis du droit de l'Union européenne (III) et, d'autre part, les limites que la Cour a récemment fixées à la primauté du droit de l'Union sur la Constitution (IV). Enfin, je suggérerai que la solution réside dans un dialogue entre les juges (V) et j'émettrai une proposition concrète afin de tempérer la jurisprudence *Melloni* (VI).

1 | L'intervention orale de M. François Daoût, ancien président de la Cour constitutionnelle belge, participant à la conférence, renvoie à la présente contribution, rédigée par André Alen, ancien président de la Cour constitutionnelle, en collaboration avec M. Willem Verrijdt, référendaire à la Cour constitutionnelle.

2 | Peers, S., Hervey, T., Kenner, J., et Ward, A., (éds), *The EU Charter of Fundamental Rights*, Oxford, Hart Publishing, 2014, p. 1459.

1. Comparaison entre l'article 52(1) de la Charte et les critères de limitation contenus dans la Convention européenne des droits de l'homme et dans la Constitution belge

L'article 52(1) de la Charte dispose :

« Toute limitation de l'exercice des droits et libertés reconnus par la présente Charte doit être prévue par **la loi** et respecter **le contenu essentiel** desdits droits et libertés. Dans le respect du principe de **proportionnalité**, des limitations ne peuvent être apportées que si elles sont **nécessaires** et répondent effectivement à des **objectifs d'intérêt général** reconnus par l'Union ou au besoin de **protection des droits et libertés d'autrui** » (c'est l'auteur qui souligne).

La Charte applique en grande partie un système matériel de critères de limitation, comme c'est également le cas pour la Convention européenne des droits de l'homme. La Constitution belge, en revanche, applique un système plutôt formel de critères de limitation.

Les critères de limitation mentionnés à l'article 52(1) de la Charte font fortement penser aux critères de limitation bien connus tels qu'ils sont appliqués depuis des décennies dans la jurisprudence de la Cour européenne des droits de l'homme (CEDH) :

(1) Même si la jurisprudence de la Cour de justice de l'Union européenne n'est pas univoque, il y a lieu, pour les droits correspondant à des droits garantis par la Convention européenne des droits de l'homme, d'appliquer la jurisprudence de la Cour européenne des droits de l'homme, selon laquelle la condition que la limitation doit être prévue par **la loi** ne suppose pas qu'il s'agisse d'une norme législative formelle, de sorte que le fondement légal peut également résider dans des normes émanant du pouvoir exécutif, voire dans une jurisprudence nationale constante³. À l'instar de la jurisprudence de la Cour européenne des droits de l'homme, la Cour de justice fixe des exigences de qualité à ce fondement légal : il doit être clair, prévisible et accessible, afin que tous les justiciables sachent clairement dans quelles circonstances la limitation sera appliquée⁴.

3| Peers, S., e.a., o.c., p. 1471.

4| *Ibidem*, p. 1473.

- (2) La limitation doit répondre à des **objectifs** d'intérêt général reconnus par l'Union ou au besoin de protection des droits et libertés d'autrui. Cette condition nous fait songer à l'énumération des biens juridiques à protéger figurant aux articles 8 à 11 de la Convention européenne des droits de l'homme. En réalité, les objectifs qui peuvent être poursuivis par une limitation d'un droit fondamental garanti par la Charte sont formulés de manière plus vague encore et n'ont donc, dans la pratique, pratiquement pas de limites⁵.
- (3) Comme dans la Convention européenne des droits de l'homme, le principal critère est celui de la **proportionnalité**. La formulation contenue dans l'article 52(1) de la Charte est un peu plus rigoureuse dans sa terminologie que « la nécessité dans une société démocratique » mentionnée dans la Convention européenne des droits de l'homme. En effet, la Charte pose comme principe que chaque limitation doit respecter « le contenu essentiel » du droit fondamental limité, mais aussi qu'elle doit être « nécessaire » et qu'elle doit « répondre effectivement » au but poursuivi. Il apparaît dans la pratique que ces critères de contrôle ne sont pas distincts, mais qu'ils constituent plutôt des éléments que la Cour de justice associe à son contrôle de proportionnalité, en mettant en balance les intérêts publics poursuivis par la limitation d'un droit fondamental et l'impact de la mesure sur les personnes concernées⁶.

Il n'est pas surprenant que le système de limitations contenu dans la Charte soit à ce point semblable au système de limitations contenu dans la Convention européenne des droits de l'homme, eu égard à **l'article 52(3) de la Charte**, qui dispose :

« Dans la mesure où la présente Charte contient des droits correspondant à des droits garantis par la Convention européenne de sauvegarde des droits de l'Homme et des libertés fondamentales, leur sens et leur portée sont les mêmes que ceux que leur confère ladite convention. Cette disposition ne fait pas obstacle à ce que le droit de l'Union accorde une protection plus étendue ».

5| Peers, S., e.a., o.c., p. 1476.

6| *Ibid.*, p. 1480.

La Cour de justice n'applique pas toujours cette disposition lorsqu'elle interprète le contenu d'un droit fondamental analogue⁷, mais elle applique apparemment la philosophie de cette disposition sur le plan des critères de limitation.

En revanche, il existe, en ce qui concerne la possibilité de limiter des droits fondamentaux, une grande diversité entre les **constitutions nationales** des États membres. Certains connaissent un système de limitations qui déroge considérablement au système contenu dans les conventions européennes relatives aux droits de l'homme. Sur ce point, la Constitution belge de 1831 diffère nettement, elle aussi, du système matériel prévu par la Convention européenne des droits de l'homme et par la Charte, dès lors qu'elle applique un **système plutôt formel de limitations de droits fondamentaux**. Dans ce système belge, deux critères sont importants :

- (1) Tout d'abord, la majorité des droits et libertés garantis par les articles 8 à 32 de la Constitution ne peuvent être limités que par une **norme législative formelle**. La seule exception est l'article 26, alinéa 2, de la Constitution, d'après lequel les rassemblements en plein air restent entièrement soumis aux lois de police. On entend ici le terme de « loi » dans son sens matériel.
- (2) Ensuite, la Constitution établit une distinction entre les **limitations régulatrices, répressives et préventives**. Les mesures régulatrices, qui ont pour objet l'exercice régulier des droits et libertés sans porter d'atteinte substantielle à ces derniers, et les mesures répressives, qui punissent les infractions commises dans l'exercice des droits et libertés, sont toujours autorisées. Par contre, les mesures préventives sont toujours interdites, l'unique exception étant les rassemblements en plein air.

En conséquence, le système de limitations de l'exercice des droits fondamentaux prévu dans la Constitution belge diffère fondamentalement du système de limitations contenu dans les conventions européennes relatives aux droits de l'homme. Mais la **Cour constitutionnelle a éliminé en partie ces différences**, en lisant toujours les droits et libertés constitutionnels en combinaison avec les dispositions analogues de la Convention européenne des droits de l'homme et de la Charte, qui – pour reprendre les termes utilisés par la Cour constitutionnelle – constituent un « ensemble indissociable ». Et du fait de cette lecture combinée de droits fondamentaux analogues, la Cour constitutionnelle applique également, dans son contrôle

7| Callewaert, J., « Leur sens et leur portée sont les mêmes. Quelques réflexions sur l'article 52, § 3 de la Charte des droits fondamentaux de l'Union européenne », *JT* 2012, p. 596. Voir pour un exemple dans lequel la Cour de justice nie la jurisprudence strasbourgeoise en matière du principe *non bis in idem* : CJUE (grande chambre), 26 février 2013, *Åkerberg Fransson*, (C-617/10, [EU:C:2012:340](#)).

au regard des droits fondamentaux, un contrôle de proportionnalité classique, alors que la Constitution belge de 1831 ne connaissait pas encore cette technique.

De cette manière, les conditions de limitation contenues dans les conventions européennes relatives aux droits de l'homme, qui fixent des garanties tant sur le plan matériel que sur celui des possibilités de limitations, garanties qui n'étaient pas prévues dans la Constitution belge, ont été intégrées par la Cour constitutionnelle dans son interprétation des droits et libertés constitutionnels. La Cour a ainsi **éliminé une des tensions potentielles entre la Constitution et les conventions européennes relatives aux droits de l'homme**. Cette stratégie permet aussi d'éviter les dangers qui iraient de pair avec une telle tension, comme l'insécurité juridique pour les justiciables et les juridictions et le risque de condamnations à Strasbourg et à Luxembourg.

Mais à l'inverse, **la Constitution belge continue à offrir une protection juridique plus étendue sur le plan des possibilités de limitations** que celle qu'offrent les deux conventions européennes relatives aux droits de l'homme : en effet, seule la Constitution belge exige presque toujours l'existence d'une norme législative formelle et elle seule interdit presque toujours les limitations préventives.

Dans la relation entre la Constitution et la Convention européenne des droits de l'homme, cette protection juridique plus étendue n'a jamais été un problème. L'article 53 de la Convention, dans l'interprétation qu'en fait la Cour européenne des droits de l'homme, implique en effet que la Convention se borne à imposer un **standard minimum**, qui peut parfaitement se concilier avec une protection juridique plus étendue émanant des constitutions nationales. Dans la relation entre la Constitution et la Charte, en revanche, des problèmes peuvent surgir. Et c'est dans ce contexte que la relation entre l'article 52(1) et l'article 53 de la Charte est pertinente.

2. La relation entre les articles 52(1) et 53 de la Charte

L'article 53 de la Charte dispose :

« Niveau de protection

Aucune disposition de la présente Charte ne doit être interprétée comme limitant ou portant atteinte aux droits de l'homme et libertés fondamentales reconnus, dans leur champ d'application respectif, par le droit de l'Union, le droit international et les conventions internationales auxquelles sont parties l'Union, ou tous les États membres, et notamment la Convention européenne de sauvegarde des droits de l'Homme et des libertés fondamentales, ainsi que par les constitutions des États membres ».

Ce texte ressemble fortement à celui de l'article 53 de la Convention européenne des droits de l'homme :

« Sauvegarde des droits de l'homme reconnus.

Aucune des dispositions de la présente Convention ne sera interprétée comme limitant ou portant atteinte aux droits de l'homme et aux libertés fondamentales qui pourraient être reconnus conformément aux lois de toute Partie contractante ou à toute autre Convention à laquelle cette Partie contractante est partie ».

Les termes utilisés dans les deux dispositions sont fort semblables et toutes deux sont **formulées** comme une clause de priorité de la protection juridique la plus étendue. En analysant purement le texte, l'on devrait donc conclure que l'article 53 de la Charte impose lui aussi une norme minimale de protection juridique et que les constitutions nationales peuvent donc toujours prévoir une protection juridique plus étendue. En rapprochant les articles 52(1) et 53 de la Charte, l'on pourrait donc partir du principe que le système de limitation de droits fondamentaux contenu dans la Charte n'offre que des garanties minimales et que les constitutions nationales peuvent encore imposer des critères de limitation complémentaires, qu'il y a lieu d'appliquer cumulativement avec les critères de limitation européens. En pareille hypothèse, eu égard à la jurisprudence précitée de la Cour constitutionnelle en ce qui concerne l'analogie entre les normes en question, il n'existerait aucune tension potentielle entre la Constitution belge et les conventions européennes relatives aux droits de l'homme et il n'y aurait aucun risque de divergences dans les contrôles au regard des droits fondamentaux.

Mais telle n'est pas l'interprétation que la Cour de justice a donnée à cette disposition dans son célèbre arrêt *Melloni*. La Cour de justice a interprété cette disposition à la lumière de trois principes : le principe de la primauté, le principe de l'effet utile et le principe de l'application uniforme du droit de l'Union européenne.

L'arrêt avait été rendu à la suite d'une question préjudicielle posée par le *Tribunal Constitucional* espagnol. L'Italie demandait l'extradition de Stefano Melloni, qui avait déjà été condamné par défaut en Italie. La Constitution espagnole accorde à chaque personne qui a été condamnée par défaut le droit à un nouveau procès, alors que la législation italienne ne prévoyait pas, dans ce cas, de droit à une procédure d'opposition. De même, la décision-cadre relative au mandat d'arrêt européen ne permettait pas au juge espagnol de subordonner l'extradition à la tenue d'un nouveau procès en Italie. C'est pourquoi le *Tribunal Constitucional* espagnol avait demandé à la Cour de justice si le juge espagnol pouvait se prévaloir de la protection plus élevée contenue dans la Constitution espagnole pour exiger ce nouveau procès. La Cour de justice a répondu à cette question par la négative. Elle a jugé que les autorités et

juridictions nationales peuvent appliquer des standards nationaux de protection des droits fondamentaux « pourvu que cette application ne compromette pas le niveau de protection prévu par la Charte, telle qu'interprétée par la Cour, ni la primauté, l'unité et l'effectivité du droit de l'Union »⁸. Ou, dans d'autres termes : la primauté de la protection juridique la plus étendue vaut intégralement en faveur de la Charte, mais pas intégralement en faveur des constitutions nationales.

L'arrêt *Melloni* a essuyé de **nombreuses critiques** dans la doctrine⁹. Certains auteurs parlent d'une prise de pouvoir de la Cour de justice au détriment des cours constitutionnelles : suite à cet arrêt, le contrôle de la constitutionnalité de la législation nationale devient quasi impossible lorsque le droit de l'Union européenne est applicable, dans la mesure où la constitution nationale offre une protection des droits de l'homme plus étendue que la Charte. D'autres auteurs, plus modérés, constatent que la Cour de justice met en cause la position des cours constitutionnelles par rapport aux juridictions internes. D'autres encore se demandent dans quelle mesure la Cour de justice instrumentalisera encore davantage les trois principes précités.

J'ai eu aussi l'occasion de constater une opposition à l'arrêt *Melloni* lors de nombreux contacts bilatéraux et multilatéraux avec des **cours constitutionnelles** étrangères. Ainsi, Madame Jadranka Sovdat, alors Vice-Présidente de la Cour constitutionnelle slovène, a affirmé que cet arrêt peut entraîner aussi bien une réduction du niveau de protection juridique offert par la constitution nationale que l'apparition de deux standards de protection des droits de l'homme dans le même État, l'un hors du champ d'application du droit de l'Union européenne et l'autre dans ce champ d'application, de sorte que l'application uniforme de la Constitution est mise en péril¹⁰.

Je n'ai nullement l'intention d'examiner toutes ces critiques, même si certaines d'entre elles ont un **fond de vérité**. Pourquoi la primauté, l'effet utile et l'application uniforme des constitutions nationales seraient-ils subordonnés à la primauté, à l'effet utile et à l'application uniforme du droit de l'Union ? Dans un contexte de pluralisme constitutionnel, ces deux niveaux juridiques ont la même importance et **la même nature originelle**. L'interprétation d'un élément donné de l'ordre juridique à plusieurs niveaux ne peut porter atteinte à l'effectivité des autres éléments, et c'est précisément ce que fait l'arrêt *Melloni*.

8 | CJUE (grande chambre) 26 février 2013, *Melloni*, (C-339/11, [EU:C:2013:107](#), point 60).

9 | Par ex. Komarek, J., "The Place of Constitutional Courts in the EU", *ECLRev* 2013, p. 421; Reestman, J.H., et Besselink, L., "Editorial", *EuConst* 2013, p. 172; Torres Pérez, A., "Melloni in three acts: from dialogue to monologue", *EuConst* 2014, p. 308-331.

10 | Sovdat, J., "The Constitutional Court of the Republic of Slovenia and European Union Law", *HKJU - CCPA* 2013, p. 905-906.

Le Président de la Cour de justice, mon collègue Koen Lenaerts, a le mérite de ne pas se soustraire à ce débat difficile. Dans une contribution rédigée pour le *Liber amicorum* offert au président émérite de la Cour constitutionnelle Marc Bossuyt, il a indiqué qu'il convient de lire l'arrêt *Melloni* en combinaison avec l'arrêt *Åkerberg Fransson*, prononcé le même jour. Dans ce dernier arrêt, la Cour de justice admet que la juridiction nationale vérifie si une sanction fiscale ne revêt pas un caractère pénal et si le cumul de sanctions fiscales et pénales prévu par la législation nationale par rapport aux standards nationaux viole le principe *ne bis in idem*¹¹. Selon le Président Lenaerts, la différence réside dans le fait que, dans le cas de *Melloni*, le législateur de l'Union a **uniformisé** lui-même le **standard en matière de droits fondamentaux** en ce qui concerne les procédures d'extradition, alors que, dans le cas du principe *non bis in idem*, la diversité reste très importante entre les États membres, dès lors que tous ne sont même pas parties au Septième Protocole additionnel à la Convention européenne des droits de l'homme¹².

