

THE PARAMETERS OF CONSTITUTIONAL CONFLICT AFTER *MELLONI*

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Abstract

Melloni makes clear that primacy of EU law is not about citizens' rights: even the core of their constitutional rights under national law has to be set aside in favour of the "primacy, unity and effectiveness" of EU law. Melloni extends the duty to set aside citizens' constitutional rights also to EU law that is not directly effective. The Court finds it acceptable that a Framework Decision that "harmonizes" fundamental rights and falls short of constitutional standards of a Member State must override constitutional rights if that EU act lives up to minimum standards of the ECHR in abstract terms. This reopens a path to constitutional conflict in the area of fundamental rights protection that was expected to be closed since the entry into force of the Lisbon Treaty. The Court's reasoning shows few signs of authentic "constitutional dialogue", as witnessed by ignoring the fact that Melloni involved the core of a constitutional right under Spanish constitutional law affecting human dignity. Melloni also once again illustrates that constitutional conflict is not merely matter between a Member State and the Court of Justice, but may exist also between Member State courts and executives, thus making the Court of Justice an arbiter of national constitutional conflict. The Spanish Constitutional Court, in its follow-up judgment, has refused to accept both the constitutional supremacy of EU law and, by implication, the Court of Justice's unreserved position on Article 53 of the Charter, but managed to avoid actual and overt constitutional conflict by an overall lowering of its autonomous fundamental rights standard. Such practical backing off can hardly be expected to occur with constitutional courts with nationally stronger positions of legitimacy. In more general constitutional terms, Melloni can be understood in the context of competing paradigms of rights, power and the relations between constitutional orders.

Introduction

European integration was the way to overcome the devastations that sovereign powers had brought Europe over centuries. The rational to overcome the *hybris* of sovereignty, largely coincided with that of post-war constitutionalism in the European state orders. The constitutional concern with power arrangements for the exercise of authority that dominated the "long 19th century", was to be offset by the paradigm of citizens' rights that came to dominate the post-war 20th century discourse, also that of EU law. The European Union is there primarily for its citizens and integration is realized through their rights. This is how the history of the Court of Justice's case law, from *Van Gend & Loos* and *Costa v ENEL* to the enunciation of European citizenship as destined to be "the fundamental status" of citizens (*Grzelczyk*² and its progeny), is usually read. If this were a

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² *Grzelczyk v Centre Public d'Aide Sociale d'Ottignies Louvain la Neuve (C-184/99)* [2001] E.C.R. I-6193.

correct reading, the protection of citizens' fundamental rights would be of prime concern to the Court of Justice. We know, of course, that things are slightly more subtle, both historically and presently. And *Melloni*³ confirms this.

Fundamental rights protection was originally a matter on which national constitutional courts held the European Court of Justice to account: the Court of Justice initially did not provide fundamental rights protection that was either substantively or as to the level of judicial scrutiny equivalent to that provided by the national courts or by the European Court of Human Rights. In as far as the Union would not provide such protection, EU law that infringes fundamental rights could not have legal effect domestically: in modern post-war European constitutionalism only that law can be valid and effective that respects fundamental rights. The *Bundesverfassungsgericht* marked off this area of potential constitutional conflict, and Sweden codified it in its Constitution, while many Member States either implicitly or explicitly supported the view that EU law must also respect fundamental rights standards to which autonomous Member State acts are subject. Since the Court of Justice began protecting ECHR rights in accordance with minimum Strasbourg standards⁴ and now the Charter of Fundamental Rights has attained primary law status, the tables can be said to have turned: the Court of Justice holds national authorities, including courts, to account as to the protection they provide for EU fundamental rights in the national jurisdictions.⁵ Whenever Member State authorities act within the scope of EU law, they must observe EU fundamental rights – this is the unambiguous message of *Åkerberg Fransson*.⁶

From the perspective of the protection of citizen's rights, this would appear to be a good thing: power is offset by rights – unless, of course, the standard of EU fundamental rights falls short of the national standard. In the latter case, we are back at the historical starting position: EU law does not guarantee rights as they are protected in a Member State but, to the contrary, limits or infringes fundamental rights – power exercised by Member State authorities is no longer offset by the rights that citizens enjoy in the national legal order. Theoretically, the conflict could be solved by taking the route of the substantive values of constitutionalism, that is by allowing for higher national standards, as is normally the case under international human rights law,⁷ and as, in one reading of this provision, would

³ *Melloni v Ministerio Fiscal* (C-399/11), [2013] 2 C.M.L.R. 43.

⁴ This is not until *Bernard Connolly v Commission* (Case C-274 99P) [2001] ECR I-01611.

⁵ Cf. L.F.M. Besselink and J.H. Reestman, "The Relative Autonomy of the EU Human Rights Standard", *European Constitutional Law Review* 4 (2008), p. 200.

⁶ *Aklagaren v Fransson* (C-617/10) [2013] 2 C.M.L.R. 46, European Court of Justice (Grand Chamber), 2013-02-26, on which Wattel and Van Bockel in 3. E.L. Rev. 2013, 38(6), 866-883. For an attempt to differentiate the scope of EU law and the scope of the Charter, now rejected in *Fransson* e.g. Clemens Ladenburger, "European Union Institutional Report", *The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions*, Tartu University Press, reports of the XXVth FIDE Congress, Tallinn, 2012, Vol. 1, , para 3.1.8, p. 168.

⁷ Art. 53 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'; Art. 5(2) ICCPR: 'There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.'

follow from Article 53 of the Charter. However, the *Melloni* judgment of the Court of Justice of 26 February 2013 rejects that reading and holds that Article 53 cannot allow for higher levels of national protection if this interferes with the primacy, unity and effectiveness of EU law, thus reducing Article 53's meaning to insignificance. Thus, also, the Court re-opens the field of constitutional conflict as concerns fundamental rights protection – unless, of course, constitutional courts are willing to reduce their standards of fundamental rights protection, i.e. in certain cases leave power previously checked by rights subsequently unchecked. The significance of Article 53 of the Charter was thought to be that “existing regimes should not be applied and interpreted ‘downwards’ by invoking the language of the Charter”⁸, but as we shall see, this is precisely what the interpretation of Article 53 in *Melloni* effected: the interpretation ‘downwards’ of the rights of the defendant under the Spanish Constitution.

In this case comment, the ruling in *Melloni* is summarized, critically analysed, and commented on from the perspective of relations between constitutional orders. To that purpose, we must pay attention not only to the Court of Justice's judgment, but also briefly outline how the proceedings ended in the Spanish Constitutional Court, which handed down its follow-up judgment on 13 February 2014.⁹

The Case at the Court of Justice

Facts

Stefano Melloni is a swindler who set up financial investment schemes in which the savings of some 1800 persons are reported to have disappeared; Melloni also disappeared for a while. In his absence, he was convicted to 18 years imprisonment, subsequently reduced to ten years due the introduction of statutory limitations, a conviction confirmed in appeal and cassation. After he had at last been arrested, his surrender to Italy was requested for execution of the prison sentence under a European Arrest Warrant in August 2008. This surrender was consented to by the *Audiencia Nacional* (Spanish High Court). This court rejected Melloni's contention that his rights to a fair trial under Art. 24(2) of the Spanish Constitution had been infringed, Melloni claiming, first, that he had revoked the appointment of the advocates that had defended him at first instance and, secondly, that his surrender should have been made conditional on the possibility of retrial. Melloni subsequently filed a constitutional complaint at the Spanish Constitutional Court, the Tribunal Constitucional, asserting that his rights of defence under Article 24(2) of the Spanish Constitution were infringed, on the same grounds invoked at the High Court.

Spanish constitutional protection of the right to a fair trial

⁸ B. De Witte, “Article 53” in *The EU Charter of Fundamental Rights: A Commentary*, Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds.), (München/Oxford/ BadenBaden: C.H.Beck/Hart/Nomos 2014), p. 1524; cf. Advocate-General Bot in *Melloni*, at para. 134.

⁹ Sentencia 26/2014, of 13 February 2014 (Boletín Oficial de l'Estado, number 60, of 11 March 2014), at <http://www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=20977>; an unidiomatic and sometimes inaccurate English translation is now available at <http://www.tribunalconstitucional.es/en/jurisprudencia/restrad/Pages/JCC2862010en.aspx>.