Selon nous, cette observation démontre précisément qu'en l'espèce, ce standard uniformisé en matière de droits fondamentaux est imposé non pas par un texte conventionnel, tel que la Charte, mais bien par une décision-cadre, soit un acte du **droit dérivé de l'Union**. Or, de telles normes doivent être transposées ou mises en œuvre dans la législation nationale par le législateur national. À chaque fois que le législateur de l'Union harmonise une matière, ce qui arrive de plus en plus souvent, la législation nationale qui en découle échapperait donc à un contrôle au regard de la constitution nationale. Il semble qu'une telle façon de procéder méconnaisse le pluralisme constitutionnel.

Dans le cas spécifique de la décision-cadre relative au mandat d'arrêt européen, la grande chambre de la Cour de justice s'est freinée par la suite. D'après un arrêt du 5 avril 2016 en cause de *Pál Aranyosi* et de *Robert Căldăraru* et plusieurs arrêts ultérieurs, l'autorité judiciaire d'exécution doit refuser l'exécution d'un mandat d'arrêt si le risque de violation des **droits de l'homme** est trop grand, par exemple si les conditions des prisons dans l'État d'émission sont méprisables¹³. Ce changement de cap est probablement dû à l'influence de plusieurs cours constitutionnelles, dont celle de Belgique¹⁴.

11 | CJUE (grande chambre) 26 février 2013, *Åkerberg Fransson*, (C-617/10, [EU:C:2012:340](#), points 32-37).

12 | Lenaerts, K., "Human rights protection through judicial dialogue between national constitutional courts and the European Court of Justice", in *Liber amicorum Marc Bossuyt*, Anvers, Intersentia, 2013, P. 367-377.

13 | CJUE (grande chambre) 5 avril 2016, (C-404/15, [EU:C:2016:198](#) et C-659/15 PPU, [EU:C:2016:140](#)).

14 | Alen, A., et Verrijdt, W., « L'influence de la Cour constitutionnelle belge sur la Cour européenne des droits de l'homme et sur la Cour de justice de l'Union européenne », in Ziemele, I., (éd.), *The Role of Constitutional Courts in the Globalised World of the 21st Century*, Riga, Constitutional Court of Latvia, 2019, p. 133.

Plusieurs cours constitutionnelles, dont celle de Belgique, ont également réagi à la jurisprudence *Melloni*. Mais avant de commenter la réaction de la Cour constitutionnelle belge, je tiens d'abord à la **contextualiser**. Ceci m'amène au troisième point, à savoir la mesure dans laquelle cette Cour se montre coopérative dans le contexte du pluralisme constitutionnel.

3. La Europarechtsfreundlichkeit de la Cour constitutionnelle belge

Comme l'écrit le Professeur Laurence Burgorgue-Larsen¹⁵, la Cour constitutionnelle belge se montre, parmi les cours constitutionnelles européennes, **la plus ouverte** à l'influence tant du droit de l'Union que de la Convention européenne des droits de l'homme. Cette ouverture peut être illustrée notamment par les constatations suivantes :

- (i) L'article 142 de la Constitution n'habilite la Cour qu'à exercer un contrôle direct des normes législatives au regard des normes répartitrices de compétences entre l'État fédéral et les entités fédérées et au regard des droits fondamentaux garantis par le Titre II et les articles 170, 172 et 191 de la Constitution. La Cour n'est pas compétente pour contrôler directement si la législation viole le droit européen et international.

Mais la Cour a développé deux techniques afin de **contrôler indirectement la législation au regard du droit européen et international**¹⁶.

En matière de droits fondamentaux, le contrôle par le biais **des droits fondamentaux analogues** est la technique la plus importante de contrôle indirect au regard de dispositions conventionnelles. En combinant les droits et libertés garantis par la Constitution avec les droits fondamentaux analogues garantis par les traités¹⁷, la Cour peut appliquer aussi bien la portée matérielle que les conditions de limitations telles qu'elles découlent de la jurisprudence de Luxembourg et de Strasbourg. De cette manière, la Cour peut donner aux dispositions constitutionnelles belges relatives aux droits fondamentaux, dont la plupart n'ont pas changé depuis 1831, une interprétation évolutive qui les fait correspondre à l'interprétation contemporaine qui découle de la jurisprudence des deux cours européennes.

15| Burgorgue-Larsen, L., « Chronique de jurisprudence européenne comparée 2016 », *RDP* 2017, p. 1099-1102.

16| Rosoux, G., *Vers une dématérialisation des droits fondamentaux ?*, Bruxelles, Bruylant, 2015, p. 135-165 ; Alen, A., Spreutels, J., Peremans, E., et Verrijdt, W., "Belgique", in Huppmann, R., et Schnabl, R., (éds.), *La coopération entre les Cours constitutionnelles en Europe*, Vienne, Verlag Österreich, 2014, p. 295-303.

17| Jurisprudence constante depuis l'arrêt n° 136/2004 du 22 juillet 2004.

À chaque fois qu'aucun droit fondamental analogue n'est en cause, la Cour peut alors avoir recours à son autre technique de contrôle indirect, fondée sur **le principe d'égalité et de non-discrimination** garanti par les articles 10 et 11 de la Constitution. En effet, ce principe interdit toute discrimination, quelle que soit son origine. La Cour peut constater une violation du principe d'égalité et de non-discrimination lorsque le législateur établit une discrimination à l'égard de tous les droits et libertés garantis par la Constitution, par les principes généraux du droit et par le droit européen et international.

Via les deux techniques précitées, la Cour constitutionnelle contrôle la législation indirectement au regard du droit de l'Union dans environ 10 % de ses arrêts et au regard de la Convention européenne des droits de l'homme dans environ 33 % de ses arrêts. À chaque fois, la Cour renvoie à **la jurisprudence pertinente de la Cour de justice et de la Cour européenne des droits de l'homme**. Dans ce cadre, il est intéressant d'indiquer que l'application de la Charte montre une tendance à la hausse : en 2018, 17 % des arrêts de la Cour constitutionnelle ont mentionné la Charte¹⁸.

Lorsque la Cour constitutionnelle associe ainsi à son contrôle les conventions européennes relatives aux droits de l'homme, elle examine non seulement la portée matérielle du droit fondamental concerné, mais aussi les **conditions de limitations** matérielles contenues dans ces conventions. Ainsi, la Cour combine l'exigence constitutionnelle d'une norme législative formelle avec les conditions de limitations matérielles contenues dans les conventions, maximisant de la sorte la protection juridique¹⁹. La Cour n'autorise ainsi la limitation d'un droit fondamental analogue que s'il est satisfait à quatre conditions :

- la limitation est prévue par une norme législative formelle qui est suffisamment claire, prévisible et accessible;
- elle est dictée par un besoin social impérieux;
- elle poursuit un objectif légitime;
- les effets de la limitation sont proportionnés à cet objectif²⁰.

18| Lambrecht, S., "Belgium: The EU Charter in a Tradition of Openness", in Bobek, M., et Prassl, J., (éds.), *The EU Charter of Fundamental Rights: Ten Years On*, Oxford(éds.), *The EU Charter of Fundamental Rights: Ten Years On*, Oxford, Hart Publishing, 2020, p. 87-108.

19| Alen, A., et Muylle, K., *Handboek van het Belgisch Staatsrecht*, Malines, Kluwer, 2011, p. 526.

20| Par ex. CC n° 202/2004, 21 décembre 2004.

- (ii) À l'inverse, la Cour constitutionnelle renvoie parfois au droit de l'Union **pour justifier une différence de traitement**, notamment lorsqu'une catégorie de personnes dont la situation ne relève pas du champ d'application du droit de l'Union est traitée différemment d'une catégorie de personnes dont la situation relève du champ d'application du droit de l'Union²¹.
- (iii) À chaque fois que le droit de l'Union est applicable, la Cour constitutionnelle se conforme également aux **obligations procédurales** qui découlent de la « jurisprudence luxembourgeoise », de la CJUE, comme l'interprétation conforme au droit de l'Union, le contrôle d'office au regard du droit de l'Union, l'interdiction de maintenir les effets d'une disposition sanctionnée pour violation du droit de l'Union européenne, et l'obligation de prendre des mesures conservatoires²².
- (iv) Enfin, la Cour constitutionnelle respecte la jurisprudence *CILFIT* et *Foto-Frost*, en posant très régulièrement à la Cour de justice des **questions préjudicielles d'interprétation** et des **questions préjudicielles de validité**. À ce jour, elle a déjà posé des questions préjudicielles dans 36 arrêts, pour un total de 128 questions²³.

4. Les limites fondées sur l'article 34 de la Constitution belge

La Cour constitutionnelle montre donc une très nette ouverture vis-à-vis de l'influence du droit de l'Union, mais cette ouverture **n'est pas synonyme d'obéissance aveugle**, pas plus qu'elle n'est illimitée. Elle dépend aussi de l'attitude de la Cour de justice dans le contexte du pluralisme constitutionnel. En 2016, la Cour constitutionnelle a rendu un arrêt qui doit être considéré comme une **réaction** à l'arrêt *Melloni*. Dans cet arrêt, la Cour a invoqué l'article 34 de la Constitution pour fixer des limites au caractère absolu des principes de la primauté, de l'effet utile et de l'application uniforme du droit de l'Union européenne.

21 | Par ex. CC n° 56/2009, 19 mars 2009; CC n° 118/2012, 10 octobre 2012.

22 | Theunis, J., "Het Grondwettelijk Hof en de procedurele verplichtingen uit het Europese Unierecht", in Pas, W., Peeters, P., et Verrijdt, W., (éds.), *Liber discipulorum André Alen*, Bruges, La Chartre, 2015, p. 409-438.

23 | Alen, A., et Verrijdt, W., « Le dialogue préjudiciel de la Cour constitutionnelle belge avec la Cour de justice de l'Union européenne », in d'Argent, P., Renders, D., et Verdussen, M., (éds.), *Les visages de l'État. Liber amicorum Yves Lejeune*, Bruxelles, Bruylant, 2017, p. 33-74.

L'article 34 de la Constitution dispose :

« L'exercice de pouvoirs déterminés peut être attribué par un traité ou par une loi à des institutions de droit international public ».

Cette disposition a été insérée en 1970 dans la Constitution car **l'adhésion** de la Belgique aux Communautés européennes, en particulier, et aux autres organisations supranationales, comme le Conseil de l'Europe, n'avait pas de fondement constitutionnel et était donc en contradiction avec le principe de la souveraineté nationale ancré dans l'article 33 de la Constitution.

Il résulte de l'arrêt n° 62/2016 de la Cour constitutionnelle²⁴ que **trois principes** peuvent être déduits de l'article 34 de la Constitution, en ce qui concerne la relation entre le droit de l'Union et la Constitution :

- (1) c'est l'article 34 de la Constitution lui-même qui règle la hiérarchie entre la Constitution et le droit de l'Union. Cela signifie implicitement aussi que la Constitution est la plus haute norme juridique, puisque seule la norme juridique la plus élevée peut définir la hiérarchie des normes;
- (2) il résulte de l'article 34 de la Constitution que le droit de l'Union l'emporte en principe sur la Constitution belge²⁵;
- (3) mais cette primauté connaît **une exception importante**, qui s'impose tant aux législateurs internes qui donnent leur assentiment à des attributions de compétences, en l'espèce à l'Union européenne, qu'aux organes, en l'espèce ceux de l'Union européenne, qui font usage de ces compétences attribuées. Cette exception concerne « **l'identité nationale** inhérente aux structures fondamentales, politiques et constitutionnelles ou aux valeurs fondamentales de la protection que la Constitution confère aux sujets de droit » (c'est l'auteur qui souligne).

24| CC n° 62/2016, 28 avril 2016, B.8.7: « Lorsque le législateur donne assentiment à un traité qui a une telle portée, il doit respecter l'article 34 de la Constitution. En vertu de cette disposition, l'exercice de pouvoirs déterminés peut être attribué par un traité ou par une loi à des institutions de droit international public. Il est vrai que ces institutions peuvent ensuite décider de manière autonome comment elles exercent les pouvoirs qui leur sont attribués, mais l'article 34 de la Constitution ne peut être réputé conférer un blanc-seing généralisé, ni au législateur, lorsqu'il donne son assentiment au traité, ni aux institutions concernées, lorsqu'elles exercent les compétences qui leur ont été attribuées. L'article 34 de la Constitution n'autorise en aucun cas qu'il soit porté une atteinte discriminatoire à l'identité nationale inhérente aux structures fondamentales, politiques et constitutionnelles ou aux valeurs fondamentales de la protection que la Constitution confère aux sujets de droit ».

25| Voir également CC n°130/2010, 18 novembre 2010.

Cette limitation de la primauté du droit de l'Union rappelle évidemment le contrôle *ultra vires*, le contrôle d'identité et le contrôle au regard des droits fondamentaux, développés par la **Bundesverfassungsgericht allemande**. Jusqu'ici, cette Cour a souvent répété ces limites, mais (à ma connaissance) elle ne les a encore jamais utilisées pour rendre une norme du droit de l'Union inopérante dans l'ordre juridique allemand.

C'est à juste titre que la doctrine part du principe que la Cour constitutionnelle appliquera elle aussi la limitation précitée avec **la plus grande prudence** et qu'en tout état de cause, elle engagera toujours un dialogue préjudiciel avec la Cour de justice si elle envisage de s'aventurer dans cette voie²⁶.

Il est par ailleurs **peu probable** qu'elle doive s'y aventurer un jour, précisément parce que la Cour de justice et les cours constitutionnelles parlent, dans les grandes lignes, la même langue, à savoir celle des droits fondamentaux. Une question de validité portant sur des actes du droit dérivé de l'Union doit être soumise à la Cour de justice par tous les juges de tous les États membres. À cet égard, la Cour constitutionnelle belge n'a rien à envier à ses consœurs : plus d'un tiers de ses arrêts de renvoi préjudiciels contiennent, outre des questions d'interprétation, également des questions de validité. Si la Cour de justice conclut qu'il y a violation, la question de la protection juridique constitutionnelle plus étendue ne se pose pas, et si elle conclut qu'il n'y a pas de violation, la Cour constitutionnelle se range toujours à cette décision.

Une tension potentielle ne se situe pas tant sur le plan des garanties matérielles que sur celui des **critères de limitation**. Il peut se présenter à l'avenir des situations dans lesquelles la Cour de justice estime qu'une directive n'est pas contraire à la Charte et où la Cour constitutionnelle doit ensuite décider si la transposition littérale de la directive dans la législation belge n'est pas contraire à **l'interdiction constitutionnelle des mesures préventives**.

Une affaire de ce type est actuellement pendante devant la Cour constitutionnelle. Cette affaire étant *sub judice*, j'en parle avec la plus grande réserve possible. Une disposition légale permet aux professionnels des soins de santé de porter des informations professionnelles à la connaissance du public, à moins que ces informations aient pour objectif de rabattre des patients²⁷. Cette **interdiction de publicité** est attaquée devant la Cour par des producteurs de médicaments et des pharmaciens. Selon les travaux préparatoires, cette interdiction

26| Gérard, P., et Verrijdt, W., "Belgian Constitutional Court Adopts National Identity Discourse", *EuConst* 2017, p. 182-205; El Berhoumi, M., e.a., « La Cour constitutionnelle face au Pacte budgétaire européen: un arrêt sans intérêt ? », *JT* 2017, p. 565-582. Voir aussi *Tijdschrift voor Bestuurswetenschappen en Publiekrecht*, 2017, n° 6, p. 294-372.

27| Article 31, § 2, 2°, de la loi du 22 avril 2019 relative à la qualité de la pratique des soins de santé, *Moniteur belge* du 14 mai 2019.

trouve appui dans l'article 8 de la directive 2000/31/CE du 8 juin 2000 sur le commerce électronique²⁸. Une interdiction de publicité absolue constitue toutefois une mesure préventive interdite au sens des articles 19 et 25 de la Constitution, qui garantissent la liberté d'expression et la liberté de presse²⁹. Si la directive 2000/31/CE doit effectivement être interprétée en ce sens qu'elle oblige le législateur belge à prévoir une interdiction de publicité absolue, l'on se demande d'emblée si cette directive est elle-même compatible avec la liberté d'expression, garantie par l'article 11 de la Charte. Dans un tel cas, la Cour constitutionnelle a l'obligation de poser une question préjudicielle de validité à la Cour de justice³⁰. Si la Cour de justice devait répondre à cette question que l'interdiction de publicité découlant de la directive est valable, une **tension apparaîtrait entre les critères de limitation prévus dans la Constitution belge et ceux contenus dans la Charte** et la question se poserait de savoir si la Cour constitutionnelle ferait application de son arrêt n° 62/2016 précité.

L'affaire décrite ci-dessus aurait pu tourner au conflit entre la Constitution, d'une part, et une directive et la Charte, d'autre part, si un arrêt récent de la Cour de justice n'avait pas potentiellement déminé l'affaire. En effet, dans son arrêt *Vanderborght* du 4 mai 2017, la Cour de justice a jugé que tant la directive 2000/31/CE que l'article 56 du Traité sur le fonctionnement de l'Union européenne (TFUE) doivent être interprétés « en ce sens qu'ils **s'opposent à une législation nationale qui interdit de manière générale et absolue toute publicité** relative à des prestations de soins buccaux et dentaires »³¹ (c'est l'auteur qui souligne). À cet égard, il est intéressant d'observer que c'est apparemment plutôt au regard de la libre prestation des services contenue dans l'article 56 TFUE qu'au regard de la liberté d'expression consacrée par l'article 11 de la Charte que la Cour de justice contrôle une telle interdiction de publicité, mais cela n'empêche pas la directive d'avoir désormais reçu une interprétation qui n'est potentiellement plus inconciliable avec les articles 19 et 25 de la Constitution belge.

28] L'article 8 (1) dispose : « Les États membres veillent à ce que l'utilisation de communications commerciales qui font partie d'un service de la société de l'information fourni par un membre d'une profession réglementée, ou qui constituent un tel service, soit autorisée **sous réserve du respect des règles professionnelles** visant, notamment, l'indépendance, la dignité et l'honneur de la profession ainsi que le secret professionnel et la loyauté envers les clients et les autres membres de la profession » (c'est l'auteur qui souligne).

29] Conseil d'État, section de législation, avis n° 39.192/3, 4 novembre 2005, *Doc. Parl.*, Chambre, 2005-2006, DOC 51-2189/001, 113-116.

30] Voir par ex. CJUE (grande chambre) 22 juin 2010, *Melki et Abdeli*, (C-188/10, [EU:C:2010:363](#) et C-189/10, [EU:C:2010:206](#)).

31] CJUE 4 mai 2017, *Vanderborght*, (C-339/15, [EU:C:2017:335](#)). Un dentiste a été poursuivi pour avoir fait de la publicité pour des prestations de soins dentaires.

Ce cas d'espèce suscite deux réflexions supplémentaires. Premièrement, la Cour de justice peut éviter pas mal de conflits avec les cours constitutionnelles nationales en se montrant **suffisamment sévère** dans son contrôle des actes du droit dérivé de l'Union au regard de la Charte. Et deuxièmement, la Cour constitutionnelle doit poser des questions préjudicielles non seulement parce qu'elle le *doit*, mais aussi parce qu'elle le *peut* : en effet, le dialogue préjudiciel permet d'exposer avec suffisamment de détails la **particularité de la Constitution belge** et d'expliquer à la Cour de justice pourquoi un acte du droit dérivé de l'Union entre en conflit avec la Constitution belge.

Ces deux réflexions illustrent dès lors également la grande importance d'un dialogue entre la Cour de justice et les cours constitutionnelles nationales. C'est la solution aux conflits potentiels que je présente ci-après.

5. La solution : un dialogue entre les juges

Dans la doctrine contemporaine, les notions de « pluralisme constitutionnel » et de « dialogue entre les juges » vont souvent de pair. Il convient toutefois de relever, à ce sujet, que le pluralisme constitutionnel est une notion **descriptive**, tandis que le dialogue entre les juges a une **portée normative**. En effet, la notion de « pluralisme constitutionnel » décrit la réalité de la coexistence et de la combinaison de listes distinctes, nationales et supranationales, de droits fondamentaux, dont les interprétations finales respectives relèvent de juridictions spécifiques. En revanche, le « dialogue entre les juges » désigne l'*obligation* qui incombe, dans ce contexte, à chacune de ces juridictions et qui consiste à éliminer les conflits potentiels entre ces textes constitutionnels distincts. Cette obligation tire sa force normative principalement du principe de la **sécurité juridique** : en effet, si les conflits entre ces textes constitutionnels – et leurs gardiens respectifs – s'éternisent, ce sont aussi bien les justiciables que les pouvoirs publics et les juridictions qui se trouvent entre deux feux³².

La **possibilité** de dialoguer est assurément présente dans les rapports entre les cours constitutionnelles et la Cour de justice. Celles-ci peuvent dialoguer aussi bien de manière directe, dans la procédure préjudicielle, que de manière indirecte, en citant mutuellement leurs jurisprudences et, le cas échéant, en les critiquant³³.

32| Alen, A., et Verrijdt, W., "The Dialogue Between the European Court of Human Rights and Domestic Constitutional Courts. The Belgian Example", in Lemmens, K., Parmentier, S., and Reyntjens, L., (éds.), *Human Rights with a Human Touch. Liber amicorum Paul Lemmens*, Anvers, Intersentia, p. 156-159.

33| Pour quelques exemples : voir Alen, A., et Verrijdt, W., « L'influence de la Cour constitutionnelle belge sur la Cour européenne des droits de l'homme et sur la Cour de justice de l'Union européenne », in I. Ziemele (éd.), *The Role of Constitutional Courts in the Globalised World of the 21st Century*, Riga, Constitutional Court of Latvia, 2019, p. 125-135.

Comme exposé ci-avant, la **Cour constitutionnelle** s'est toujours montrée très ouverte au dialogue. J'ai déjà démontré, à d'autres occasions, que si la Cour constitutionnelle utilise encore la terminologie d'un rapport hiérarchique entre la Constitution et le droit international et européen, c'est plutôt, dans la pratique, la logique du pluralisme constitutionnel et du dialogue qu'elle a adoptée, sans qu'il soit question, dans ce contexte, d'un rapport hiérarchique entre les diverses composantes de l'ordre juridique à plusieurs niveaux³⁴.

L'on prétend parfois que la **Cour de justice** est beaucoup moins ouverte au dialogue. Les motifs avancés sont, premièrement, le fait que la Cour de justice ne renvoie qu'à ses propres arrêts et jamais aux décisions d'autres juridictions et, deuxièmement, le fait que la Cour de justice ne tolérerait aucun compromis sur le plan de la primauté, de l'effet utile et de l'application uniforme du droit de l'Union européenne. À mon estime, il y a lieu de nuancer cette vision considérablement. Premièrement, il ressort des arrêts précités *Aranyosi* et *Căldăraru*, ainsi que des arrêts *Taricco*³⁵, que la Cour de justice est, bien au contraire, prête à reconsidérer sa jurisprudence à la suite de critiques émanant de cours constitutionnelles. Et deuxièmement, c'est à l'initiative de la Cour de justice qu'a été créé en 2017 le *Réseau judiciaire de l'Union européenne*, dont le but est précisément de promouvoir l'échange d'informations et d'idées entre la Cour de justice et les plus hautes juridictions des États membres³⁶.

6. Conclusion

Nous voudrions, en guise de conclusion, formuler une modeste **proposition** afin d'apaiser les tensions futures entre le droit de l'Union européenne et les constitutions nationales. Nous comprenons en effet fort bien qu'il soit nécessaire, pour le maintien de l'Union, de conserver l'uniformité dans certains domaines. Mais, dans le même temps, il faut aussi prêter attention à la cohérence des constitutions nationales et à l'effectivité de la jurisprudence des cours constitutionnelles nationales.

Pour concilier ces deux principes, il faut inverser la logique de la jurisprudence *Melloni*. Le point de départ doit être que la protection juridique plus étendue offerte par les constitutions nationales doit être, en principe, **cumulée** avec la protection juridique offerte

34| Alen, A., et Verrijdt, W., « La relation entre la Constitution belge et le droit international et européen », in I. Riassotto, L. Heuschling et G. Ravarani (éds.), *Liber amicorum Rusen Ergeç*, Luxembourg, *Pasicrisie luxembourgeoise*, 2017, p. 31-54.

35| CJUE (grande chambre) 8 septembre 2015, *Taricco*, (C-105/14, [EU:C:2015:555](#)) et 5 décembre 2017, *M.A.S. et M.B.*, (C-42/17, [EU:C:2017:936](#)).

36| https://curia.europa.eu/jcms/jcms/p1_2170125/fr/

par la Charte, et ce, aussi bien sur le plan de la portée matérielle du droit fondamental que sur celui des critères de limitation. La protection juridique nationale plus étendue ne doit s'incliner que dans les seuls et rares cas où cette façon de procéder compromet l'uniformité du droit de l'Union européenne. L'examen de la question de savoir si l'uniformité du droit de l'Union est en péril doit nécessairement être réservé à la **Cour de justice**, avec toutefois deux précisions :

- (i) L'unité du droit de l'Union doit être invoquée avec beaucoup **plus de retenue**, de sorte que la Cour de justice ne peut pas se contenter de répéter des formules de style. Par conséquent, ce n'est pas parce qu'une directive d'harmonisation est en cause que l'uniformité du droit de l'Union est automatiquement compromise;
- (ii) Dans ce contexte, la Cour de justice doit également **tenir compte**, de manière effective et visible, des questions, des aspirations et des critiques émanant des cours constitutionnelles, qu'elles soient formulées via une question préjudicielle ou d'une autre façon. Ses arrêts doivent répondre clairement à ces questions.

À notre estime, cette proposition se justifie aussi bien dans la théorie que dans la pratique. Sur le plan **théorique**, l'on ne peut que constater que les traités fondamentaux de l'Union européenne, ainsi que les pouvoirs qui y sont attribués aux organes de l'Union d'adopter des actes de droit dérivé, trouvent leur fondement ultime dans les constitutions des États membres. Sur le plan **pratique**, les conflits potentiels entre les constitutions nationales et le droit de l'Union seront peu nombreux et les cas dans lesquels l'uniformité du droit de l'Union devra l'emporter seront plutôt rares. Ces cas sont négligeables au regard de la totalité du contentieux national et européen en matière de droits fondamentaux.

Les juridictions supranationales comme les cours constitutionnelles nationales devraient adopter une attitude suffisamment souple et conciliante, étant donné qu'un conflit incessant ne peut que favoriser l'insécurité juridique, avec pour effet que les justiciables, les pouvoirs publics et les juridictions ne sauront plus quelle jurisprudence appliquer, ce qui diminuerait l'autorité des juridictions nationales et supranationales concernées. Cela détériorerait également le constitutionnalisme et les droits de l'homme, des valeurs qu'il faut protéger à tout prix.



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1. Introductory remarks

Placing limitations on the exercise of fundamental rights is a necessary feature of every legal system. Given that all qualified rights enjoy equal protection, conflicts must be solved by striking the right balance, hence by the application of the principle of proportionality.

Let me, in light of that, quote Professor Tamara Čapeta of the Zagreb Faculty of Law and as of recently also an Advocate General of the Court of Justice of the European Union ('the CJEU'):

'The principle of proportionality is new to the Croatian legal system. However, it is today a value shared by all democratic European legal orders. Consequently, it is extremely important also for Croatia to promptly recognise it and adapt accordingly its legal culture which is being built together with other European countries.'

This quotation is from the preamble to the book I published in 2016 titled 'Principle of Proportionality in the Jurisprudence of European Courts and the Croatian Constitutional Court (with Particular Emphasis on Property Rights)'. I was prompted by a 'discovery' that, in spite of being recognised within the EU and the Council of Europe (a fact I learned as a judge of the Ustavni sud (Croatian Constitutional Court) from 2007 by analysing the jurisprudence of both European courts), the principle of proportionality is still almost completely unknown in Croatia, both in legal theory and practice, with the exception of the Croatian Constitutional Court.^{1, 2}

1| Croatian scientific literature and legal textbooks are not familiar with the principle of proportionality. When researching for the book, I noticed only one work on this topic – the article, published in 2000, of Professor Siniša, R., 'Principle of Proportionality: Origin, Constitutional Grounds and Application', *Collection of Papers of the Zagreb Faculty of Law*, No 50 (1-2); pp. 31-53. Professors Čapeta and Rodin also wrote briefly on the principle of proportionality as a legislative and judicial principle in the book *Foundations of EU Law*, Zagreb, Narodne novine, 2011. It was also mentioned by Professor Josipović in the book *Principles of EU Law in the Judgments of the EU Court*, Zagreb, Narodne novine 2005, and by Professor Omejec in the book *Council of Europe and the European Union: Institutional and Legal Framework*, Zagreb, Novi informator, 2008.

On the other hand, Stone Sweet speaks about the viral global spread of the principle of proportionality: "In the last thirty years the application of the principle of proportionality has spread across legal systems of countries of different legal history and culture at a rate unmatched by any other principle or doctrine (diffusion of proportionality)". See in Stone Sweet, A.; Mathews, J., *Proportionality, Judicial Review and Global Constitutionalism, Reasonableness and Law*, Springer, 2009, p. 193.

2| As its case-law database shows, the Croatian Constitutional Court has been applying this principle for at least fifteen years, both in abstract and individual control. However, the Court's even more intensified application of this principle in recent years has not 'spilt over' onto either the legislator (in the law-making process) or the judiciary (in deciding on individual cases). Its application has unfortunately remained incidental.

Coming back to Europe, the Charter of Fundamental Rights of the European Union ('the Charter') is not the first document to include the principle of proportionality. Let me recall that, although very common in the EU, the principle of proportionality is far from being a creation of the European Union or the CJEU. Many European countries knew it in some form even before the EU was created. Since it was developed and applied in the 20th century by the German federal legal order, the German principle of proportionality is most often mentioned as an inspiration for the CJEU. Of course, it is equally a standard tool in the hands of another European court, the one in Strasbourg.

Today we can talk about the influence of national courts, in particular constitutional courts, and European courts on the application of the principle of proportionality, and the conversation which occurs between these actors.

2. Article 52(1) of the Charter

2.1. Principle of proportionality

What about the principle of proportionality in general? In short, this means that the State, which sometimes has to restrict individual rights in order to pursue some public interest or to protect the rights of others, does so by taking care to limit the rights of individuals to the least possible extent. Thus, the principle of proportionality is, in essence, one of the instruments for limiting State power, without which democratic systems cannot exist.

As the control of a regulatory State in modern democracies is entrusted to courts, the principle of proportionality has also developed as one of the methods of judicial control of the State in the exercise of its legislative and administrative prerogatives. Hence, it is not surprising that theory and practice do not always agree on the acceptable limit of judicial control over legislative power, which enjoys democratic legitimacy.³

3| Contiades and Fotiadou see the application of the principle of proportionality not as a field of conflict between lawmakers and judges, but as an opportunity for their communication. If we accept that proportionality is the leading way to approach competing rights, that is to say a globally used method for evaluating legislative choices, then the principle of proportionality must be taken into account by the lawmaker when deciding on issues that influence fundamental rights. On the other hand, when reviewing the lawmaker's choice, the judge performs a balancing act which allows him or her, or even requires him or her, not only to analyse the facts of the case but also to evaluate the rights and principles at stake, taking into consideration the underlying important moral and political standards for making a decision. Therefore, proportionality limits a judge, forcing him or her to follow specific steps, dictating the route he or she has to follow when reviewing legislative limitations on a fundamental right. This mutual obligation to apply the principle of proportionality enables dialogue (rather than conflict) between the judge and the lawmaker, and obliges the judge to adopt an approach of self-restraint while reviewing the lawmaker's choices. See in: Contiades, X.; Fotiadou, A., *Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation*, 2012, p. 667.