Under the case law of the Tribunal Constitucional, the right to be present at a criminal trial is an essential part of the right to a fair trial and to defence (Art. 24(2) Constitution). The Spanish Constitutional Court had established that constitutional rights also have effect in relation to institutions external to the Spanish legal order, but in the case of an allegation of such an “indirect” infringement by an external authority, the threshold for establishing an infringement is higher: it must concern the very core of the right in a manner that affects human dignity. The Constitutional Court had established that the right to a fair trial would be infringed in this manner if the right to be present in criminal trials would be denied in cases of very serious offences; and, hence, extradition or surrender of a person to a country where there is otherwise no right to a retrial after trial *in absentia* would have to be made conditional on allowing for retrial of the person extradited or surrendered. The denial of the right to be present at a trial and the lack of a right to retrial in such cases was considered to touch the core of the right to a fair trial, affecting human dignity. This was at stake in the case of Melloni: in Italy there is also right to retrial after conviction *in absentia* for a serious offence. The question thus arose whether Framework Decision 2002/584 on the European Arrest Warrant, which does not explicitly allow for making the surrender conditional on retrial, precludes such a condition in order to guarantee the rights of defence of the person surrendered.

The EAW Framework Decision

Framework Decision 2002/584 in its original version allowed, in principle, making surrender for execution of a conviction conditional on the possibility of retrial in cases of trial *in absentia* (Art. 5 sub (1)). Significant differences in legal traditions regarding trial *in absentia* – what is regular practice in one Member State is constitutionally barred in another¹⁰ – were reason to replace this provision with another set of more precise provisions of the amending Framework Decision 2009/299.

The amended Framework Decision specifies the conditions under which conviction in a trial *in absentia* cannot constitute a reason for non-surrender of the convicted person (Art. 4a(1) of the amended EAW Framework Decision). The surrender of the person cannot be refused – amongst others – in the following circumstances:

- a) the person was unequivocally aware of the scheduled trial, of the date and place of it, and of the fact that a conviction may follow also in this person’s absence;
- b) the person was defended by legal counsel whom he or she had mandated, appointed either by the person concerned or by the State.

In the case of Mr. Melloni, these grounds were relevant: on their basis his surrender must take place while there is no right to retrial, a situation which was unconstitutional under Spanish law.

The questions referred to the European Court of Justice

¹⁰ John Vervaele, *The European Arrest Warrant and Applicable Standards of Fundamental Rights in the EU*, *Review of European Administrative Law* 2013-2, 40.

The first of the Tribunal Constitucional's three questions was whether Framework Decision 2002/584 on the European Arrest Warrant, which does not explicitly allow for making the surrender conditional on retrial, precludes such a condition in order to guarantee the fundamental right of defence of the person surrendered. Secondly, if the EAW Framework Decision does preclude such a condition, it was asked whether this is compatible with the right to a fair trial and the rights of defence under Articles 47 and 48 of the Charter.

The third and final question posed would be relevant if the Framework Decision were to be judged compatible with the Charter, and it concerned Article 53 of the Charter. This reads as follows:

“Level of protection

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 Union law and international law and by international agreements to which the Union 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 Tribunal Constitucional asked whether this provision allows a Member State “to make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the requesting State, thus affording [the right to a fair trial and the rights of defence] a greater level of protection than that deriving from European Union law, in order to avoid an interpretation which restricts or adversely affects a fundamental right recognised by the Constitution of the first-mentioned Member State?”¹¹

The judgment of the Grand Chamber

Admissibility

The Court first addressed an issue of admissibility arising for reasons of intertemporal law. The Spanish High Court had ordered the surrender of Melloni on 12 September 2008, while the implementation deadline of the new Article 4a of the EAW Framework Decision was 28 March 2011, with the possibility of a unilateral extension to 1 January 2014 of which Italy had availed itself; hence, the applicable EU provision was that of the old EAW Framework Decision, which allows for the kind of condition that Spanish authorities would have to pose under Spanish constitutional law.

The Court rejects this view. The Court holds that the fact that Italy had decided to defer the implementation deadline until 1 January 2014 does not make the present request for a preliminary ruling inadmissible:

“It is apparent from the order for reference that, in order to interpret the fundamental rights recognised under the Spanish Constitution in accordance with

¹¹ *Melloni*, at para. 26.

the international treaties ratified by the Kingdom of Spain, the national court wishes to take into consideration the relevant provisions of EU law to determine the substantive content of the right to a fair trial guaranteed by Article 24(2) of that constitution.”¹²

Evidently, if a constitutional court in interpreting the autonomous meaning of a national constitutional provision wishes to take into account EU law, the Court of Justice will provide it with the requested information as to the meaning of the relevant EU law, also if this is for merely for the purpose of determining the autonomous meaning of national constitutional law. This is in line with earlier admissibility case law, but this time explicitly framed with regard to deciding autonomously national constitutional questions. The particular framing of the Court’s judgment in relation to the Spanish Constitutional Court’s task is picked up subsequently by the latter Court in its follow-up judgment, as I argue below.

Are there uncodified possibilities to protect fundamental rights?

The first question submitted was whether Article 4a(1) of the Framework Decision allows the executing judicial authorities to make the execution of a European arrest warrant conditional upon the conviction rendered *in absentia* being open to review in the issuing Member State, in order to guarantee the rights of defence of the person surrendered.

Essentially, this question concerns the exhaustiveness of the list of cases in which the national court must execute the arrest warrant in the absence of the right of retrial in the requesting state (Art. 4a(1) under a and b). From the judgment of the Spanish Constitutional Court by which this question was referred – the first reference in its history – it appears that the referring court did not wish to challenge the exhaustiveness of the list of cases of actual non-surrender as such, but only the exceptional situation of *conditioning* the surrender under circumstances in which the application would lead to an infringement of fundamental rights protected under primary EU law, as the Framework Decision itself provides that it

“shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the Treaty, including the right of defence of persons subject to criminal proceedings, and any obligations incumbent upon judicial authorities in this respect shall remain unaffected.” (Art. 1(2) Framework Decision 2009/299).

So, in reality, the question posed was whether the necessity of protecting fundamental rights could be considered as a general condition for the application of the Article 4a (1) of the Framework Decision. This is not an odd question. After all, the Framework Decision itself claims that it does not prevent the application of fundamental rights, which are, as the Spanish Constitutional Court emphasizes, primary rules to which secondary law (the Framework Decision) is subject¹³; all application of secondary EU law is subject to its being in conformity with fundamental rights. Thus viewed, pieces of legislation of exclusive harmonization are also always subject to an unwritten exception if they would lead under

¹² *Melloni*, para. 33.

¹³ Tribunal Constitucional, Order 6922-2008, 9 June 2011, pp. 15-17.

a particular set of circumstances to an infringement of fundamental rights. In other words, the Spanish Constitutional Court posed a question like the one addressed in *N.S.*¹⁴: does mutual recognition allow for fundamental rights exceptions not explicitly provided for in secondary legislation? This is a controversial question in EU law, since, as is commonly held, it potentially undermines the notion of mutual recognition and restricts the mutual trust on which it is based.

The Court of Justice sidesteps the issue by rephrasing the question, leaving out the referring court's explicit reference to the fundamental rights conditionality of secondary law and its application entirely: "[The] Tribunal Constitucional asks, in essence, whether Article 4a(1) of Framework Decision 2002/584 must be interpreted as precluding the executing judicial authorities, in the circumstances specified in that provision, from making the execution of a European arrest warrant issued for the purposes of executing a sentence conditional upon the conviction rendered *in absentia* being open to review in the issuing Member State."¹⁵

The Court's answer relies heavily on *Radu*, in which the Court did not want to know of fundamental rights conditionality.¹⁶ In *Melloni*, it reiterates that the EAW's objective is that of replacing a multilateral system of extradition with a simplified and more effective system based on a high degree of confidence which should exist between Member States. The Framework Decision consequently only allows refusal of the execution of a warrant in cases of mandatory non-execution explicitly provided for. The executing judicial authority may make the execution of a European arrest warrant subject solely to the conditions set out in the Framework Decision. Basing itself on the wording of the optional ground for non-execution of a European Arrest Warrant provided in Article 4a(1), the Court concludes that the provision precludes "making the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in his presence".¹⁷

The Court seeks further confirmation of this "literal interpretation" in the specific objective of the new Article 4a, which is to restrict the opportunities for refusing to execute an arrest warrant and to harmonize the grounds for non-recognition of judgments, allowing "the executing authority to execute the decision despite the absence of the person at the trial, while fully respecting the person's right of defence". Surrender can hence not be made subject to a retrial in the issuing Member State, if the person was aware of the trial while absent or has given a mandate to the legal counsel that defended him or her during that trial.¹⁸

Although the Court's rephrasing of the question polished it away, the issue of fundamental rights could not be totally avoided either. It reasons away, however, the possibility of secondary law being applied in conformity with fundamental rights beyond the text of the Framework Decision, by holding – with reference to the Opinion of the Advocate General – that the EU legislature's providing for "an exhaustive list of exceptions of the circumstances in which the execution of a European arrest warrant issued in order to

¹⁴ *N.S. v Secretary of State for the Home Department and M.E. v Refugee Applications Commissioner Ministry for Justice Equality and Law Reform* (C-411/10 and C-493/10), E.C.R. 2011 I-13905.

¹⁵ *Melloni*, para. 51.

¹⁶ *Radu* (Case C-396/11) 29 January 2013.

¹⁷ *Melloni*, para. 36-40

¹⁸ *Melloni*, para. 41-43.

enforce a decision rendered *in absentia* must be regarded as not infringing the rights of the defence, is incompatible with any retention of the possibility for the executing judicial authority to make that execution conditional on the conviction in question being open to review in order to guarantee the rights of defence of the person concerned” (para. 44). The Advocate General in the relevant sections of his Opinion had established the intention of the legislature as apparent from the text of the Framework Decision. In other words, if the EU legislature provides an exhaustive list of cases in which it deems a fundamental right to be duly observed, that is the end of the matter and there can be no further appeal to fundamental rights whatsoever.

Finally the Court arrives at the crux of the Spanish Constitutional Court’s question i.e. the obligation to respect fundamental rights as enshrined in Article 6 TEU to which an application of the European arrest warrant Framework Decision is subject, and hence might in appropriate cases affecting the core of a fundamental right lead to a fundamental rights conditionality of surrender, also in cases covered by Article 4a(1) of the Framework Decision. The Court rejects this view, holding that “it should be noted that that argument, in reality, raises the question of the compatibility of Article 4a of Framework Decision 2002/584 with the fundamental rights protected in the legal order of the European Union” (para. 45).

The Court’s conclusion on the first question is that Article 4a(1) precludes “in the circumstances specified in that provision, from making the execution of a European arrest warrant issued for the purposes of executing a sentence conditional upon the conviction rendered *in absentia* being open to review in the issuing Member State” (para 46).

Is the Framework Decision contrary to ECHR or Charter?

The second question of the Spanish Constitutional Court concerned the compatibility of Article 4a(1) under a and b with the right to a fair trial and the rights of defence under the Charter. The Court of Justice reiterates, with reference to its judgment in the *Trade Agency* case,¹⁹ that although the right of the accused to appear in person at his or her trial is an essential component of the right to a fair trial, that right is not absolute. It continues:

“The accused may waive that right of his own free will, either expressly or tacitly, provided that the waiver is established in an unequivocal manner, is attended by minimum safeguards commensurate to its importance and does not run counter to any important public interest. In particular, violation of the right to a fair trial has not been established, even where the accused did not appear in person, if he was informed of the date and place of the trial or was defended by a legal counsellor to whom he had given a mandate to do so.”²⁰

¹⁹ Case C-619/10 *Trade Agency* [2012] ECR I-0000, paragraphs 52 and 55; this concerns judgment in default of appearance in civil cases and the system of double review in the enforcement of a foreign civil judgment.

²⁰ *Melloni*, para. 49.

This is, the Court states, in keeping with the ECtHR case law,²¹ and the Court confirms the stated objective of the amending Framework Decision “to enhance the procedural rights of persons subject to criminal proceedings whilst improving mutual recognition of judicial decisions between Member States”. On this basis, the Court concludes:

“Article 4a(1)(a) and (b) of Framework Decision 2002/584 lays down the circumstances in which the person concerned must be deemed to have waived, *voluntarily and unambiguously*, his right to be present at his trial, with the result that the execution of a European arrest warrant issued for the purposes of executing the sentence of a person convicted in absentia cannot be made subject to the condition that that person may claim the benefit of a retrial at which he is present in the issuing Member State” [para. 53; emphasis added].

The Court then immediately concludes from this that Article 4a(1) “does not disregard” the right to an effective remedy and the rights of defence under Articles 47 and 48(2) of the Charter and is therefore compatible with these provisions (paras 53-54).

Apparently, the Court derives the element of a “voluntary and unambiguous” waiver by the convicted person from the case law of the ECtHR, since it is not in the text of Article 4a(1) of the Framework Decision which speaks in various places only about “unequivocally” waiving one’s right to be present, which does not necessarily imply “voluntarily” waiving that right.

Does Article 53 Charter allow Spain’s higher level of protection to apply?

Whereas the referring Constitutional Court presented three interpretations of Article 53 of the Charter,²² the Court of Justice cuts the judicial dialogue short and dismisses out of hand any interpretation which would allow a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law. According to the Court, any such reading aims to subject surrender “to conditions intended to avoid an interpretation which restricts or adversely affects fundamental rights recognised by its constitution, even though the application of such conditions is not allowed under Article 4a(1) of Framework Decision 2002/584” (para. 56). This the Court cannot accept:

“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.

²¹ It cites the decisions of the ECtHR in *Medenica v. Switzerland*, no. 20491/92, § 56 to 59, ECHR 2001-VI; *Sejdovic v. Italy* [GC], no. 56581/00, § 84, 86 and 98, ECHR 2006-II; and *Haralampiev v. Bulgaria*, no. 29648/03, § 32 and 33, 24 April 2012.

²² See Aida Torres Pérez, “Spanish Constitutional Court, Constitutional Dialogue on the European Arrest Warrant: The Spanish Constitutional Court Knocking on Luxembourg’s Door; Spanish Constitutional Court, Order of 9 June 2011, ATC 86/2011”, (2012) 9 EuConst, 116-119.

59 It is settled case-law that, by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order (see Opinion 1/91 [1991] ECR I 6079, paragraph 21, and Opinion 1/09 [2011] ECR I 1137, paragraph 65), rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State (see, to that effect, inter alia, Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, paragraph 3, and Case C 409/06 *Winner Wetten* [2010] ECR I 8015, paragraph 61).

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.”

In support of this position, the Court points out that a Member State is not allowed to refuse to execute a European arrest warrant when the person concerned is in one of the situations mentioned in Article 4a(1) of the Framework Decision (para. 61). This provision was intended to solve the difficulties in the area of recognition of verdicts rendered *in absentia*, and effects “a harmonisation of the conditions of execution of a European arrest warrant in the event of a conviction rendered *in absentia*, which reflects the consensus reached by all the Member States regarding the scope to be given under EU law to the procedural rights enjoyed by persons convicted in absentia who are the subject of a European arrest warrant” (para. 62). The Court then refers to the considerations of unity and effectiveness:

“Consequently, allowing a Member State to avail itself of Article 53 of the Charter to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member State, a possibility not provided for under Framework Decision 2009/299, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing Member State, by casting doubt on *the uniformity* of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise *the efficacy* of that framework decision.” [para. 63, emphasis added]

The Case at the Tribunal Constitucional

On 13 February 2014, the Tribunal Constitucional handed down its follow-up judgment in *Melloni*, which was published on 11 March.²³ In the third paragraph of the grounds of its judgment, the Tribunal notes that the answers of the Court of Justice are “very useful” (*de gran utilidad*), but nonetheless need to be supplemented with the doctrine laid down in

²³ See footnote 9, above.