The fundamental importance played by the principle of proportionality in justifying the State's intervention in individual rights, acknowledged by the jurisprudence of national courts and European courts, has been confirmed by its inclusion in the Charter. Article 52(1) of the Charter contains the general, 'horizontal' clause which establishes the acceptable limitation and conditions for the exercise of the rights and freedoms protected by the Charter. It reads:

'Article 52 Scope and interpretation of rights and principles

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.⁴

As it derives from the Explanations in relation to Article 52 of the Charter,⁵ the article sets up the scope of rights and principles and lays down rules for their interpretation. Paragraph 1 deals with arrangements for the limitation of rights, and its wording is grounded on the case-law of the CJEU.⁶

However, the problem is how to interpret individual aspects of Article 52(1) of the Charter. From the viewpoint of the general principle clause, the matter should be clear and derive from the rules already established in the CJEU case-law, taking the specific circumstances of a concrete case into consideration. Thomas von Danwitz, Judge of the CJEU, who was hosted at the Croatian Constitutional Court in February 2020, deems that the general clause in Article 52(1) of the Charter should be interpreted in an autonomous way, and by taking the CJEU case-law on the principle of proportionality into consideration in the context of human rights protection.⁷ In the same vein, Mr Romero Requena of the European Commission claims that, since the Charter entered into force, the proportionality test has played an important

4| However, the rights contained in Title I of the Charter (Articles 1 to 5), namely human dignity, the right to life, the right to personal integrity, prohibition of torture or other inhuman and degrading treatment or punishment, prohibition of slavery and forced labour, are not subject to limitations (the same applies to the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe and national constitutions).

5| See at: <https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=CELEX%3A32007X1214%2801%29>.

6| See judgment of 13 April 2000, *Karlsson and Others*, C-292/97, [EU:C:2000:202](#), paragraph 45.

7| See Danwitz Von T., Paraschas, K., 'A Fresh start for the Charter: Fundamental Questions on the Application of the EU Charter of Fundamental Rights', *Fordham International Law Journal*, vol 35, Issue 5, 2017, p. 1415. Available at: <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2602&context=ilj>.

role in the legislative process, and that the model should not be regulated. Rather, the proportionality of each individual measure should be considered on a case-by-case basis.⁸

I think that we can agree that the application of the principle of proportionality in the protection of fundamental rights requires an individual approach and that there is no uniform solution. In other words, individualisation of the case is inherent to this principle. This, to be fair, is also one of the main objections of the opponents of the application of the principle of proportionality who claim that its fluidity and lack of solid structure lead to legal uncertainty and unpredictability in practice.⁹ However, let us leave that topic for some other occasion.

8| In relation to the limitations regime, several judgments make reference to Article 52(1) of the Charter. However, they do not reveal much. Until judgment of 1 July 2010, *Knauf Gips v Commission*, C-407/08 P, [EU:C:2010:389](#), the CJEU made no explicit reference to Article 52(1) of the Charter or to the need for legal regulation of the limitation of any right cited in the Charter. Judgment of 5 October 2010, *McB.*, C-400/10 PPU, [EU:C:2010:582](#), is a good example of allusion to the essence of the right in the face of possible violation: the CJEU found that the fact that the biological father, unlike the mother, has no automatic right to custody of a child, has no effect on the essential content of his right to private and family life, as long as this right is protected. The same case alludes also to 'the necessary protection of rights and freedoms of other persons'. In judgment of 5 May 2011, *Deutsche Telekom*, C-543/09, [EU:C:2011:279](#) the CJEU found that the transfer of data to a company different from the one that held it initially 'does not go against the very substance of the right in Article 8 of the Charter'. See in: 'XXIII Colloquium of the Association of Councils of State and the Supreme Administrative Jurisdictions of the European Union', Madrid – 25-26 June 2012, at: http://www.aca-europe.eu/colloquia/2012/General_report.pdf. See also: Gutman, K., 'The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best Is Yet to Come?', *German Law Journal*, 20, 2019, pp. 884-993, at: <https://www.cambridge.org/core/journals/german-law-journal/article/essence-of-the-fundamental-right-to-an-effective-remedy-and-to-a-fair-trial-in-the-caselaw-of-the-court-of-justice-of-the-european-union-the-best-is-yet-to-come/B52CC437EF039A8A478C901B29A51C59>; and Scarcello, O., *Preserving the 'Essence' of Fundamental Rights under Article 52(1) of the Charter: A Sisyphean Task*. Cambridge University Press, 2021, at: <https://www.cambridge.org/core/journals/european-constitutional-law-review/article/preserving-the-essence-of-fundamental-rights-under-article-52-1-of-the-charter-a-sisyphean-task/B6CCBE08347B15088D160ED472A62E3A>.

9| In addition to these authors who support the principle of proportionality, but criticise its application in certain cases (due to inconsistencies in application which disrupt legal certainty), there are those who deny this principle any kind of legitimacy. They find it a vague concept that obscures the boundaries of the separation of legislative, executive and judicial power and makes it possible for judicial power to replace the decisions (regulations) of the remaining two powers who are constitutionally authorised to pass enactments of a general nature. They do not dispute judicial activism, but wonder about the boundaries, about how far European courts (or any other court for that matter) can go in reviewing regulations of legislative and executive powers, and about who will set the limits for judges. Who, for example, will protect society from possible judicial arbitrariness? Who will control the courts? See, for instance, Lord Hoffmann, 'The Influence of the European Principle of Proportionality upon UK Law', Ellis, E. (ed.) *The Principle of Proportionality in the Laws of Europe*, Oxford-Portland, Oregon, Hart Publishing, 1999, p. 63; Green, N., 'Proportionality and the Supremacy of Parliament in the UK', Ellis, E. (ed.), *The Principle of Proportionality in the Laws of Europe*. Oxford-Portland, Oregon, Hart Publishing, 1999, pp. 155-164; Tsakyrakis, S., 'Proportionality: An Assault of Human Rights', *International Journal of Constitutional Law*, 7(3), 2009, p. 28; Contiades, X.; Fotiadou, A., 'Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation', *International Journal of Constitutional Law*, 10(3), 2012, pp. 660-686.

2.2. Conditions for limiting rights

Article 52(1) of the Charter contains rules for limiting individual rights, either by EU or national law. However, it opens the question of the methodology of approach in its application for both the legislator and the court. The question is whether it contains only one test, or several tests or sub-tests.

According to the first sentence of Article 52(1) of the Charter, the limitation has to:

- (a) be provided for by law
- (b) respect the essence of rights and freedoms recognised in the Charter.

In accordance with the second sentence, subject to the principle of proportionality, limitations may be imposed only:

- (a) if they are suitable (the suitability test); and
- (b) if they are necessary (the necessity test) for achieving objectives of public interest (EU) or for the protection of the rights and freedoms of others.¹⁰

The wording 'rights and freedoms of others' not only relates to fundamental rights of third parties, but also to all rights recognised by EU law, notably the rights that stem from the provisions of the EU Treaties. There is no hierarchy of rights under the Charter in the sense that some individual rights and freedoms are superior to others, that is to say, all rights are equal and the principle of proportionality applies equally to them.

10| Legal theory and practice disagree on whether there are three or four conditions that must be complied with. See, Gutman, K., 'The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best Is Yet to Come?', *German Law Journal*, 20, 2019, p. 890; and Scarcello, O., *Preserving the 'Essence' of Fundamental Rights under Article 52(1) of the Charter: A Sisyphian Task*. Cambridge University Press, 2021, p. 650. Among other things, this is also because, as Gutman points out, the wording of Article 52(1) of the Charter indicates that 'there are four main conditions that must be complied with, whereas the passage from the Court's case-law [judgment of 13 April 2000, *Karlsson and Others*, C-292/97, [EU:C:2000:202](#)] ... could imply that the essence/substance criterion relates – or is somehow linked – to proportionality. In fact, this may explain why some case-law of the General Court refers to three, not four, conditions with respect to Article 52(1) of the Charter, thereby assessing the essence criterion in the context of the proportionate nature of the measure in question'. She, however, admits that 'the Court of Justice generally makes a concerted effort to undertake the assessment of each of the four conditions separately [as in judgment of 27 September 2017, *Puškár*, C-73/16, [EU:C:2017:725](#)]'.

The definition in the first sentence, that every limitation on the exercise of rights must be provided for by law, is undoubtedly a *sine qua non* without which no limitation may be imposed. With no legal ground, one's rights and freedoms cannot be limited. If we start from the first sentence of Article 52(1) of the Charter, then the Court should (first) determine if a disputed measure/regulation compromises the very essence of a specific right and freedom. Neither the concept of the essence of the right nor the principle of proportionality is new to the CJEU (or the ECtHR and national constitutional courts equally).¹¹ However, as Gutman states, it may be considered something of a 'late bloomer'.¹²

11 | The concept of the essence of a fundamental right is not a novelty. It can be traced back to the 1949 'Wesensgehalt' (German Basic Law), which in turn influenced the embodiment of this concept in the constitutions of other Member States (Republic of Estonia, Hungary, Romania, Portuguese Republic, Republic of Poland, Slovak Republic, Kingdom of Spain.). It has thus also found a place in the Charter simply perhaps because it is integrated in the constitutional traditions of the Member States. See Scarcello, O., Preserving the 'Essence' of Fundamental Rights under Article 52(1) of the Charter: A Sisyphean Task. Cambridge University Press, 2021, p. 648; and Gutman, K., 'The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best Is Yet to Come?', German Law Journal, 20, 2019, pp. 884-885.

The Croatian Constitution recognises the principle of proportionality, but without the concept of the essence of a fundamental right. Article 16 of the Croatian Constitution reads: 'Freedoms and rights may only be restricted by law in order to protect the freedoms and rights of others, the legal order, and public morals and health.

Every restriction of freedoms and rights shall be proportional to the nature of the need for such restriction in each individual case.' However, in its case-law related to Article 16 of the Constitution, the Croatian Constitutional Court, starting from the jurisprudence of both European courts, applies the concept of the essence of rights as well. See, for example, Decisions U-I-988/1998 of 17 March 2010 (Official Gazette No. 40/10); U-IP-3821/2009 and others of 17 November 2009 (Official Gazette No. 143/09); U-I-54269/2009 of 18 October 2009 (www.usud.hr).

At the EU level, explanations in relation to Article 52(1) of the Charter indicate that the doctrine of the essence of a right is grounded on the case-law of the CJEU on the protection of fundamental rights, understood as general principles of EU law. The explanations quote the 2010 Karlsson judgment where the CJEU found that a limitation on the exercise of a fundamental right may be justified if it pursues a legitimate aim in line with the EU legal order, and 'does not constitute, with regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of (that) right ...'. This passage can be found also in the 1979 Hauer judgment. See more in: Lenaerts, K., 'Limits on Limitations: The Essence of Fundamental Rights in the EU', German Law Journal, 20, 2019, pp. 779-793.

12 | For more detail, see: Gutman, K., 'The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best Is Yet to Come?', German Law Journal, 20, 2019, p. 884. This is because the concept of the essence of fundamental rights appears only in Article 52(1) of the Charter. The author deems that the concept of the essence of fundamental rights 'and in particular the fundamental right to an effective remedy and to a fair trial appears to be underdeveloped in the case-law of the Court of Justice of the European Union as compared to other aspects concerning the Charter, such as its scope of application and the so-called horizontal effect of Charter rights. Moreover, in some of the Court's case-law concerned with the application of Article 52(1) of the Charter, the examination of the essence of the Charter right concerned sometimes seems to be given "short shrift" or cursory mention – if at all – in contrast to other elements of the analysis, such as "provided for by law" or – more often – proportionality. This may not be all that surprising, given that the consideration of the essence of fundamental rights in EU law brings into play a host of complex issues from a variety of perspectives, as spotlighted by this special issue'. Scarcello points out that after *Schrems I*, the idea of an essential content of rights has attracted scholars' attention, but the question related to defining the essential content of a specific right has still not been answered in a fully satisfactory way. He calls this the question of method. See Scarcello, O., Preserving the 'Essence' of Fundamental Rights under Article 52(1) of the Charter: A Sisyphean Task. Cambridge University Press, 2021, p. 648.

2.3. The essence of rights and the principle of proportionality

As for methodology the courts use in applying Article 52(1) of the Charter,¹³ for example, the sequence of steps for its 'correct' application, we can argue that the test of proportionality and the test for the respect for the essence are two types of assessment.¹⁴

If we start from the premiss that under the concept of the essence of a right every fundamental right has a (hard) nucleus granting each individual a sphere of liberty that must remain free from interference, then this nucleus is absolute and may not be subject to any limitation. Accordingly, if it is established that the very essence has been compromised, the disputed measure is automatically unacceptable and has to be removed from the legal system. Therefore, there is no need to establish whether the disputed measure is proportional, as found by the CJEU in *Schrems*.¹⁵

13| See also Lenaerts, K., 'Limits on Limitations: The Essence of Fundamental Rights in the EU', *German Law Journal*, 20, 2019, pp. 779–793, pp. 787, 788.

14| Scarcello claims that it is not unexpected that the absolute theory prevails. He substantiates this view by saying that 'the sheer distinction between core and periphery seems to many to be more faithful to the text of the Charter. Second, it squares with the history and precedents of the Court, which relied extensively on the equivalent notion of substance. Scholars supporting the absolute theory, on the other hand, give different answers. Lenaerts, for instance, argues that the Court first establishes that the essence was not violated and only later engages in a proportionality assessment. This two-step method is clear, but the comments on how the first step should be accomplished are not always specific'. See Scarcello, O., *Preserving the 'Essence' of Fundamental Rights under Article 52(1) of the Charter: A Sisyphean Task*. Cambridge University Press, 2021, pp. 652, 653. Scarcello criticises both theories and endorses the so-called interest theory, deeming that the essence of a right cannot be referred to in vacuo.

15| See judgment of 6 October 2015, *Schrems*, C-362/14, [EU:C:2015:650](#), where the CJEU for the first time declared invalid an EU measure on the ground that it did not respect the essence of two fundamental rights, namely the right to respect for private life and the right to effective judicial protection. That case concerned a preliminary reference made by the Ard-Chúirt (High Court, Ireland) in which that court questioned the validity of Commission Decision 2000/520 (hereinafter: 'Commission Decision') providing that personal data could be transferred from the EU to the United States (US) on the basis that the safe harbour privacy principles applicable to organisations established in the US ensured an adequate level of protection of these data. After it found that the expression 'adequate protection', within the meaning of Directive 95/46 of the European Parliament and Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, repealed by Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data ('the Data Retention Directive'), must be interpreted as to mean that such transfer can be done only where the US legal order offered an 'essentially equivalent protection' to that guaranteed under EU law, the Court noted that the Commission Decision permitted US public authorities, notably the National Security Agency (NSA), to have access, on a generalized basis, to the content of incoming electronic communications from Europe. The Court found that this approach constituted such a serious and intrusive breach of the fundamental right to respect for private life guaranteed in Article 7 of the Charter that it compromised the very essence of that right. In addition, the Commission Decision did not provide individuals with 'any possibility to pursue legal remedies in order to have access to personal data relating to them, or to obtain the rectification or erasure of such data'. Thus, the Court found that the disputed measure did not respect the essence of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter.

This is not the first judgment where the CJEU invoked the concept of the essence of a right, but it is the first in which it declared invalid an EU measure or a regulation on the ground that it did not respect the essence of two fundamental rights, namely the right to respect for private life and the right to effective judicial protection (Articles 7 and 47 of the Charter), in relation to the protection of personal data.¹⁶

Only after it is found that the essence of a right has not been compromised does the second sentence of Article 52(1) come into play, that is to say that the test of proportionality is carried out. In other words, it is assessed if the disputed measure is necessary and if it genuinely meets the objectives of general interest recognised by the EU, or the need to protect the rights and freedoms of others, as illustrated in the cases *Digital Rights Ireland*, and, in particular, *Schrems* and *Tele2 Sverige*.¹⁷

16] Even before the Charter entered into force, the CJEU found, although implicitly, that the EU or national measure did not respect the essence of a particular fundamental right (see judgment of 3 September 2008, *Kadi and Al Barakaat International Foundation v Council and Commission*, C-402/05 P and C-415/05 P, [EU:C:2008:461](#)).

17] See judgments of 8 April 2014, *Digital Rights Ireland and Others*, C-293/12 and C-594/12, [EU:C:2014:238](#); and of 6 October 2015, *Schrems*, C-362/14, [EU:C:2015:650](#); and of 21 December 2016, *Tele2 Sverige and Watson and Others*, C-203/15 and C-698/15, [EU:C:2016:970](#).

In *Digital Rights Ireland* and *Tele2 Sverige*, the CJEU found that the Data Retention Directive and national legislations at hand seriously limited the right to respect of private life as they, for the purpose of fighting serious crime, enabled the retention of metadata. However, those measures did not compromise the essence of this right as they did not permit retention of the content of electronic communications. In *Digital Rights Ireland*, the CJEU added that the essence of the right to the protection of personal data was not compromised either. The directive prescribed certain principles of data protection under which the Member States were obliged to ensure appropriate technical and organisational measures for preventing accidental or unlawful destruction of data or their accidental loss or alteration. Hence, the limitations here are less intense than in *Schrems*. In *Digital Rights Ireland*, the CJEU invalidated the Data Retention Directive, given that it violated the principle of proportionality by limiting the fundamental right to privacy and data protection (Articles 7 and 8 of the Charter). The main goal of the directive was to harmonise the legislations of Member States on the retention of certain data generated or processed by public communications network and publicly available electronic communications services. It secured the accessibility of data for the prevention, investigation, detection, and prosecution of criminal offences, especially organised crime and terrorism. Thus, the directive enabled the mentioned providers to retain data on traffic and location, as well also other data necessary to identify a subscriber or registered user. However, it did not enable the retention of the content of electronic communications; including information consulted using an electronic communications network. Nevertheless, the CJEU found that the retention of the data, and allowing access to these data to national authorities, interfere with the fundamental right to respect of private life and the right to the protection of personal data. Furthermore, the fact that data are retained and subsequently used without the subscriber or registered user being informed is likely to generate in the minds of the persons concerned the sense that their private lives are the subject of constant surveillance. The CJEU therefore found that the EU legislator, by passing the Data Retention Directive, exceeded the limits imposed by the principle of proportionality. Given this, it noted, bearing in mind the importance of the protection of personal data in the light of the fundamental right to respect of private life and data protection, that the EU legislature's freedom of discretion is reduced, and thus prone to strict review. Although the retention of data stipulated by the directive can be considered appropriate for attaining the objective, the wide-ranging and particularly severe interference in the fundamental rights at hand was too serious to be considered strictly necessary.

President Lenaerts ‘admits’ that there is some overlap between the concept of the essence of a fundamental right and the principle of proportionality because it is implied that a measure compatible with the principle of proportionality also respects the concept of the essence of a fundamental right.¹⁸ On the other hand, a measure that violates the essence of a fundamental right automatically violates the principle of proportionality. However, here the overlapping ends, given that a measure may respect the essence of a fundamental right and still violate the principle of proportionality. This can be seen in cases such as *Digital Rights Ireland*, *Schrems*, and *Tele2 Sverige*.

From a methodological point of view, it is important to emphasise the order in which the possible violations of the fundamental right are examined. The wording of Article 52(1) of the Charter, and also the statement of reasons for the cited judgments and the subsequent case-law of the CJEU, leads to the conclusion that the Court will first examine whether the disputed measure respects the essence of the fundamental right at stake, and, if the answer is affirmative, only then will it carry out a proportionality test in order to establish whether the measure, although not compromising the essence of the fundamental right, is disproportionate or unnecessary for the purpose of achieving objectives of general interest or to protect the rights and freedoms of others.

It follows that the CJEU opted for two phases in interpreting and applying Article 52(1) of the Charter. It will first establish whether the essence was violated and only later perform the proportionality test.¹⁹

18] Some authors deem that the CJEU has not elaborated on a general definition of what is meant by the ‘essence’ of fundamental rights in EU law for the purposes of Article 52(1) of the Charter. Rather, the case-law seems to proceed on an ad hoc basis, depending on the application of the fundamental right at issue and the particular circumstances of the case. But Gutman and Orlando deem that, in the assessment of justified limitations to the exercise of fundamental rights recognised in the Charter, the viability of the essence criterion in that assessment is a problem. They both maintain that so far there has been no overall guidance on the meaning and application of this criterion in the case-law. Depending on the case, the CJEU’s approach is ‘largely aimed at determining whether the particular limitation calls into question the fundamental right concerned, or rather whether that limitation is of a more circumscribed or temporary nature, thereby respecting the essence of that right’. See Gutman, K., ‘The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best Is Yet to Come?’, *German Law Journal*, 20, 2019, p. 889.

19] See Scarcello, O., *Preserving the ‘Essence’ of Fundamental Rights under Article 52(1) of the Charter: A Sisyphean Task*. Cambridge University Press, 2021, pp. 652, 653; and Gutman, K., ‘The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best Is Yet to Come?’, *German Law Journal*, 20, 2019, p. 894.

I find this highly significant, as it emphasises the importance of the concept of the essence of a fundamental right and its autonomous nature, which has not been sufficiently stressed in the case-law of the ECtHR, and, in my opinion, to some extent also in that of the CJEU. In this respect, the lesser problem is if the court, after having determined that the measure is proportionate, finds that it does not compromise the essence of the right.

It is important to keep the autonomous nature of the essence of a fundamental right in mind for two reasons: one lies in the past and the other in the future. In the past, both European courts tended to incorporate the concept of the essence of a right into the assessment of proportionality of a disputed measure. This is because the traditional description of proportionality in the case-law of the ECtHR, as well as in that of the CJEU, includes the protection of the very essence or substance of the right, although it has not been expressly recognised in the Convention for the Protection of Human Rights and Fundamental Freedoms. The ECtHR applied this concept for the first time in the 1968 *Belgian Linguistic Case*,²⁰ where it also found that ‘it goes without saying that such regulation must never injure the substance of the right to education nor conflict with other rights enshrined in the Convention’. Since then, it has often referred to this concept in its case-law, and in completely different contexts. Although the doctrine of the essence of a fundamental right is linked to determining the ultimate extent of the restriction of the rights protected under that convention, the ECtHR also used it to generally emphasise that rights can be restricted or to stress the importance of certain rights and human dignity.²¹

20| *Relating to Certain Aspects of Laws on Use of Languages in Education in Belgium (Merits)* – 1474/62; 1677/62; 1691/62 [1968] ECHR 3 (23 July 1968), p. 29.

21| According to Christoffersen, the greatest obstacle to the proper analysis, and accordingly to the application of the doctrine of the essence of rights, is the lack of precision in the definition or description of a right with an untouchable essence. All rights do not necessarily contain an untouchable essence. At a theoretical level, a distinction is made between the absolute and the relative theory of the essence of rights. The differences between the two are important for the ECtHR in so far as they emphasise the importance of distinguishing between common balancing actions and the absolute protection of the essence of rights not subject to balancing. He concludes that although the ECtHR makes a difference between balancing and the essence of rights, its case-law reflects the relative theory of the essence of rights. Absolute doctrine is not recognised, but is implicitly applied in the partial overlap between relative and absolute rights. See Christoffersen, J., *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights*, Liden Boston: Martinus Nijhoff Publishers, 2009, p. 163.

Therefore, the wording of Article 52(1) and its ‘correct reading’ and application are even more important, as only the first or preliminary examination to see if a disputed measure compromises the essence of a right will reflect its absolute nature.²²

2.4. The essence of rights and new challenges

Regarding the future, the cases already referred to (*Digital Rights Ireland*, *Schrems* and *Tele2 Sverige*) illustrate that the European legislator and courts are facing new challenges in the protection of privacy and personal data due to increasing use of new technologies. The digital era is a reality, it has spread worldwide at viral speed, in Stone Sweet’s words,²³ while the protection of the fundamental rights to privacy and personal freedom, and ultimately human dignity as well, is becoming more vulnerable. Let us not forget that human dignity enjoys a special place in the Charter as it is enshrined in Article 1, which underlines its importance, influence and interrelation with all other fundamental rights. Of course, and needless to say, it enjoys absolute protection.

22| Scarcello claims that the absolute theory ‘draws a firm line between the core of a right, which is assumed untouchable, and a periphery, which, conversely, might be sacrificed. According to this approach, while one may interfere with the periphery of a right to realise a competing one, no limitation of the core would be legally acceptable. Moreover, the essence of a right shall not be established through proportionality, as a proportionality assessment would inevitably involve mutual adjustments and limitations between rights. The relative theory, on the other hand, claims that every interference with a right can and shall ultimately be justified through proportionality, including limitations of the core. When it comes to the debate on [Article 52(1)], the absolute theory seems to prevail. Several supreme or constitutional courts in Europe have endorsed this approach, including influential institutions as the German and the Spanish Constitutional Courts. At the moment, the most famous supporter of the relative theory in the judicial arena is perhaps the [ECtHR]. Absolute theory squares with the history and precedents of the Court, which relied extensively on the equivalent notion of substance. It is crucial to realise how the two theories diverge when it comes to the question of method, namely how the core of a fundamental right is determined’. See Scarcello, O., *Preserving the ‘Essence’ of Fundamental Rights under Article 52(1) of the Charter: A Sisyphean Task*. Cambridge University Press, 2021, pp. 648, 651, 652.

23| See footnote 1.

It thus seems that the conflict between new technologies, in this digital era in which we live, and fundamental rights, with human dignity in their nucleus, will be more pronounced, or, as stated by the former President of the Latvian Constitutional Court, Ms Ineta Ziemele, and I quote: 'If technologies reduce our privacy or make us believe that privacy is something obsolete, does that not also affect a person's self-determination? Somebody else might own our personal data to such an extent that it raises a question firstly about the very possibility of our right to privacy, and ultimately about human dignity. In a post-liberal, technology-driven world are we still the masters of our inner self? In a world where algorithms are using our data, questions about the changed scope of the right to privacy arise and may reasonably suggest that we ought to look at subtle changes in the concept of human dignity.'²⁴

Ms Ziemele claims that the protection of privacy must not give way to science and technology, as such an approach would not be acceptable from the aspect of the protection of human dignity. Naturally, this also increases the burden of responsibility of the judiciary. Cases concerning the protection of privacy and human dignity are very sensitive, and the clarity of the court's positions on the fundamental rights and values in question in a specific case is extremely important.

In addition to *Schrems* (in which the CJEU for the first time declared invalid an EU measure on the ground that it did not respect the essence of two fundamental rights, the right to respect for private life and the right to effective judicial protection), and the cases *Digital Rights Ireland* and *Tele2 Sverige* (in which it found that the disputed EU regulations on the protection of personal data disproportionately limited the right to privacy and the protection of personal data (Articles 7 and 8 of the Charter), let me draw your attention to one more case involving human dignity, although older than the ones previously mentioned. It is the 2004 *Omega* case.²⁵

In *Omega*, the Bonn police authority prohibited the Omega company from offering games involving the simulated killing of human beings on the ground that they infringed human dignity. Given that Omega had entered into a franchise contract with a British company, it argued that the ban was contrary to the freedom to provide services embodied in Article 49 EC Treaty (now Article 56 TFEU). Thus, the CJEU was called upon to strike a balance between that article EC and the concept of human dignity, as understood by a national authority. After noting that the ban constituted a restriction on the freedom to provide services which, nevertheless, pursued a legitimate objective – the protection of human dignity – the CJEU ruled that, for the purposes of applying the principle of proportionality, 'it is not indispensable ...

24| Available at: https://www.echr.coe.int/Documents/Speech_20200131_Ziemele_JY_ENG.pdf.

25| Judgment of 14 October 2004, *Omega*, C-36/02, [EU:C:2004:614](https://eur-lex.europa.eu/eli/jud_2004/014).

for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected'.²⁶ Thus, the fact that a Member State other than Germany had chosen a system of protection of human dignity that was less restrictive of the freedom to provide services did not mean that the German measure was contrary to the EC Treaty. Given that the ban satisfied the level of protection required by the German Constitution and did not go beyond what was necessary to achieve that result, the CJEU considered that it was a justified restriction on the freedom to provide services. Omega demonstrates that the CJEU did not seek to impose a common conception of human dignity. Instead, it endorsed a model based on 'value diversity'.²⁷

This approach is certainly welcome, but if one bears in mind the dangers to human dignity in the present digital environment, one can question the attractiveness of the national differences regarding the values which in their nucleus carry the protection of human dignity. In any case, this speaks for, and reinforces the importance of, judicial dialogue in Europe, which has been confirmed many times.

2.5. The essence of rights and the protection of social rights

The increasing number of cases also relate to the protection of social rights, some of which are expressly protected by the Charter. In dealing with them, the CJEU also calls upon the concept of the essence of a fundamental right and the principle of proportionality in Article 52(1) of the Charter.²⁸

26| *Ibid*, paragraph 37.

27| Tridimas, T., *The General Principles of EU Law*, 2nd ed. Oxford University Press, Oxford, 2006, p. 341.

28| Contiades and Fotiadou deem that unlike civil rights, where the key issue is setting limits to their limitation, the crucial problem concerning social rights is how to delineate their legal content. In essence, after comparing the content of civil and social rights (civil rights usually create justiciable claims, while social rights in most cases ground objective obligations as binding on the government, although these obligations do not correspond to subjective rights), they conclude that two aspects of proportionality appear: a defensive aspect, in which proportionality is a tool for defending rights against limitations (traditionally applied in the field of civil rights); and a creative aspect, where proportionality appears as a tool for forming the content of the right (this being of particular importance for the field of social rights, where various interests are being balanced, which can be done only through the use of proportionality). See in: Contiades, X.; Fotiadou, A., *Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation*, 2021, pp. 663, 665.

For example, in the judgment of *Bauer and Willmeroth*,²⁹ the CJEU pointed out that in accordance with settled case-law, the right to annual leave constitutes only one of two aspects of the right to paid annual leave as an essential principle of EU social law, a right also including entitlement to remuneration for (untaken) annual leave. This is even more so, given that the right to paid annual leave is also expressly laid down in Article 31(2) of the Charter, and is thus, as regards its very existence, both mandatory and unconditional in nature. The exercise of the 'essence' of this right thus does not need to be given concrete expression by the provisions of EU or national law, which are only required to specify the exact duration of annual leave and, where appropriate, certain conditions for the exercise of that right.³⁰

Starting from the above general principles, the CJEU found that the loss of the right to (acquired and untaken) annual leave (due to the death of a worker) a loss which includes the deprivation of his legal heirs of the right to (untaken) annual leave, compromised the essence of the right in Article 31(2) of the Charter. Therefore, the CJEU found that the national regulation preventing the payment of an allowance to the legal heirs of a deceased worker in lieu of paid annual leave not taken by him is not in line with Article 7 of Directive 2003/88 and Article 31(2) of the Charter. In such circumstances, the national court must disapply that national legislation and directly apply EU law.³¹

In the judgment of *Fries*,³² the First Chamber examined the preliminary questions in relation to the violation of Article 21(1) and Article 15(1) of the Charter by combining the principle of proportionality and the doctrine of the essence of rights in Article 52(1) of the Charter.³³ It examined if point FCL.065(b) in Annex I to Regulation No 1178/2011,³⁴ which denied pilots the right to fly in commercial air transport operations after attaining the age of 65 years, discriminated them on grounds of age and violated their right to engage in work and to pursue a freely chosen or accepted occupation.

29| Judgment of 6 November 2018, *Bauer and Willmeroth*, C-569/16 and C-570/16, [EU:C:2018:871](#).

30| *Ibid*, paragraphs 39, 51, 84 and 85.

31| *Ibid*, paragraphs 62 and 86.

32| Judgment of 5 July 2017, *Fries*, C-190/16, [EU:C:2017:513](#).

33| See judgment of 7 February 2019, *RK v Council*, T-11/17, [EU:T:2019:65](#).

34| Commission Regulation (EU) No 1178/2011 of 3 November 2011 laying down technical requirements and administrative procedures related to civil aviation aircrew pursuant to Regulation (EC) No 216/2008 of the European Parliament and of the Council Text with EEA relevance, (OJ 2011 L 311, p. 1).

As it was clear that the age limitation places pilots older than 65 years in an unfavourable position, the CJEU examined the justifiability of this measure by applying the principle of proportionality in Article 52(1) of the Charter. The CJEU carried out the classical proportionality test and it established that the measure is provided for by law (paragraph 37 of the judgment); that it pursues the legitimate goal of general interest – establishing and maintaining a high uniform level of civil aviation safety in Europe (point 41 of the judgment); that it is appropriate (paragraphs 45 and 46) and necessary (paragraphs 53 and 54) for achieving the goal.

In brief, the CJEU found that it does not appear unreasonable for the EU legislature, by taking into consideration the importance of human factors in the field of civil aviation and the progressive reduction of the physical capabilities necessary for acting as an airline pilot over the years, to find it necessary to fix an age limit for acting as a pilot in the commercial air transport sector, in order to maintain an adequate level of civil aviation safety in Europe. In relation to setting the limit at specifically the age of 65, the CJEU maintained that there were no reasons preventing the legislator from combining an individualised approach for the 60 to 64 age group with the age limit of 65, which represents, in the light of the foregoing considerations, a choice firmly rooted in the relevant international rules, which are themselves based on the current state of medical expertise in that field. Furthermore, that age limit does not have the automatic effect of forcing the persons concerned to withdraw definitively from the labour market, as they are not automatically retired but can perform other duties in the company, including activities outside the commercial air transport sector (paragraph 66).