the Tribunal's judgment in the Constitutional Treaty case of 2004.²⁴ It reaffirms that the transfer of powers under the Spanish Constitution is subject to substantive limits, namely "respect of the sovereignty of the State, of our fundamental constitutional structures and of the system of fundamental principles and values consecrated in our Constitution, in which fundamental rights acquire their proper substance".²⁵ It then rephrases, with reference to the 2004 judgment, that applying the primacy of EU law is based on the presupposition of respect for fundamental national constitutional structures, which includes fundamental rights.²⁶ It recalls that it is not the Constitution but the Treaties that are the framework of validity for Union legislation, "although the Constitution requires that the legislation accepted as the result of the transfer be compatible with its basic values and principles". Moreover, of particular importance in the context of Article 53 of the Charter, it repeats that, notwithstanding all of this, the Tribunal has held that

"in the unlikely case in which, in the ulterior development of European Union law, this law would prove to be irreconcilable with the Spanish Constitution, while the hypothetical infringement of European law [of primary European law] is not remedied by the ordinary channels provided [by that law], ultimately, the conservation of the sovereignty of the Spanish people and the supremacy of the Constitution which it has given itself could lead this Court to approach the problems which in such a case would arise, through the corresponding constitutional procedures, problems which under current circumstances are considered inexistent."²⁷

Next, the Tribunal recapitulates its doctrine on "indirect" infringements of the right to a fair trial under Article 24 of the Spanish Constitution as developed in its case law, but emphasizes the importance of international human rights treaties, with which the constitutional value system coincides. The constitutional standard by which the order to surrender Mr. Melloni needs to be judged includes, therefore, the human rights treaties to which Spain is a party, among which the ECHR and Charter of Fundamental Rights as interpreted by the competent organs established by the relevant treaties, and these interpretations in turn are "essential elements to interpret the absolute content of the right recognized in Article 24(2) of the Spanish Constitution, the disregard of which would constitute an indirect infringement of the fundamental right by the Spanish authorities".²⁸ After examining the case law of the ECtHR (including more case law than the Court of Justice mentions in its judgment) and that of Court of Justice, the Tribunal concludes that

²⁴ TC *Melloni*, Fundamentos jurídicos [hereinafter: FJ], para 3, p. 10; the reference is to DTC 1/2004, 13 December 2004.

²⁵ The English translation inserts more text in the quote from the original judgment of 2004 than is found in the Tribunal's *Melloni* judgment.

²⁶ *Ibid.* p. 11: "Igualmente destacamos que la primacía del Derecho de la Unión Europea jurisdiccionalmente proclamada opera respecto de un Ordenamiento, el europeo, que se construye sobre los valores comunes de las Constituciones de los Estados integrados en la Unión y de sus tradiciones constitucionales, lo que nos llevó a subrayar que es el propio Derecho de la Unión el que garantizaría, a través de una serie de mecanismos previstos en los Tratados, el presupuesto para la aplicación de su primacía, que no es otro que el respeto de las estructuras constitucionales básicas nacionales entre las que se encuentran los derechos fundamentales (en la DTC 1/2004, de 13 de diciembre, FJ 3)."

²⁷ The reference is to DTC 1/2004, of 13 December, FJ 4.

²⁸ TC *Melloni*, FJ para. 4, p. 14.

these interpretations “coincide to a large extent” and can therefore provide it with the interpretative criteria to decide the case.

“Hence, we must now affirm, overruling the doctrine laid down in STC 91/2000, that a conviction *in absentia* does not involve an infringement of the absolute contents of the fundamental right to a fair trial, even if there is no remedy for the absent defendant, when this absence has been voluntarily and unambiguously decided by a defendant who was duly summoned, and has been effectively defended by an appointed Lawyer (Article 24.2 of the Spanish Constitution).”²⁹

On this basis, the Tribunal rejects the appeal, considering that the *Audiencia Nacional* had established on the basis of an examination of the documents that legal counsel appointed by Melloni had not stopped representing him, while voluntarily waiving his right to be present at the hearings at all instances; hence, it had decided to surrender Mr. Stefano Melloni without infringing the requirements derived from the absolute content of this fundamental right under the Spanish Constitution.

This judgment of the Tribunal was accompanied by three concurring opinions, to which reference is made only briefly in the comments below.

Commentary

The *Melloni* ruling of the Court of Justice is a landmark case on the status and rank of the EU fundamental rights in relation to national constitutional rights, as well as on the primacy of EU law. As the former concerns the rights paradigm, and the latter the power paradigm, *Melloni* can provide insight in their relationship at the present state of European integration.

This comment focusses, firstly, on some institutional features of relations between courts, legislatures and executives; secondly it looks to the general power relationships between the EU and national constitutional orders by looking at the way the Court of Justice attaches overriding importance to the “primacy” of EU law, which it now refers to in couple with “unity and effectiveness”; finally, the perspective of fundamental values that underlie the case of *Melloni* is briefly discussed from the perspectives of “constitutional dialogue” and constitutional identity.

Fundamental rights and mutual recognition: of legislatures, executives and Courts

Mutual recognition sits uneasily with effective fundamental rights protection. The protection of fundamental right is conceived of not as something that should be realized by each of the authorities involved in recognizing the acts of another authority, but by

²⁹ Ibid., p. 16.

delegating that protection to the authority whose acts are recognized: mutual recognition operates on the basis of a generalized sense of “mutual trust” that the other will take its task seriously is, not whether in the concrete case rights are protected, even if it concerns the general minimal standard enjoined by the ECHR. This is evident in the Court of Justice’s case law on the EAW, as evidenced in *Radu*: the principle of mutual recognition does not allow for fundamental rights scrutiny in the concrete case (although some Advocates General have, at least to some extent, thought differently³⁰). This is repeated all the more forcefully in *Melloni*, where it concerned the application of a specific higher standard of protection: any invocation of fundamental rights protected at national level would undermine the objectives of secondary legislation – this is the starting point that the Court takes in its answer to the first question. Whenever secondary legislation – here Article 4a(1) of the Framework Decision – proclaims its intention to harmonize the cases in which a restriction of a fundamental right is considered to be legitimate. In its answer to the second question it finds it sufficient that totally in the abstract, the provision is in accordance with ECHR and Charter standards. Abstract conformity with European fundamental rights standards, either the minimum standard of the ECHR or the maximum standard of the Charter, prevents fundamental rights review in concrete cases under that legislative provision – such review, so the Court seems to find, would undermine mutual recognition and the mutual trust on which it is based.³¹

As a matter of fact, attaching this importance to secondary legislation as ‘harmonization of EU fundamental rights’ risks erasing the difference between the primary law nature of fundamental rights and secondary law as subject to this. Also it places considerable confidence in the legislature, perhaps too much so.

In this context it somehow seems to be forgotten since the EU entered the post-Lisbon era is the fact that the EAW Framework Decision and the amending decision which is at the centre of *Melloni*, are legislative only in substance. It was legislated upon by the Council, not the Parliament. It was a congregation of executives that acted authoritatively in this case. The amending decision, moreover, was not on the initiative of the Commission but of fellow executives. This was the problem inherent in the very nature of decision-making under the Third Pillar. With regard to executive acts, one might expect a stronger judicial protection and closer judicial scrutiny than in the case of the products of legislatures with the direct democratic legitimacy of parliaments. In fact, the gradual extension of judicial protection in the course of the 20th century across Europe has generally been considered to be the natural consequence of the increased dominance of the executive.³² But what applies to national legal orders across Europe may not apply to the EU. *Melloni*, at least, does not seem to be inspired by the concern of critically counterbalancing legislation that is made by an executive assembly only. Quite to the contrary: in *Melloni*, even executive-

³⁰ Advocate General Sharpston in *Radu* (Case C-396/11) points 71 ff.; Advocate General Cruz Villalón’s Opinion in *I.B.* (Case C 306/09) [2010] ECR I-10341, para. 43-44; of Advocate General Bot in *Wolzenburg*, (Case C 123/08) [2009] ECR I 9621, points 148 and 151; Advocate General Mengozzi in *Lopes da Silva Jorge* (Case C 42/11) [2012] 5 September 2012, point 28.