In that judgment, the CJEU did not separately deal with the possible violation of Article 15(1) of the Charter. However, it recalled its principal view that the freedom to pursue a trade or profession, like the right to property, is not an absolute right but must be considered in relation to its social function. Accordingly, it is possible to impose restrictions on its exercise, provided that those restrictions in fact correspond to the objectives of general interest set by the EU, and do not constitute, with regard to the goal pursued, disproportionate and intolerable interference, impairing the very substance of this right. In the specific case, it found that the disputed prohibition does not affect the actual substance of the freedom to choose an occupation, since it merely imposes certain restrictions on the professional activity of pilots in commercial air transport who have attained the age of 65.

3. Concluding remarks

I find that the topic of the conference and of the panel on limitations on the exercise of fundamental rights confirm the importance of not only Article 52 of the Charter, but also of the methodology the Court chooses in its application. In this contribution I have tried to indicate that there are also those who criticize the prevailing methodology, but I believe, and I hope I am not alone, that this only contributes to our common goal – this of achieving more consistent protection of human rights which in their nucleus carry human dignity and the essence of each individual right – and the essence of our work is protection of individual rights. The methodology in Article 52 of the Charter as well as similar principles in our national constitutions are irreplaceable for determining whether in individual cases the fair balance has been disrupted or the essence of the right compromised. There is no perfect method for assessing the possible interference with and violation of individual rights, but the principle of proportionality has thus far proved itself to be the optimal instrument for its determination.

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Rethinking the proper role of proportionality in the limitation of fundamental rights

1. Introduction

In an often-quoted judgment delivered in 2013, the Corte costituzionale (Constitutional Court, Italy; 'the Italian Constitutional Court'), speaking of the fundamental right to health based on Article 32 of the Costituzione della Repubblica Italiana (Constitution of the Italian Republic; 'the Italian Constitution'), stated in general terms that no constitutional right enjoys absolute prevalence over the others. No right – not even the right to life, one might infer – can become a 'tyrant' in respect of the others, the Court goes on; there is no hierarchy among fundamental rights, since all rights are expressions of human dignity. The Italian Constitution, like other contemporary charters of rights, requires a permanent balancing exercise among fundamental rights under proportionality criteria, without sacrificing the very essence of any of them (judgment of 9 April 2013, No 85/2013, p. 9).

At EU law level, Article 52(1) of the Charter of Fundamental Rights of the European Union ('the Charter') makes the very same point, stating that 'any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others'. The provision is worded as well in general terms, and apparently applies to *all* rights and freedoms recognised by the Charter.

Yet the jurisprudence of the European Court of Human Rights ('the ECtHR') – which sets minimum standards of protection not only for the rights recognised by the European Convention on Human Rights ('ECHR'), but also for the corresponding rights enshrined in the Charter, thanks to the equivalence clause contained in Article 52(3) of the latter – has long recognised the existence of some 'absolute rights', for which *no limitation* is possible. Their emblematic example is the right not to be subjected to torture and inhuman or degrading treatment or punishment enshrined in Article 3 ECHR, whose protection, according to the

consistent case-law of the ECtHR, may never be balanced against any other competing interest or right.

For its part, the Court of Justice of the European Union recognised, as early as 2003, the existence of some rights enshrined in the ECHR ‘which admit of no restriction’, mentioning in particular ‘the right to life or the prohibition of torture and inhuman or degrading treatment or punishment’, (judgment of 12 June 2003, *Schmidberger v Austria*, C-112/00, [EU:C:2003:333](#), paragraph 80). More recently, the same Court reaffirmed the absolute nature of the protection afforded by Article 4 of the Charter in crucial cases on the European arrest warrant (judgment of 5 April 2016, *Aranyosi and Căldăraru*, C-404/15 and C-659/15 PPU, [EU:C:2016:198](#), paragraphs 85-87) and on the Dublin System (judgment of 16 February 2017, *C. K.*, C-578/16 PPU, [EU:C:2017:127](#), paragraph 69). Such recognition means, as the current President of the Court of Justice has pointed out, that ‘since no limitation may be imposed upon those rights, their content and their essence are, in effect, coterminous’ (Lenaerts, 2019): any restriction of these rights would result in an impingement on their very ‘essence’ and would, as such, be impermissible. Which means that, in practice, Article 52(1) of the Charter should not apply to those ‘absolute rights’, which apparently do not lend themselves to limitations under the general umbrella of proportionality.

So, was the Italian Constitutional Court wrong? Are there really – according to the common constitutional tradition of EU member States, on which the Charter is built – fundamental rights that are, so to speak, *more fundamental* than the others, and cannot be limited under any circumstances? More precisely: are there rights which cannot be limited according to general proportionality criteria, such as those set out in Article 52(1) of the Charter?

2. The case against ‘absolute’ rights

As is well-known, the very existence of ‘absolute rights’ has been long discussed in legal philosophy, and continues to be the subject of a lively debate among human rights law scholars, some of whom strongly deny the very theoretical plausibility of such concept.

- (a) To start with, the precise identification of absolute rights is still a matter of debate. Beyond the rights enshrined in Article 3 ECHR, to which – incidentally – the whole bulk of the ECtHR case-law on the point refers, which other rights should be considered ‘absolute’ remains unclear.

The standard assumption identifies absolute rights with those in respect of which no derogation is permitted under Article 15 ECHR, even in times of war and other public emergency threatening not less than ‘the life of the nation’.

However, this simple equivalence is hardly convincing.

Article 15 ECHR encompasses rights that can of course be limited, such as the right to life, which is subject to the exceptions set out in Article 2(2) ECHR as well as to those resulting from the *ius in bello*, as the same Article 15 ECHR makes clear.

Another possible criterion to identify absolute rights could be, then, that of inferring this nature from the simple fact that the relevant provision sets forth no explicit limitation to it. But fresh difficulties would arise on this path: other fundamental rights, such as the right to a fair trial enshrined in Article 6 ECHR, which are subject to no explicit limitation; yet, the resulting standards of protection for the right to a fair trial are the result of complex balancing exercises with the competing interests of all the parties involved in a trial, so that it would be odd indeed to speak of an 'absolute' right in this context – in fact, Article 6 ECHR is usually not labelled as such, either in academic discourse or in case-law.

Things are somewhat muddled even in respect of the rights on whose 'absolute' nature (almost) everyone seems to agree, namely Article 3 ECHR rights. As is well known, the question whether it should be permissible for State actors to torture someone – or at least to submit him or her to some kinds of ill treatments proscribed by Article 3 ECHR – under exceptional circumstances, such as in the ticking bomb scenarios, has been intensively discussed in international legal literature in recent times, especially in the wake of the tragic 9/11 attacks. A majority of legal scholars around the world have reaffirmed the absolute nature of the international commitment against any act of torture enshrined in Article 2(2) of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). However, the number of voices in favour of a relativisation of the ban on torture in exceptional cases have been remarkable, even among well-respected legal scholars, to the surprise and disappointment of many human rights lawyers.

(b) But even if we take for granted the absolute nature of at least Article 3 ECHR rights, the theoretical and practical implications of such an assumption remain, to some extent, unclear.

The ECtHR case-law has consistently held, in principle, that as regards Article 3 rights – including the prohibition of ill treatments other than torture – there is no room for balancing them against any competing interest. The point has been made, for example, in the line of cases concerning the removal (by way of deportation, extradition or European arrest warrant) of an individual towards a State where he or she faces the risk of being subjected to torture or other ill treatments proscribed by Article 3 ECHR.

Yet it has long been claimed by prominent legal scholars that a certain degree of ‘relativism’ cannot be excluded in the application of an ‘absolute’ guarantee such as that afforded by Article 3 ECHR (Feldman, 2002, 242). The determination of the thresholds of ‘torture’ as well as ‘inhuman and degrading treatments’ is notoriously context-sensitive, and takes into account all the circumstances that confer the special significance of an attack on human dignity to an act that, in a different context, would not qualify as such. Indeed, slapping a person in the face could be considered as a minor act of violence, surely falling below Article 3 ECHR threshold, unless such an act is performed by a police officer in a cell on a person under arrest. In such an instance, the ECtHR would surely hold that Article 3 ECHR applies.

On the other hand, the positive obligations stemming from Article 3 ECHR – for example, the obligation to protect a person from possible ill treatments carried out by third parties – are surely not ‘absolute’: as we shall see in greater detail later, the State is under an obligation to take all *reasonable* steps according to the circumstances and the available resources, but not to avoid any possible ill treatment.

(c) Finally, one of the strongest arguments against ‘absolute’ rights is that of a possible *clash of absolutes*. Absolute rights can reciprocally conflict, in situations where the fulfilment of both is impossible. The law – so runs the argument – must solve such dilemmas, and determine which of the competing rights must prevail in the given circumstances. However, if one of the ‘absolute’ rights must yield to the other, this means precisely that it cannot be considered ‘absolute’.

Think of the judgment of the Court of Human Rights of 6 June 2010, *Gäfgen v. Germany*, ([CE:ECHR:2010:0601JUD002297805](#); ‘the *Gäfgen* case’), decided by the Grand Chamber of the ECtHR. A police officer was held to have violated Article 3 rights because he had threatened a suspected kidnapper with torture, with a view to forcing him to reveal the whereabouts of his young hostage. The claim made by distinguished scholars is that the prohibition of torture and inhuman/degrading treatments enshrined in Article 3 ECHR were clashing, here, with the duty imposed upon the State by Article 2 to save the hostage’s life (and with the duty, arising from the very same Article 3, to free him from the anguish and distress caused by his unlawful detention, amounting as such to torture) (Greer, 2015). If the right not to be subjected to torture is an absolute right, *whose* right must prevail here?

3. Shifting the focus from 'rights' to 'obligations'

In the light of these objections, one might wonder whether the concept of 'absolute rights' is really helpful, or rather gives rise to unnecessary misunderstandings, which could perhaps be avoided by shifting the focus from the rights to the *obligations* flowing from them.

Indeed, obligations of diverse nature and scope can lie behind a single right.

If I say that A has a right to life, privacy, or a particular payment, the information I am giving by such a statement is incomplete. At least two basic clarifications are required: *towards whom* A has a right, and what is the content of his or her right – i.e., what is the obligation that the duty-bearer is supposed to fulfil.

If we are speaking of A's right to life recognised by both *constitutional and human rights law*, we mean that *States*, and in general *public powers*, have a number of *different* duties: the basic *negative* prohibition – spelled out in Article 2(1) ECHR – to intentionally kill A; but also, inter alia, the duties not to deport or extradite him or her to a State where he or she faces a serious prospect to be sentenced to the capital penalty, as well as the various positive obligations developed by constitutional and human rights law aimed at ensuring a practical and effective protection of A's life (from the obligation, primarily incumbent on police forces, to prevent aggressions by other individuals to that, incumbent rather on the criminal justice system, of investigating suspicious deaths, and later prosecuting and punishing those found responsible for unlawful killings).

Now, the claim implied in the assertion that a particular *human right* is 'absolute' is that the State, as a bearer of the duty, is under an obligation to protect it whatever the circumstances. However, since many heterogeneous *obligations*, of either negative or positive content, can correspond to the same *right*, we should rather discuss whether each one of these obligations – which are directed, by the way, to different public actors – really needs to be discharged *under any circumstance*, or does admit some *exceptions*.

Focusing first on the ECHR, a closer analysis is warranted on the precise *content* of the single obligations set forth, explicitly or implicitly, in its single provisions, and consequently on their possible *limitations* as resulting from the very text of the ECHR.

- (a) Now, several ECHR provisions spell out sharp-edged *prohibitions* directed at State agents. Think, first, of Article 3: 'No one shall be subjected to torture ...'. But consider also Articles 2(1) ('No one shall be deprived of his life intentionally ...'), Article 4 ('No one shall be held in slavery or servitude'; 'No one shall be required to perform forced or compulsory labour'), Article 5(1) ('No one shall be deprived of

his liberty ...'), Article 1(1) Prot. 1 ('No one shall be deprived of his possessions ...'), Article 1 Prot. 13 ('No one shall be condemned to [the death penalty]'). Even Article 7, enshrining the principle of legality in criminal matters, is framed in fact as a prohibition ('No one shall be held guilty of any criminal offence ...'), preventing criminal courts from convicting someone of an offence that was not established by law at the time of its commission.

The prohibitions set out by these provisions are sometimes worded in an *unconditional* way, more often as subject to possible *exceptions*.

The negative obligation spelled out in Article 3 ECHR is a paradigm of the first category. The prohibition ('No one shall be subjected ...') is expressed here in *unconditional* terms, no possible exception to it being mentioned. By contrast, the prohibition to intentionally deprive anyone of his life enshrined in Article 2(1) ECHR is subject to the *exceptions* enumerated in paragraph 2 of the same provision.

It is important to take note, for our purposes, that the exceptions to the obligations clearly set forth by an ECHR provision are themselves generally worded in a (relatively) precise fashion. Apart from Article 2(2) ECHR, a remarkable example is represented by Article 5(1) ECHR, which on the one hand sets out a general prohibition of depriving someone of his or her liberty ('no one shall be deprived ...'), and on the other hand sets out in detail *six possible conditions* under which such a deprivation is lawful under the ECHR.

Crucially, there seems to be no room, in these cases, for a recourse to the general criterion of proportionality of the interference in the assessment whether or not the interference is lawful: either the court will find that one of the exceptions allowed by the norm applies to the case at issue (and then, a violation of the ECHR right at issue should be ruled out); or it will find that none of these exceptions is applicable (and then, it will be bound to conclude that a violation has actually occurred).

- (b) Things work differently for those ECHR provisions that simply recognise a 'right' or a 'freedom', without specifying what obligations should flow upon the State from this recognition.

Article 8 ECHR, for example, proclaims the right to respect for private and family life, but does not directly set out which specific obligations to abstain or to act derive from this right. Here, the definition of the State obligations flowing from the provision is entirely entrusted to the interpretation; and the ECtHR case-law has, indeed, fulfilled this task, through a gradual clarification of the scope of the right and, consequently, of the *obligations* binding on public actors.

At the same time, a parallel process of judicial definition of the possible *exceptions* to the obligations flowing from the right or freedom has taken place within the ECtHR case-law. The relevant ECHR norm recognising a right or a freedom usually contains a *general clause* authorising limitations to the right or freedom at issue, subject to a set of standard basic conditions: in particular, a legal basis of the limitation, and its being 'necessary in a democratic society' to protect at least one of the competing interests or rights enumerated in the provision itself. Based on this kind of limitation clause, the ECtHR case-law has notoriously borrowed the general criterion of proportionality from German constitutional law and jurisprudence, using it as a tool to assess, in each concrete case at issue, whether or not the interference with the right is justified under the ECHR perspective.

Both the definition of the (negative) obligations arising from the ECHR provisions enshrining a right or a freedom and the possible exceptions to this prohibition are, here, *an open field for the interpretation*, under the general umbrella of the proportionality principle.

- (c) A similar process of judicial development has notoriously led the ECtHR to derive from most ECHR provisions *positive* obligations, beyond those, of purely negative content, which the framers of the ECHR had in mind. The ECtHR case-law has long recognised, beyond the traditional *Abwehrrechte*, duties to act upon State actors, with the aim of ensuring a practical and effective protection of the rights enshrined in the ECHR.

One might wonder, at this point, whether these obligations are unconditional, or subjected to possible exceptions; and a possible answer could be that those obligations flowing from 'absolute rights', such as that enshrined in Article 3 ECHR, should as well be considered unconditional, whereas those derived from 'relative rights' should follow the logic of those rights and remain, therefore, subject to possible exceptions. This answer actually corresponds to the standard opinion in the current debate on 'absolute rights'; yet it is hardly convincing in the end.

The positive obligations derived by the case-law from Article 3 ECHR, for example, have indeed very little in common with the basic negative obligations (i.e., prohibitions) explicitly stated, in unconditional terms, in that provision. The former obligations require State officials to take action, rather than refrain from doing something. And whereas inaction is never impossible, the possibility of taking action, and even more the possibility of taking a *successful* action (in terms of effective protection of the right), are necessarily *conditioned* by all sort of circumstances.

The State's duty to protect X from ill treatment by Y, for example, can be effectively fulfilled only if the police knew, or at least ought to have known, given the circumstances, that X was at risk of being assaulted by Y. Moreover, in the definition of the boundaries of these obligations, the ECtHR takes into due account a wide set of factors, among which the multiplicity of the tasks incumbent on the State and the scarcity of the overall resources, so as not to impose excessive burdens on the State, especially when the fulfilment of the positive obligation would have a significant financial impact.

But there is more. When it comes to determining the scope of positive obligations, the explicit provisions on the exceptions to (or on the possible limitations of) a particular right or freedom do not seem to play any role. Take Article 2(2) ECHR: the three exceptions envisaged here are tailored on the completely different instance of a public agent intentionally killing people, and are immaterial as to definition of the scope of the positive obligations to protect people's lives.

If all this is true, it would be arduous indeed to draw a sensible distinction between the positive obligations derived from Article 2 ECHR, on the one hand, and those derived from Article 3 ECHR, on the other, based on an alleged 'absolute' character of the latter. As a matter of fact, neither set of obligations can sensibly be held 'absolute': there is simply no unconditional obligation upon the State to *prevent* (or to *punish*) either *any* unlawful killing, or *any* ill treatment. There is, instead, an obligation to take *reasonable, adequate* steps to prevent and punish both categories of acts. The language of 'absoluteness' seems out of place here.

4. Non-written limitations to the ECHR obligations?

Having said that, a new question arises: are those prohibitions that are actually framed in *unconditional* terms, or are subject to a list of explicit *exceptions*, open to (further) *non-written exceptions* in particular situations?

- (a) One might be tempted to answer in the affirmative at least in the situation, mentioned above, of a clash between *negative* obligations (prohibitions) and the competing *positive* obligations to protect the rights enshrined in the ECHR.

Such a conflict could theoretically arise in respect of both the unconditional obligations, such as those enshrined in Article 3 ECHR, and the obligations subject to a list of possible exceptions. The *Gäfgen* case is an example for the first category, while the case of *Lufssicherheitsgesetz* (Avian Security Law), declared unconstitutional by the Bundesverfassungsgericht (Federal Constitutional Court, Germany; 'the FCC') in 2006, is an excellent example of the second. While the FCC has addressed the question mainly under the perspective of the principle of

the inviolability of human dignity as enshrined in Article 1 of the Grundgesetz (Basic Law), a case could have easily been made that the order to strike down a plane hijacked by terrorists – which would inevitably cause the deaths of many innocent passengers and crew members alongside the hijackers – should be considered justified by the need to fulfil the competing (positive) obligation to *save the lives* of an even greater number of potential victims, who would be bound to die if the plane were directed into a crowded tower in a 9/11-like fashion.

The argument, though, would not be persuasive in the end.

As I have already mentioned, the positive obligations, having no specific textual basis in the ECHR, have been construed by the ECtHR as *intrinsically* 'conditional': they do not, and cannot, impose *unlimited* duties. Crucially, the ECtHR requires that the action which might be necessary to afford protection to the individual interest at stake be itself *lawful*: and one of the essential conditions for the lawfulness of the action is its compliance not only with the national legal system, but *also with the ECHR standards themselves*, which impose constraints to any State action – including the fulfilment of the positive obligations arising from the very same Convention.

In other words, positive obligations are a priori limited by the need to respect the negative obligations based on human rights law, and indeed by the principle of the rule of law: the State has the duty to take all reasonable steps *within the limits permitted by the law*, and in particular by the negative obligations set forth by the ECHR. The obligation to save the lives of potential terrorist victims yields to the prohibition to intentionally kill someone, outside the (exhaustive) exceptions listed in Article 2(2) ECHR.

The same is true for the right to personal liberty enshrined in Article 5 ECHR. This provision allows for several exceptions to the general ban on depriving someone of his or her freedom of movement; but beyond those exceptions, no further limitation of the liberty at issue is allowed, not even for the sake of other ECHR rights, as the Grand Chamber of the Court has recently clarified in the judgment of the ECtHR of 4 July 2019, *Kurt v. Austria*, ([CE:ECHR:2019:0704JUD006290315](#)), a case concerning the positive obligations to prevent domestic violence. No State could claim, for example, the legitimacy of a measure implying the preventive indeterminate detention of suspected terrorists, alleging that such a measure is imposed by the need to fulfil the positive obligations, arising from Article 2 ECHR, to protect lives and limbs of the potential victims of those suspects. Such an argument would ignore that the latter obligations must only be fulfilled within the boundaries drawn by the rule of law, which include the respect for the obligations set forth, in unequivocal terms, by the ECHR, among which the prohibition to deprive someone of his or her personal liberty except in the cases (exhaustively) listed in Article 5(1)(a) to (f) ECHR.

(b) One might wonder, though, whether both kinds of prohibitions are subject to possible *non-written* limitations warranted not by the logic of a conflict with competing positive obligations, but instead by the general criterion of *proportionality*, under the same logic expressed by the Italian Constitutional Court's judgment quoted at the outset of this paper.

However, since the relevant provisions do not mention such a limitation, on which legal basis could this conclusion be grounded?

An obvious reference could be the idea of *necessity*, which is indeed firmly established in several branches of the law, including international law as well the national criminal and tort laws, and which typically works as a defence against the allegation of a breach of the law. Such a defence is often considered based on the idea – equally widely recognised in legal as well as in moral discourse – of the *lesser evil*: when the causation of a harm is necessary to avert a greater harm, the decision to act could not amount, from a moral as well as a legal perspective, to a proscribed wrong. The same logic, in the end, which underlies the general criterion of proportionality.

The defence of necessity has received so far, at least to my knowledge, little attention within the specific context of international human rights law, and surely has not been addressed as such either by the ECtHR nor by the respondent States or intervening third parties as to allegations of breaches of 'absolute' rights. In fact, this silence is striking, since necessity is the obvious defence raised in national criminal proceeding concerning cases like that examined by the ECtHR in the *Gäfgen* case.

One point, however, should be crystal clear.

Admitting, by way of *interpretation*, a possible role for the defence of necessity in international human rights law would open a dangerous path indeed.

The ECHR has already struck the balance between the competing (individual and collective) interests and has already determined, as to the unconditional obligations, that they cannot be overridden under any circumstance; and as to the remaining obligations, that they can be overridden only in the carefully drafted circumstances set out by the ECHR itself.

Recognising instead that (unspecified) 'necessity' considerations could limit the reach of the protection afforded by the ECHR beyond the recognised exceptions, based on case-by-case balancing exercises among the competing interests at stake, would be tantamount to allowing the States to regularly invoke the logic of lesser evil – if not even the *raison d'Etat* – to exonerate themselves from those obligations. In practice, the reach of obligations as vital for

the rule of law as the prohibition to unlawfully kill someone, to subject someone to torture or the other ill treatments proscribed in Article 3 ECHR, or to deprive someone of his or her personal liberty save in the exceptional circumstances listed in Article 5(1) ECHR, would be transformed into an obligation subject to the general, non-written clause ‘unless such an act is necessary, under the circumstances, to avoid a greater harm’. Any more precise determination of the scope of this general clause would be left, then, to the interpretation by the courts (and, prior to their intervention, to the appreciation of State authorities, who would be all too happy to read them extensively).

5. Implications for EU law

What implications should be derived for EU law from the above conclusions?

As already mentioned, Article 52(1) of the Charter is framed as a general provision, which might be interpreted as applying, in principle, to every one of the rights and freedoms recognised by the Charter.

Such a conclusion, however, would hardly be convincing. Paragraph 3 of the same provision establishes an equivalence clause, according to which ‘in so far as [the] Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said [ECHR]’, without prejudice – of course – to the possibility for the Charter to grant a higher standard of protection. It seems to me that the general clause on limitations contained in paragraph 1 ought to be interpreted in *the light of the equivalence clause* itself – which, for its part, is linked to the general obligation upon the EU to respect the ECHR, expressed in Article 6(3) TEU. Accordingly, in so far as a Charter provision recognises a right that corresponds to a right guaranteed by the ECHR, this right should be granted, *at least*, the same level of protection it enjoys under the ECHR and its relevant case-law, including – crucially – with respect to possible exceptions and limitations.

- (a) This means, first, that the Charter provisions recognising a right in respect of which the ECHR sets forth obligations framed in *unconditional* terms, the EU law will be called upon to ensure that this obligation is respected in an equally unconditional way, i.e. *without being subject to the general limitation clause* contained in Article 52(1) CFREU.

The obvious example is, once again, the prohibition of torture and inhuman or degrading treatment or punishment enshrined in Article 4 of the Charter, which corresponds to Article 3 ECHR. But the same should be said, *inter alia*, for the prohibition of retroactive application of new or harsher criminal law provisions, enshrined in Article 49(1) of the

Charter, which corresponds to Article 7 ECHR – which admits, again, no exceptions apart from the international criminal law clause contained in paragraph 2.

(b) Secondly, as regards Charter rights for which the ECHR sets out obligations subject to a list of carefully crafted *exceptions*, EU law will be equally bound to ensure at least the same level of protection, without any possibility of creating new exceptions through the general limitation clause based on Article 52(1) of the Charter.

Therefore, whenever exhaustive exceptions are explicitly provided for in the ECHR – as in Articles 2(2) and 5 ECHR – the recourse to Article 52(1) of the Charter as a legal basis to craft new possible exceptions to the corresponding Charter rights would be inappropriate, and could potentially lead to conflicts with the ECtHR as to the definition of the standards of protection for the various rights and liberties.

If this is correct, the recent case-law on Article 50 of the Charter on the right to *ne bis in idem* could possibly be questioned as to its compatibility with the equivalence clause.

Both Article 50 of the Charter and the corresponding ECHR provision – Article 4(1) of Protocol 7 – are framed as prohibitions, the second explicitly allowing the ‘reopening of the case in two specific cases: emergence of new evidence, or a ‘fundamental defect’ in the previous proceedings. According to the equivalence clause of Article 52(3) of the Charter, the same minimum standard should apply also to EU law, with the consequence that no further limitation should be possible based on Article 52(1) of the Charter.

Yet, as is well known, the Court has recently applied this latter clause in three Italian cases (judgments of 20 March 2018, *Menci*, C-524/15, [EU:C:2018:197](#) and of 20 March 2018, *Garlsson*, C-537/16, [EU:C:2018:193](#) and of; 26 March 2018, *Di Puma*, C-596/16, [EU:C:2018:192](#)), in which it held: (i) that the duplication of proceedings that are criminal in nature for the same offence constitutes a *limitation* of the right enshrined in Article 50; and (ii) that such a limitation may be nevertheless *justified* on the basis of Article 52(1) of the Charter. By so doing, the Court ends up recognising the possibility of limiting the right at issue *beyond* the sole exception provided in Article 4 of Protocol 7 ECHR, through a direct application of Article 52(1) of the Charter: a result that the ECtHR had in fact avoided in its Grand Chamber judgment of 15 November 2016, *A and B v Norway*, 24130/11 and 29758/11 by ruling out any duplication of proceedings (and the consequent necessity to justify such a duplication) when the authorities involved act within the framework of integrated system of response to the same wrongdoing.

(c) Thirdly, and finally, the ‘natural’ room for the proportionality assessments envisaged in Article 52(1) of the Charter – and for the judicial determination of the ‘essential content’ of the right according to that provision – seems confined to

those rights, freedoms, principles which either do not correspond to ECHR rights, or correspond to those that are themselves subject, in the ECHR legal space, to possible limitations whose determination was left open to judicial interpretation by the framers of the ECHR, through ‘necessity in a democratic society’-clauses or the like. The wording of Article 52(1) of the Charter marks, indeed, a significant progress, within international human rights law, towards the generalisation of an approach to limitations to fundamental rights born in the different context of German constitutional law, and then gradually adopted by many constitutional and human rights law jurisprudences throughout the world. However, the field of application of this ‘open’ limitation clause should be carefully marked, so as to avoid a dilution of some basic guarantees afforded by the ECHR, whose limitations have been sharply determined by the framers of the ECHR.

6. Conclusions

Proportionality is not, and should not become, a *passe-partout* to weaken human rights guarantees, within the ECHR system of protection as well as in the framework of EU law.

Whilst its role remains crucial as a general criterion for the assessment of the legitimacy of limitations in respect of a large number of fundamental rights and liberties, proportionality should not be used as a tool to narrow the scope of, or carve non-written exceptions to, precise prohibitions spelled out by the charters.

My impression is that the alleged ‘absolute’ nature of a particular *right* does not play any significant role in determining the nature of the obligations imposed upon States by the ECHR. The relevant limits should be drawn, instead, from the nature of the *obligations* themselves, as set forth by the single ECHR provisions. In Ronald Dworkin’s terms: whenever a provision of a charter spells out a ‘rule’, and not simply a ‘principle’, the rule must be applied in its exact terms. And if the rule contains a *prohibition*, the prohibition must strictly be observed, save in the specific cases for which the provision itself provides for an exception to the prohibition.

The logic behind this assumption is very clear, by the way. Behind these prohibitions lies a comparative assessment between competing interests, which has already been undertaken by the framers of those charters, and is accordingly foreclosed to State actors and courts.

This already corresponds to the established case-law of the ECtHR, and should also apply – as I have tried to demonstrate – within the framework of EU law, where Article 52(1) of the Charter should be restrictively interpreted, in the light of the equivalence clause contained in paragraph 3 of the same provision.

This is also true, I think, from a national perspective, looking at the interpretation of the *constitutional* provisions.

The passage from judgment No. 85/2013 by the Italian Constitutional Court, which I quoted at the outset of this paper, spells out the general principle that no ‘right’ should be considered absolute. However, this passage should not be overinterpreted as if it allowed non-written limitations to clear *rules* established by the Italian Constitution, beyond the exceptions explicitly provided for in those very rules. When, for example, the Italian Constitution states in Article 13 that no one can be detained for longer than 96 hours unless upon authorisation by a judge, no proportionality assessment and no exceptional circumstances could ever be invoked to elude the stringency of this rule.

The unconditional prohibitions set forth by the Italian Constitution, as well as those subject to a *numerus clausus* of possible exceptions, must be taken seriously by its interpreters, who shall not use proportionality as a tool to unduly narrow the scope of these obligations.

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Concluding remarks by Mr Koen Lenaerts, President of the Court of Justice of the European Union

The Member States of the European Union are diverse and yet they have decided democratically to come together to build an 'ever closer Union'. It is with this idea in mind that the Constitutional Court of Latvia invited the constitutional courts from the four corners of Europe to engage in a mutual exchange of ideas on matters of constitutional importance. When I say 'of constitutional importance' I refer not just to the Member States but also to the European Union as an entity that has its own constitutional system, albeit one that does not entail 'statehood'.

Constitutionalism, both inside and outside the State, is really what unites the participants in this conference. The courts represented here are required to give concrete expression to the values set out in Article 2 of the Treaty on European Union (the 'TEU'). The values of Article 2 TEU are the essence – the inner core – of what binds Europeans together. On the abstract level, recognising the existence of that bond is uncontroversial. Matters become trickier – even conflictual sometimes – where one has to translate those values into concrete principles and rules. Metaphorically speaking, that challenge of transforming something abstract into something concrete may be compared to the way in which the supply of electricity operates. First, electricity is produced and transported at a high voltage – that high voltage can be compared to common values in their abstract form. Second, there are a whole range of transformers – those are the principles. Last, but not least, there is the supply of electricity at the voltage required for electrical appliances in a factory or in a household. Those are the rules.

The challenge, which was discussed during this conference, is how to translate the values of Article 2 TEU first into principles and then into concrete rules.

As President Levits said in his outstanding opening speech, primacy must be the baseline for the whole system because without primacy the Union can simply not function.

I prefer to use the English word 'primacy' rather than 'supremacy'. Supremacy has the connotation of superiority and implies a value judgement. In the 2004 ruling on the compatibility with the Spanish Constitution of the Constitutional Treaty, which never in fact became the (primary) law of the Union, the Spanish Constitutional Court wrote a remarkable

chapter on the distinction between '*supremacía*' and '*primacía*', supremacy and primacy.¹ That court indicated that primacy is, in fact, a rule of uniformity of application, which is absolutely necessary. This is not because the Union is endowed with supremacy over the Member States. That is not the case. On the contrary, the Member States are *die Herren der Verträge*, the Masters of the Treaties. However, when there is a conflict between a national rule and an EU rule, then there is a pragmatic need to ensure uniform application of EU law. When referring to the primacy of EU law, one could equally use the expressions 'uniformity of application' or 'equality before the law'.