³¹ This interpretation is reinforced by the contrasting judgment of the Court in *Jeremy F v Premier minister* (Case C 168/13 PPU), 30 May 2013, para. 37 ff., where the *absence* of explicit provisions in the Framework Decision creates space for fundamental rights considerations.

³² Instead of many others, Lord Woolf, “Judicial Review – The Tensions Between the Executive and the Judiciary”, (1998) 114 *Law Quarterly Review* 579.

made EU law that is *non-directly effective* is, as I argue presently, granted primacy that had so far only been given to directly effective EU law.

Primacy

- *Primacy of non-directly effective EU law: setting aside primary EU law?*

From *Van Gend & Loos* onwards, the doctrine of direct effect has been a judicial invention. There is only one exception to this: the text of the EU Treaty from Maastricht until the Lisbon, originally provided that framework decisions “shall not entail direct effect” (Article 34 (2) sub b EU Treaty (2006)). However, also *after* Lisbon, this qualification still applies to the EAW Framework Decision (including the amending Framework Decision 2009/299) under the primary law of Protocol 36 to the Lisbon Treaty.³³ Holding that non-directly effective EU law entails the duty to set aside national law is something of a revolution in EU law, and may amount to setting aside primary law. This deserves closer scrutiny.

There has been some controversy in the literature over how direct effect and primacy relate to each other. Apart from quasi metaphysical views of EU law as inherently superior to national law, there is a narrower and a broader notion of primacy. The narrower notion, in line with *Costa v ENEL* and the language of *Simmenthal*³⁴, is that primacy of EU law is essentially the duty to *set aside* national law in cases of conflict with EU law. The broader notion considers primacy not only as the duty to *disapply* national law but also to the duty to apply national law *consistently* with EU law.³⁵ The narrower notion of primacy would seem to be conditional on the relevant EU law being direct effective, whereas the broader notion might also apply to EU law that is not directly effective. From the perspective of the broader notion, saying that primacy applies also to non-directly effective EU law is no big deal as long as there is no duty to set it aside and oust it from the national legal order. Also in this view, a real novelty, if not a revolution, would reside in *Melloni* were it to entail that national law is to be *set aside* in favour of non-directly effective EU law. It is therefore important to establish whether that is really the case.

At its surface, *Melloni* does not seem to impose such a duty. The Court does not refer to *Simmenthal* and it does not speak its language of “setting aside” conflicting national law. Moreover, there is a curious treatment of “primacy, unity and effectiveness” when it comes to applying this trinitarian formula to the case at hand. In fact, it seems that the Court applies only two of the three essential characters of EU law: unity and effectiveness. In paragraph 63, the Court explains that a reading of Article 53 of the Charter that would

³³ Protocol (No 36) on transitional provisions, Art. 9: “The legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of the Treaty on European Union prior to the entry into force of the Treaty of Lisbon shall be preserved until those acts are repealed, annulled or amended in implementation of the Treaties.”

³⁴ *Amministrazione delle Finanze dello Stato v Simmenthal* (C-106/77) II [1978] ECR 629.

³⁵ Also known as “indirect effect”, both as regards directives or other non-directly effective EU law, as e.g. in *Criminal Proceedings against Pupino* (C-105/03) [2005] E.C.R. I-5285 (ECJ); see Koen Lenaerts and Tim Corthaut, “Of birds and hedges: the role of primacy in invoking norms of EU law”, *E.L. Rev.* 2006, 31(3), 287-315.

allow the Spanish higher level of protection, would “cast doubt on the uniformity” and “compromise the efficacy” of the Framework Decision. It does not say that it would infringe the *primacy* of EU law. And this might confirm the tenet formulated by various authors that Article 53 of the Charter is not a clause about primacy in the first place. I briefly go into this view, which *Melloni* subverts, in what follows, before arguing that primacy is indeed at stake and that, moreover, *Melloni* must be understood as also entailing the obligation to set aside national constitutional standards.

- *Article 53 of the Charter as a potential restriction of primacy*

Various authors have held that the drafters of Article 53 of the Charter did not have the intention to qualify primacy, nor does the text need to be read in that way.³⁶ For example, Bruno De Witte says, in this context, that if “the Charter’s authors had wanted to change such a prominent feature of Community law, which the Court of Justice has constantly affirmed over the years, they would have formulated it in clear terms; but even if they had wished to do so, the authors of the Charter did not have the legal authority to modify primary EU law.”³⁷ Both of these arguments are not, in themselves, persuasive.

The Court of Justice may have affirmed and re-affirmed the absolute primacy of EU law over the years, but it is equally clear that this has never been accepted in the same terms in most Member States. One cannot assume more readily that the Member State representatives either at the Convention on the Future of Europe or at the time of the Lisbon Treaty intended to enter into an obligation that infringes their national constitutional obligations, rather than that they would have wanted to qualify the absolute doctrine of primacy. Given the formally non-binding nature of the original Charter text, the members of the first Convention, notwithstanding the terms of their mandate, could have written into it whatever they liked. Moreover, by the time of the Lisbon Treaty, the parties did not want to lay down a doctrine of absolute primacy in a legally binding text,³⁸ and it is hard to deny that they had the power to change that as they liked had they wanted to. The history of the making of Article 53 clearly shows the concern for its potential effect on primacy, for some of the drafters negatively, for others

³⁶ Advocate General Bot in *Melloni*, para. 100 suggests this, relying on Ladenburger, FIDE Report 2012, above footnote 6 above, p. 175 and its footnote 124. Bruno de Witte has adhered to this view in a succession of publications reaching from “The Role of the ECJ in the Protection of Human Rights”, *The EU and Human Rights*, Alston (Ed.), (OUP: Oxford 1999), 859-898, to “Tensions in the Multilevel Protection of Fundamental Rights. The Meaning of Article 53 EU Charter”, *Citizenship and Solidarity in the European Union – from the Charter of Fundamental Rights to the Crisis, the state of the art*. Alessandra Silveira, Mariana Canothilho, Pedra Madeira Froufe (eds.), (Peter Lang: Bern/Bruxelles, 2013), 205-217, and “Article 53” in *The EU Charter of Fundamental Rights: A Commentary*, (2014); a fundamentally similar position is followed by J. Bering Liisberg, ‘Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?’, (2001) 38 *Common Market Law Review*, 1171-1199. Of the contrary view is, among others, Stefan Griller, “Primacy of Community Law: A Hidden Agenda of the Charter of Fundamental Rights”, in: *Perspectives of the Nice Treaty and the Intergovernmental Conference in 2004*, Dimitris Melissas and Ingolf Pernice (eds.), Nomos Verlagsgesellschaft, Baden-Baden 2002, 47 ff.

³⁷ B. de Witte, “Article 53” in *The EU Charter of Fundamental Rights: A Commentary*, (2014), 1531-1532.

³⁸ Cf. Declaration 17 concerning primacy, added to the Lisbon Treaty, which is moreover ambiguous by claiming that it merely codifies pre-Lisbon case law, so by definition does not deal with issues raised since.

positively.³⁹ After the adoption of the Charter, the Commission found it necessary to issue a statement that the Charter would not require constitutional amendments, apparently considering Article 53 as a provision that prevented collisions between national constitutions and the Charter, but without specifying how.⁴⁰ In short, the state of affairs as to the intention of Article 53 was entirely open and left ambiguous, perhaps consciously. From the EU perspective, one was perhaps able to say primacy was not given up; from the national constitutional perspective, the prevailing national standard of protection was not given up either.

Another argument used for the view that primacy is not what Article 53 is about was that the text does not allow for a restriction of primacy in as much as it only says that “nothing *in this Charter*” can restrict national constitutional rights protection, thus allowing for such a restriction on the basis of other EU law, both primary and secondary, as interpreted by the Court. This reading suffers the disadvantage that it trivializes the meaning of Article 53 and overlooks the very essence of the Charter, at least since the Charter acquired primary law status, which is to control secondary law by virtue of being superior to it. Secondary law, notwithstanding its primacy vis-à-vis national law, must surely be subject to the superior primary law of the Charter. In other words, due to its superior rank under EU law, the Charter can necessarily qualify secondary law’s primacy, just as it can qualify its applicability and validity.