The question whether 'primacy is absolute' is not the right one. Primacy is a conflict rule, meaning, as Judge Prechal said in her contribution this morning, that when rules conflict, the Union rule must prevail, provided that that Union rule complies with the Treaties and with the Charter of Fundamental Rights of the European Union (the 'Charter'). In that regard, the Court of Justice enjoys exclusive jurisdiction to verify that proviso. This means, in essence, that a national court cannot examine that compliance but must always refer questions on the validity of secondary EU law to the Court of Justice. However, once the Union rule at issue is validated by the Court of Justice, it is the common European rule and as such, it is to prevail over any conflicting national rule, including constitutional rules. That is because no Member State can break away from the unity of EU law. It is a matter of equality.

However, that is only the beginning of the analysis. The following question then arises: what is the source of the European Union's legitimacy to act? The answer lies, first of all, in the principle of conferral. All the competences exercised by the Union have been conferred upon it by the Member States in the Treaties. It is not a question of individual Member States having given a mandate to the European Union. The 27 Member States together concluded a treaty and collectively they created the European Union and endowed it with competences. The 1969 Vienna Convention on the Law of Treaties² contains the *pacta sunt servanda* rule.

A party to a treaty cannot unilaterally claim 'that is not the way our government understood it and our Parliament, when it ratified the treaty, cannot have understood it that way either. So, we feel no longer bound by this or that rule.' This is not possible under the basic rule of international law: *pacta sunt servanda*. The Member States, knowing that they might subsequently have differences of opinion as to what the precise limits of the competences of the Union were, instituted a Court of Justice of the European Union as a neutral umpire common to all Member States, with one judge per Member State, to rule on such matters. As was rightly pointed out by Judge Kusiņš, the composition of the Court of Justice is one

1 | Tribunal Constitucional, Opinion 1/2004 of 13 December 2004.

2 | Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, United Nations, *Treaty Series*, vol. 1155, p. 331.

of the principal mechanisms through which all national legal systems that are represented in the Court of Justice are able to influence the development of EU law. Each judge does not represent the interests of his or her Member State of nationality. However, each judge's contribution to the Court of Justice's work makes possible a positive and constructive input of national identity, national culture, national legal traditions etc. At the end of the day, it is a common court, whose judges must, on an equal footing, work together in specifying the limits and the content of the obligations entered into by the Member States. Otherwise the system cannot work.

So, once a Member State makes the sovereign and free choice of being part of a structure of common governance, the *pacta sunt servanda* rule of international law applies: all the branches of government – including courts – have to comply with the common standards. There cannot be any unilateral break with the common rules, no matter how justified such a break might seem from a purely national perspective.³

Returning to the metaphor I used earlier, one comes down from a very high voltage (values) through transformers (principles) and finally to the electricity supply needed for industrial or household appliances (rules). That process involves a considerable amount of judicial reasoning, the clarity of which is extremely important for what Judge Ziemele referred to as the question of legitimacy. Hence, there is an imperative need for a single court to act with a single voice – the Court of Justice of the European Union – to say what EU law is, in order that all Member States and all Union citizens are placed on an equal footing before that law.

However, the substantive work of defining EU law must take place through a legitimate judicial process. That is where the constitutional traditions common to the Member States come into play. The role of comparative law in the reasoning of the Court of Justice is to identify those common constitutional traditions, but also to enable that court *to be informed* of issues that define national identity. The possibility of making reverse preliminary references was discussed in that context during this conference and was considered not to be a good idea. However, the concern raised is a legitimate one: how should the content of the national identities of the Member States be ascertained, and, more broadly, how should national constitutional traditions be defined and determined?

A number of procedural mechanisms were identified as potential means for those national constitutional traditions to be found and for the requisite degree of consensus to be established. Judge Ziemele rightly observed, on that point, that there may be one, two or three Member States that dissent from a constitutional trend that is common to all the

3| See, in this regard, Martinico, G., 'Taming National Identity: A Systematic Understanding of Article 4.2 TEU', *European Public Law*, 27(3), 2021, p. 447.

other Member States but on such a fundamental point that those ‘dissenting’ Member States should somehow be accommodated. Judge Prechal referred to the ‘headscarf’ cases as a good example of such accommodation. The judgment of 15 July 2021 of the Grand Chamber of the Court of Justice in Joined Cases C-804/18 and C-341/19, *WABE* and *Müller Handel*, synthesises two national traditions that are at opposite ends of the spectrum: the constitutional principle of *laïcité* (secularism) in France and the high degree of respect paid by public authorities to the expression of religious beliefs in Germany.⁴ The Directive on non-discrimination on grounds of religious belief⁵ sets the standard at European Union level. That Directive is based on a Treaty provision, Article 19 TFEU (ex Article 13 EC), by which the Member States entrusted the European Union with powers to combat discrimination on those and other grounds. The Union legislature adopted that Directive and the Court of Justice is therefore called upon to interpret it. In doing so, the Court of Justice must engage in a balancing exercise as between different rights: the right of religious expression, the right of parents to make educational choices for their children in *WABE*, the kindergarten case, the freedom to conduct a business in the *Müller Handel* case. National courts are then to fine-tune this balancing in the light of national specificities, since the Directive can accommodate a certain degree of diversity among the Member States, provided that they comply with the common European threshold of equal treatment. What the Court of Justice does, ultimately, is to incorporate into its interpretations of EU law the substantive content of constitutional traditions common to the Member States, to the extent that such common traditions exist. Where it is not possible to identify traditions that are common to the Member States, the Court of Justice proceeds with extreme caution in order not to impinge upon the core values of the different Member States. The Court of Justice thus takes great care to accommodate national identities and there are a number of examples of that in the case law.

However, the Court of Justice cannot simply rubber-stamp any claim of national identity that is made. That is the case, in particular, where a Member State relies on arguments based on national identity in order to justify a breach of the values set out in Article 2 TEU or of fundamental rights recognised in the Charter.⁶ The same is true where a Member State departs completely, in a particular policy field, from the obligations imposed by EU law and relies on a provision in its own national constitution, perhaps even on a provision that was inserted in the constitution *after* EU law had developed in a certain direction, in order to be able to say thereafter, ‘that is contrary to our constitution; it touches upon our

4| CJEU, judgment of 15 July 2021, *WABE*, C-804/18 and C-341/19, [EU:C:2021:594](#).

5| Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).

6| On the relationship between national identity and Article 2 TEU, see P. Faraguna, ‘On the Identity Clause and Its Abuses: “Back to the Treaty”’, *European Public Law*, 27(3), 2021, p. 428.

national identity.’ Such an approach is simply unacceptable. It would amount to granting Member States *de facto*, under the guise of arguments based on their national identities, a unilateral power of veto *vis-à-vis* legislative decisions of the Union that have been adopted in accordance with the Treaties and thus in accordance with the rules which all Member States accepted when they acceded to the Union.

It is important that all matters such as these – by which I mean the constitutional traditions common to the Member States and concerns for national identity, or, as Judge Viganò put it, ‘core fundamental rights’, which can potentially give rise to difficulties, even in fields where full harmonisation has taken place – should be brought before the Court of Justice by the constitutional and supreme courts of the Member States, so that they can be discussed at the pan-European level. That is why I am glad that the number of references from national constitutional courts is increasing. In any such reference it should be explained why the case affects the essential core of the national identity of the Member State concerned, why the national tradition at issue should be accommodated in spite of the need for uniform application and enforcement of EU law. Unilateralism is not the way to go. Currently, there are a number of constitutional courts in Central and Eastern Europe that are dealing with crucial matters relating to the relationship between national law and EU law. They must refer. A unilateral departure from equality of the Member States before EU law is not an option.

Moreover, declining to refer such matters is futile, as this type of case will always find its way to the Court of Justice in any event. That is what happened recently in the case of Romania. Scarcely three weeks after the delivery of the judgment of the Romanian Constitutional Court on 8 June 2021, questioning the authority of the judgment of the Court of Justice in *Asociația “Forumul Judecătorilor din România” and Others* of 18 May 2021⁷, a Court of Appeal judge, who had been called upon to apply that latter judgment, explained the dilemma in the following terms, in the framework of an expedited reference for a preliminary ruling. ‘I must and want to follow the judgment of the Court of Justice, but I risk disciplinary proceedings being opened against me if I do so.’⁸ Is it really preferable to have an internal judicial conflict of that sort, within a single Member State, play out publicly before the Court of Justice? Would it not have been better if the Constitutional Court of Romania had itself made a reference? Referring is the normal way of dealing with such issues. That is what the Italian Constitutional Court did in *Tarrico II*, i.e. the *M.A.S. and M.B.* case, as well as in *Consob*,⁹ explaining its

7] CJEU, judgment of 18 May 2021, *Asociația “Forumul Judecătorilor din România” and Others v Inspecția Judiciară and Others*, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, [EU:C:2021:393](#).

8] CJEU, C-430/21 *RS* (pending).

9] CJEU, judgments of 5 December 2017, *M.A.S. and M.B.*, C-42/17, [EU:C:2017:936](#), and of 2 February 2021, *Consob*, C-481/19, [EU:C:2021:84](#).

constitutional concerns in a transparent way in terms of national identity and fundamental rights. Many Member States participated in the debate before the Court of Justice. That is the way the preliminary ruling procedure works. All Member States can make observations. These observations can be based on expertise provided by national constitutional courts.

It should be added that it is not true that the Court of Justice always acts *pro Unione*. The *Test-Achats* case,¹⁰ a reference from the Belgian Constitutional Court, provides a clear example. This case, which was decided ten years ago, concerned the Directive on equal treatment between women and men as regards services in the internal market¹¹. That Directive included an exception that allowed for both premiums and benefits relating to life insurance – in respect of which the factor of risk depended on life expectancy of the insured person – to be based on an actuarial risk assessment that treated women as a separate group from men¹². Belgium transposed that provision into Belgian law and a consumer association challenged it before the Belgian Constitutional Court. That court stated that, according to the Belgian constitution, this rule was contrary to the principle of equal treatment between women and men, as understood at that time in the constitutional order of the Kingdom of Belgium. The case came to the Court of Justice. More than ten Member States, expressing a range of different views, participated in the debate. In the end, the Court of Justice invalidated the relevant provision of the Directive, as proposed by the Belgian Constitutional Court.

There must be mutual trust. There is nothing wrong with a national constitutional court expressing the view, in good faith, that it has a problem with a judgment of the Court of Justice. However, such a constitutional court must explain its concerns transparently and it must accept that all the other Member States will need to make their observations on the reference made by that constitutional court. Ultimately, the Court of Justice may, after thoughtful consideration, come to re-balance its previous findings.¹³

10| CJEU, judgment of 1 March 2011, *Association belge des Consommateurs Test-Achats and Others*, C-236/09, [EU:C:2011:100](#).

11| Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (OJ 2004 L 373, p. 37).

12| Council Directive 2004/113/EC, art. 5, para 2.

13| On the importance of judicial dialogue, see G. Martinico, above No 3, at p. 463 (referring to the Italian Constitutional Court as a good example of that dialogue). See also Fromage D., de Witte, B., 'National Constitutional Identity Ten Years on: State of Play and Future Perspectives' (2021) 27, *European Public Law*, 27(3), 2021, p. 411, at p. 424 (noting that 'it is only by means of dialogue between European and national judges that the proper role of Article 4(2) can be shaped on a case-by-case basis, and it is only the Court of Justice that can have the final say').

The EU Member States – not the Court of Justice itself – have repeatedly increased the scope of the competences conferred on the European Union, far beyond the original internal market paradigm. That is why the degree of interaction – and thus the degree of potential tension or conflict – between national constitutional principles and EU law is becoming ever greater. The undermining of the rule of law and, more specifically, the threat to the independence of the national judiciary is of concern to the European Union because it directly affects the functioning of the Area of Freedom, Security and Justice that is based on mutual trust. All 27 Member States must have a properly functioning justice system that complies in full with Articles 2 and 19 TEU and the Charter. Without such a system, the principle of mutual recognition of judicial decisions in civil and commercial matters, as well as in criminal matters, is no longer possible. Therefore, the central feature of the present-day European Union, the Schengen area with the free movement of persons and all that it implies in terms of legal relationships – which may not only be of an economic but also of a non-economic nature – is under threat where Member States no longer trust each other's legal and judicial systems. That is why it is incumbent upon the Court of Justice to examine whether values are justiciable and, if so, under what conditions.

How then can we move from values, via principles, to concrete rules? The legislature of the Union has provided some benchmarks. There is an increasing number of directives which give concrete expression to the value of respect for the rule of law. For example, in the context of criminal proceedings, there is a directive¹⁴ on the presumption of innocence and on the right to be assisted by a lawyer at the very first police interview (this European Union directive in fact puts into effect the *Salduz* case law of the ECtHR).¹⁵ There is an ever-expanding body of rules which are adopted to ensure that there is a level playing field inside national judiciaries in terms of independence, impartiality and fair trial rules. All of that matters for trust between the Member States' legal systems. That is the core of the constitutional identity of the European Union itself. It is a core which should exist in the same way in all 27 Member States. In that sense, the opposition between identities is hard to understand when it comes to the core values of constitutional identity. Of course, each Member State has its own specific characteristics, not least its language. Moreover, certain constitutional principles such as the French concept of *laïcité* (secularism) exist in some Member States and not in others. The Court of Justice needs to be aware of that. However, what unites the 27 Member States and the European Union is far stronger than what divides them. The undertone of the

14| Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ 2013 L 294, p. 1).

15| ECtHR, judgment of 27 November 2008, *Salduz v. Turkey*, CE:ECHR:2008:1127JUD003639102.

discussion about national identity is often that it is something that exists separately from the European Union. In actual fact, most aspects of Member States' national identities, more than 90 per cent, overlap with the European Union's own constitutional identity, namely fundamental rights and the values set out in Article 2 TEU. National identities and common constitutional traditions are not diametrically opposed. They overlap to a massive extent.

My final words to this conference are an appeal to work together. Constitutional and supreme courts must refer and, if necessary, they must refer the same issue more than once, even in the same case. That has happened several times in the history of the Court of Justice, giving rise to important judgments such as *Taricco I* and *II*¹⁶. National courts must never depart from case law unilaterally. If there is perceived to be a problem with the limits of Union competences, the national court must have the courage to make a reference, explain the legal issues in a transparent fashion, and thereby allow all the other Member States the chance to have their say on the matter. It is only after a fully deliberative process that the Court of Justice, which is composed of one judge per Member State and is assisted by eleven Advocates-General of the highest quality from eleven different Member States, will come to a synthesis of all the points of view that are expressed before it. That synthesis will take due account of the concerns expressed by the referring court whilst maintaining the unity of EU law and thus the equality of the Member States before the law.

16| CJEU, judgment of 8 September 2015, *Taricco and Others*, C-105/14, [EU:C:2015:555](#); CJEU, judgment of 5 December 2017, *M.A.S. and M.B.*, C-42/17, [EU:C:2017:936](#).



Signing of the Guest Book of the Freedom Monument by the President of the Constitutional Court of the Republic of Latvia and the President of the Court of Justice of the European Union

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COURT OF JUSTICE OF THE EUROPEAN UNION

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The Court of Justice of the European Union (the 'CJEU') encapsulated the essence of European integration in the following terms: "The values contained in Article 2 TEU have been identified and are shared by the Member States. They define the very identity of the European Union as a common legal order." At the same time, Article 4(2) TEU provides that the European Union 'shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional'. No conflict can arise between the values forming the identity of the European Union and those that are shared and cherished by the Member States, since the constitutional traditions common to the latter, which are protected by Articles 4(2) and 6(3) TEU, are integral to EU law.

What role are those common values to play in the EU legal order and in those of the Member States? To answer that question, it must be understood that the European Union has created a common constitutional architecture that seeks to guarantee a harmonious relationship between those legal orders, whilst satisfying the highest standards of legitimacy. The only way to make that architecture work successfully, so as to bring the greatest benefit to the citizens of the European Union, is through genuine participation by civil society and by national and European institutions, including the CJEU and national constitutional courts. It is with that goal in mind that the CJEU and those constitutional courts have decided to launch a regular dialogue between them to discuss that common constitutional architecture. The first event in what is intended to become a traditional gathering took place in Riga, Latvia, on 2-3 September 2021 under the auspices of the Constitutional Court of the Republic of Latvia.

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