The fact is, of course, that *Melloni* sweeps aside any doubts that Article 53 of the Charter might raise about primacy, whether they were intended or not. As in *Winner Wetten*,⁴¹ the Court switches into a different mode when it thinks primacy might be interfered with. Although in paragraph 63 of *Melloni*, the Court seems only to have an eye to ‘unity’ (‘uniformity’) and ‘effectiveness’ (‘efficacy’), it frames the totality of the argument in terms of primacy. Its answer to the question on Article 53 immediately presents the conclusion that the interpretation suggested by the Spanish Constitutional Court “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” (para. 58); it next states that it is “by virtue of the principle of primacy of EU law” that rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of (non-directly effective!) EU law.

Moreover, *Melloni* not only holds to an absolute concept of primacy, it indeed entails the duty to set aside national constitutional law. Although the Court does not refer to *Simmenthal*, it does refer to *Winner Wetten*, which, if anything, only reinforces the *Simmenthal* language (arguably quite unnecessarily). Instead as more irenic approaches such as those of *Omega*⁴² and *Sayn Wittgenstein*⁴³, it introduces the polemic term the

³⁹ Documented in detail by J. Bering Liisberg, ‘Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?’, (2001) 38 *Common Market Law Review*, 1172-1182.

⁴⁰ See COM(2000) 644 final of 11 Oct. 2000, summarized in Bering Liisberg ‘Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?’, (2001) 38 *Common Market Law Review*, 1181.

⁴¹ *Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim* (Case C-409/06) [2010] ECR I-8015.

⁴² *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* (Case C-36/02) 2004 ECR I-9609.

⁴³ *Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* (Case C-208/09) [2010] ECR I-13693.

“ousting effect”, which the Court found to be entailed by both primacy and the duty of Union loyalty of Member States (in *Winner Wetten*, more specifically the German constitutional court). *Winner Wetten* may well be read as an act of open warfare,⁴⁴ and *Melloni* may well be considered its continuation in a more overtly constitutional context. *Winner Wetten* concerned the prospective overruling of *Länder* legislation on the basis of the general principle of legal certainty; *Melloni* concerns the core of a constitutional fundamental right in a particular Member State. In *Winner Wetten*, primacy is explicitly the primacy of *directly effective* secondary EU law, which has an “ousting” effect regarding national law even if that “ousting” creates a legal void and legal uncertainty; *Melloni* is about *non-directly effective* EU law. Thus, the reference to *Winner Wetten* (and *Internationale Handelsgesellschaft*) implies that this type of EU law also has the effect of setting aside national law, in the sense that the Spanish norm concerning the rights of the defence of a person convicted *in absentia* must be disapplied, even if the Court did not need to say this in so many words in *Melloni*.

- *Fields of application and “primacy, unity and effectiveness”*

At first glance similar to Article 53 ECHR and Article 2 ICCPR, which stipulate that the protection afforded by those international instruments cannot do away with the protection of fundamental rights provided at national level, Article 53 of the Charter is dissimilar as regards the addition of the expression “*in their respective fields of application*”:

“Nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, *in their respective fields of application*, by [...] the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.”

The *Melloni* judgment clarifies what this means in as much as it recognizes that when Member State authorities implement EU law, they are also bound by national fundamental rights provisions: “[W]here an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights” (para. 60). So, in the Court’s view, the scope of EU law and that of national constitutional law overlap in the case of implementation of EU law. When implementing EU law, Member State authorities both act squarely within the scope of EU law *and* are also subject to national standards: the fields of application overlap, and both national and EU fundamental rights standards apply.

This approach of the Court gainsays interpretations which suggested that each of the fundamental rights sources only apply within their own ambit, so that the matter of “higher level of protection” would not be a matter of conflict, but rather one of delimiting the respective fields of competence which are essentially juxtaposed, each unique within their own sphere and to which separate standards apply. A suggestion along these lines in the opinion of Advocate General Bot (para. 100 and 110)⁴⁵ is clearly rejected by the Court.

⁴⁴ For a more benign reading prior to *Melloni*, see L.F.M. Besselink, “Respecting Constitutional Identity in the EU”, (2012) *CMLRev* 49: 671–694, at 689-691.

⁴⁵ See, however, also his opinion at paragraphs 104 and 127.

The Court adds that such an application of national higher standards is, however, dependent on two conditions. The first is that the national standard can only apply if it does not fall below the standard of the Charter: "... provided that the level of protection provided for by the Charter, as interpreted by the Court, ...[is] not thereby compromised" (para. 60). This condition is self-evident and not problematic: the *Charter is a minimum standard* and does not obstruct a national standard providing protection over and above the Charter standard.

The second condition specifies, however, that the national standard can only apply "... provided that [...] the primacy, unity and effectiveness of EU law are not thereby compromised" (para. 60). If the application of a national standard would compromise the "primacy, unity and effectiveness" of EU law, the *EU standard is the maximum standard*, that sets aside national standards even if they are higher. This second condition merits further reflection, but we first make some remarks on the case of co-applicability of national and EU standards.

If there is sufficient discretion for Member States in the implementation of EU law, or if otherwise EU law allows for diversity, primacy, unity and effectiveness are *not* at stake. Such discretion and diversity exist when a directive can be implemented in various ways, cases of minimum harmonization, or explicit references to national standards,⁴⁶ or if primary law allows for differentiation on the basis of national standards, as is the case in the restriction of free movement rights.⁴⁷ Another example close to the issues at stake in *Melloni* is the "public policy" exception in secondary law as we find it in the area of civil law in the Brussels I Regulation, which can be invoked to refuse recognition of a judgment "if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought."⁴⁸ The Court of Justice held in *Trade Agency* that this refers to "a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order."⁴⁹ This clearly sets a limit to mutual recognition and mutual trust on which the Regulation is based, but this limit is mandated by the Regulation itself. It may seem paradoxical but, in the private law context, the "public policy" exception is stronger than the appeal to the core of a constitutional right in public law. Were the Spanish Constitutional Court's case law on criminal law verdicts *in absentia* to apply to judgments in default in private law, this would be without any problem whatsoever. Private law

⁴⁶ E.g. Art. 7(2) of the Framework Decision 2008/913 of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ 2008, L 328/55; or the more general references in secondary legislation to conformity with fundamental rights recognized by Member States and EU, such as Article 1 (7) of the Services Directive; preamble recital (10) of the Data Protection Directive 95/46/EC of 24 October 1995 (OJ L 281, 23.11.1995, p. 31): 'Whereas the object of the national laws on the processing of personal data is to protect fundamental rights and freedoms, notably the right to privacy [...]; whereas, for that reason, the approximation of those laws must not result in any lessening of the protection they afford but must, on the contrary, seek to ensure a high level of protection in the Community'.

⁴⁷ *Omega* (Case C-36/02) 2004 ECR I-9609, at paragraphs 37-38.

⁴⁸ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 012, 16/01/2001, 1, Art. 34 under (1): "A judgment shall not be recognised: 1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought".

⁴⁹ *Trade Agency* (Case C-169/10), 51.

“public policy” is paradoxically a stronger ground for exceptions to mutual recognition than public law “public policy”.

The “primacy, unity and effectiveness” exception to fundamental rights applies only when a piece of EU law is at stake that applies or should apply uniformly throughout the EU. This leads us to reflect on the threefold expression ‘primacy, unity and effectiveness’ which is canonized in *Melloni* and has rarely been used before⁵⁰, and has the potential to become a magic formula.⁵¹ The novelty of the formula here resides in the element of “unity” in combination with primacy and effectiveness – a renovation of the more classic expressions “uniformity” or “uniform effect”.

Semantically, the difference might be significant, since “the unity of EU law” is not immediately at stake if there is no “uniformity”.⁵² The best example of this may be in the field of public interest exceptions to the free movement provisions, as found in *Omega*, where the Court held that uniformity in the protection of fundamental rights that restrict free movement is not required.⁵³ This is not, however, cause for optimism about the constitutional diversity which the Court allows in the Union, by speaking of “unity” rather than “uniformity”; one swallow does not make a summer.

First, the Court itself, within two paragraphs, switches back from the ‘unity’ of EU law in paragraph 60, to the ‘uniformity’ of EU law in paragraph 63 – which is the language of 1970 (*Internationale Handelsgesellschaft*).

Secondly, in contrast to that of the economic free movement rights, the context of secondary legislation is different. The relevant provisions of the EAW Framework Decision as interpreted in *Melloni* require “uniformity”, rather than “unity”: as we saw, the possibility of allowing fundamental rights exceptions in the application of the relevant provisions is rejected. The Court’s explanation is that the Framework Decision aims to establish uniformity, and this the Court takes at face value: no cases covered by the letter of Article 4a(1) of the Framework Decision could ever be an infringement of a fundamental right. This uncritical acceptance of whatever the legislators’ stated aims are increases the scope for constitutional conflict. Thus it may be pointed out that there are, at least in the abstract, some differences that can be traced between the language of the

⁵⁰ A digital full text search in English in the publicly accessible case law of the ECJ at curia.eu on “primacy, unity and effectiveness” leads to the result that it was not used in this particular combination prior to *Melloni*, and that it has since been used *Siragusa* (Case C-206/13) 6 March 2014, para. 32; the expression ‘unity and effectiveness’ (of Community law or Union law) was used in *Commission v Italy* Judgment (Case 118/85), 16 June 1987, para. 11, *Winner Wetten* (Case C 409/06) at para. 61; *Križan* (Case C-416/10) 15 January 2013 at para. 70; the “unity of European Union law” was used in *Akzo Nobel Chemicals and Akcros Chemicals v Commission* (Case C-550/07 P) 14 September 2010, para. 115, and in the different and specific context of *Strack* (Case C-579/12 RX-II) 19 September 2013, para 58.

⁵¹ On the phenomenon in the Court’s case law, see e.g. Urška Šadl, “Case – Case-Law – Law: Ruiz Zambrano as an Illustration of How the Court of Justice of the European Union Constructs Its Legal Arguments”, (2013) 9 European Constitutional Law Review, pp 205-229.

⁵² This would be analogous to the distinction made by Advocate General Kokott in her View in *Strack* (Case C-579/12 RX-II) delivered on 11 June 2013, para 75, between the meaning of “the unity and consistency” of EU law as a ground for review under Article 256 (2) and (3) TFEU: “[I]t must be found that the unity of Union law is adversely affected, in particular, where the General Court has misconstrued rules or principles of EU law which have particular importance whereas the consistency of European Union law is adversely affected where the General Court has misconstrued existing case-law of the European Union courts.”

⁵³ See footnote 47 above.

Framework Decision and the case law of the ECtHR. The difference between an “unequivocal” waiver of the right to be present at trial and a “voluntary and unambiguous” waiver was pointed out above. Similarly, the text of the Framework Decision seems to put at one and the same level representation by an appointed legal counsel and one of the person’s own choice. It will be up to the ECtHR to establish to what extent these differences can be bridged or whether they may lead to unjustified infringements of Article 6 ECHR; but national courts might on the basis of national standards come to conclusions in particular cases which conflict with the abstract result of *Melloni*.

Constitutional identity and constitutional dialogue

The EU Treaty imposes the duty to respect the national identities of Member States inherent in their constitutional and political structures (Article 4(2) TEU). Legally this expresses the plurality of political orders and of their underlying core values: unity in diversity. The notion of respect for constitutional identity regards essential constitutional values that are common to Member States, but also those which are particular to one or several Member States only. It is not only the constitutional traditions common to the Member States that are protected, but also pluralism of values. The very fact of this pluralism confirms that core values and their meanings are contestable. To give an example: whether the form of a state is a constitutional monarchy or a republic may be a question touching on a Member State’s identity. Whether the republican form of the state entails a prohibition of noble names and titles, is not necessarily identical in all republics, nor generally accepted within a particular republic.⁵⁴ And yet, under EU law this issue is rightly considered to pertain to the constitutional identity of the state.⁵⁵

The *Melloni* case highlights an element of institutional differentiation that is immediately related to the inherent contestability of substantive values that inheres in pluralism of values. The Spanish Constitutional Court’s interpretation of the rights of defence with regard to trials *in absentia*, as involving human dignity in cases of so-called “indirect” infringements, was a judicial interpretation that was not shared by the Spanish Government when it adopted the relevant provision of the Framework Decision in the Council, nor was it shared by all other Spanish courts. In decision-making on the EAW, the Spanish Government pursued another interest than the interest that was served by the Constitutional Court; it is the difference between waging the fight against terror and crime versus the protection of individual rights in that fight. The salience of this is that when the Spanish Government voted in favour of the 2009 Framework Decision, it acted in violation of the Spanish Constitution as understood in standing case law of the Spanish Constitutional Court.⁵⁶ One may say that it attempted to amend Spanish constitutional law via the *Brussels route*.

⁵⁴ Cf. Leonard F.M. Besselink, “Respecting Constitutional Identity in the EU.” 49 CMLRev (2012) nr 2 pp. 671–693.

⁵⁵ *Sayn-Wittgenstein* (Case C-208/09) [2010] ECR I-13693.

⁵⁶ See J.H. Reestman, “After Åkerberg Fransson and Melloni”, European Constitutional Law Review, Volume 9, Issue 02, September 2013, pp 172 -174.

The Court of Justice sanctioned that approach in *Melloni*. In terms of rights protection one can criticize this as inclining too much to the crime fighters perspective – though Stefano Melloni was neither a terrorist nor involved in organized crime – and too little to the rights of citizens⁵⁷, an inclination that is evident in much of the Court of Justice’s EAW case law. From the institutional perspective it becomes evident that the Court of Justice arbitrated, willy-nilly, on a constitutional disagreement between the Spanish Government and the Spanish Constitutional Court in favour of the former.

This touches on another point that was discussed in the Opinion of the Advocate General in *Melloni*. This concerned a matter that the Court left aside in its judgment, the question whether the rights of defence under the Spanish Constitution are part of the constitutional identity. The Advocate General comes to the conclusion that it does not (paragraphs 137-145 of the Opinion). To that effect he states:

“Apart from the fact that the determination of what constitutes the ‘essence’ of the right to defend oneself remains contested in the Tribunal Constitucional, the *Kingdom of Spain itself* stated, at the hearing, relying inter alia on the exceptions in Spanish law to the holding of a retrial following a judgment rendered in absentia, that the participation of the defendant at his trial is not covered by the concept of the national identity of the Kingdom of Spain.” (para. 141, italics added)

This is a rather unconvincing approach on both counts.

The fact that the core of a right is contested clearly does not imply that there is no such core, as we explained above. A superficial glance at the relevant Spanish constitutional case law places it beyond doubt that the relevant constitutional right at stake did not concern the finesses of the right or its outer margins, but its very core only. In the terminology of the Spanish Constitutional Court, its violation affects “human dignity” – a legal concept that was reason for the Court of Justice in *Omega* to accept the differentiated effect of the free movement of services in different Member States. The importance of the core right was not picked up by the Court of Justice. A symptom of *Melloni* as a dialogue among the deaf?

Holding subsequently that it was “the Kingdom of Spain itself” that had stated that rights of the defence in a trial *in absentia* do not belong to the national identity of Spain is rather naïve. It was the *government* speaking, not the *Member State* – the same government that had violated its Constitution (as it was then interpreted) when agreeing to the Framework Decision. The situation was similar to that faced by the Court of Justice in *Landtová*⁵⁸ where the Czech Government had a fundamental – and outspoken – constitutional conflict with the Czech Constitutional Court.⁵⁹ One would expect the Court of Justice to be alert to such problems. Perhaps the Court avoided getting into the quagmire of arbitrating between national constitutional institutions by avoiding the issue of constitutional identity altogether – but it had got itself into it already by total deference to the Council’s (i.e. the Member State governments’) intentions with the 2009 Framework Decision. Indeed, the

⁵⁷ Cf. Advocate General Bot in *Melloni*, para. 120: fundamental rights should be observed but the procedural guarantees to which they give rise should “not [be] used to hinder the execution of legal decisions”.

⁵⁸ *Marie Landtová v. Česká správa sociálního zabezpečení* (Case C-399/09) [2011] ECR I-05573.

⁵⁹ Michal Bobek, “Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure”, (2014) 10 European Constitutional Law Review, pp 54-89.

Council in its (*in casu* exclusive) legislative role has the important task to respect national constitutional identities. This could possibly legitimate deference by the Court towards the legislature. But when the Council cannot do so because one of its members chooses to act in conflict with a constitutional obligation resulting in a failure for the EU to respect its obligation under Article 4(2) TEU, such deference is problematic.

A different way to look at the Court's silence on the issue of constitutional identity is that this may still be an option out of future constitutional conflict in the context of Article 53 of the Charter.⁶⁰ This would lead to a quite different understanding of primacy: although EU primacy is the "normal" case of a conflict between a national and an EU fundamental rights standard, this would suffer an exception if the national standard pertains to constitutional identity of a Member State; and this escape route of constitutional identity is left open in *Melloni*.⁶¹

An objection is that on this reading Article 53 of the Charter only applies to the uncontroversial case of Member State discretion, but that the higher national standard can only apply when national constitutional identity being at stake; in this last case, it is not Article 53 of the Charter but Article 4(2) TEU that is the basis of this prevalence of the national standard.⁶² The meaning of Article 53 of the Charter remains trivial.

Another objection is that national constitutional courts do clearly not take the approach of distinguishing between fundamental rights that belong to the constitutional identity of the Member State and fundamental rights that do *not* belong to that identity. In principle, fundamental rights are by definition fundamental and by their nature pertain to that identity. Indeed, national constitutional courts are able to distinguish. But that distinction turns on the crucial criterion of *equivalence*. This is famously codified in Article 23 of the German Basic Law and also articulated by the Italian Constitutional Court in *Fragd*⁶³ in language of which the Spanish Constitutional Court in *Melloni* is reminiscent. And, clearly, there is no equivalence whatsoever between the Spanish constitutional case law as it stood before *Melloni* and the European Arrest Warrant as interpreted by the Court of Justice.

- *The Judicial Dialogue*

The Court of Justice's *Melloni* judgment has been received critically in the literature, in particular as regards the quality of the Court's reasoning on the other. The quality of the Court's reasoning has been characterized by one German scholar with epithets as "a too

⁶⁰ Nik de Boer, CMLRev 2013.

⁶¹ Cf. Advocate General Bot in *Melloni*, para. 137 ff.; earlier along those lines Leonard F.M. Besselink, "Multiple Political Identities: Revisiting the 'Maximum Standard'". In: *Citizenship and Solidarity in the European Union – from the Charter of Fundamental Rights to the Crisis, the state of the art*. Alessandra Silveira (ed.), [Euroclio Series] Peter Lang, (Bern/Bruxelles) 2013, p. 248-249.

⁶² Whether this is to be understood as an exception to primacy or not, see Leonard F.M. Besselink, "National and constitutional identity before and after Lisbon", 3 *Utrecht Law Review* (2010), November 2010, pp. 36-49. At <http://www.utrechtlawreview.org/index.php/ulr/article/viewFile/139/135>; Armin von Bogdandy, Stephan Schill, "Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty", [2011] CMLRev 48: 1-38.

⁶³ *Fragd (SpA) v Amministrazione delle Finanze dello Stato* (Case No 232/89), Corte Costituzionale 21 April 1989.

global analysis”, “astonishing”, “again an inadequate approach of the problem”, “unfounded”, “half-hearted”.⁶⁴ On the quality of the judicial dialogue on the part of the Court of Justice, a Spanish scholar caustically remarked that “...the institutional empathy shown by the Court is equivalent to that of a potato”⁶⁵; he remarked on “the striking absence” of a balanced assessment of the arguments put forward by the referring court, which is “a prerequisite of legal empathy”: “if there is any clear manifestation of deafness or the Asperger syndrome of the Court of Justice, it is this.”⁶⁶ However, the reproach of a refusal to engage in a serious dialogue was made to the Spanish Constitutional Court too, notably in the concurring opinion of Judge Encarnación Roca Trías in the follow-up judgment, in which she complains that the majority failed to engage in “an effective and not merely apparent judicial dialogue”.⁶⁷

The series of judicial utterances in *Melloni* ended with the Spanish Constitutional Court generally lowering the standard of protection previously provided by Article 24 of the Spanish Constitution, both in cases of surrender within the EU and in cases of extradition to any other non-EU state.⁶⁸ The Constitutional Court found a basis for doing so in an important provision of the Spanish Constitution which provides that

“[t]he norms concerning fundamental rights and liberties recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and with international treaties and agreements on the same matter ratified by Spain”.⁶⁹

This provision – Article 10(2) of the Constitution – also takes on board EU law, whenever that is relevant within the Spanish legal order. As the Court of Justice acknowledged in its consideration of the admissibility issue, it is precisely in the autonomous interpretation by the Spanish Constitutional Court of the meaning of the Spanish Constitution’s provisions relevant to the *Melloni* case that the Court of Justice’s interpretation of the Charter and the EAW Framework Decision comes in; that is to say, within the autonomous interpretation by the Constitutional Court of national constitutional law.

This setting can also explain why the Constitutional Court found it legitimate to “supplement” its interpretation of the Constitution with its remarks about the prevalence

⁶⁴ Gaede, “Minimalistischer EU-Grundrechtsschutz bei der Kooperation im Strafverfahren“, (2013) NJW 1279: “... eine zu pauschale Analyse, ... erstaunlich, ...abermals eine unzureichender Problemzugang... begründungslos ... halbherzig...“, 1279.

⁶⁵ Pablo Martín Rodríguez, “Crónica De Una Muerte Anunciada: Comentario A La Sentencia Del Tribunal De Justicia (Gran Sala), de 26 de Febrero de 2013, Stefano Melloni, C-399/11“, 2013 Revista General de Derecho Europeo, 30, 34: “...la escasa empatía institucional mostrada por el TJ, similar efectivamente a la de un tubérculo.”

⁶⁶ Martín Rodríguez, “Crónica De Una Muerte Anunciada: Comentario A La Sentencia Del Tribunal De Justicia (Gran Sala), de 26 de Febrero de 2013, Stefano Melloni, C-399/11“, 2013 Revista General de Derecho Europeo, 30, 35: “A mi modo de ver, esta empatía jurídica requiere o se compone de cuatro elementos: 1) valoración sopesada de los argumentos aportados, 2) reconocimiento de la alteridad (esto es, de la pertinencia y legitimidad de la posición del interlocutor), 3) fundamentación minuciosa de la posición propia y 4) mitigación, si no es posible la eliminación, de las discrepancias potenciales. Señalemos inmediatamente la sobresaliente ausencia del primero: si hay alguna manifestación clara de la sordera o del síndrome de Asperger del TJ es ésta.”

⁶⁷ ‘diálogo entre Tribunales eficaz y no sólo aparente’.

⁶⁸ This was criticized in some of the concurring opinions to the judgment of the *Tribunal Constitucional*.

⁶⁹ Art. 10(2) Spanish Constitution.

of the Spanish Constitution in cases where EU law would conflict with it. For all intents and purposes, this means that if EU law conflicts with the fundamental rights standard of the Spanish Constitution, and this conflict cannot be solved otherwise, the latter will prevail. In sum, the interpretation of Article 53 of the Charter by the Court of Justice in *Melloni* will not, if it would really come to it, be followed by the Constitutional Court. That this is not a fanciful interpretation of the Constitutional Court's final judgment in *Melloni* is witnessed by the concurring opinion of Justice Encarnación Roca Trías, which criticizes the majority precisely for making this interpretation at least possible if not the only one intended. For her, the dialogue would have been successful if the Constitutional Court had simply accepted and followed the line of reasoning of the Court of Justice, even though that would seem to be the one way traffic of "obedience" rather than a plurilateral "dialogue".⁷⁰

The degree of principled judicial disobedience compensates for the judicial obedience and compliance in lowering the protection provided by what allegedly was the core of a constitutional right. A more "dialectic" element in the Constitutional Court's judgment inheres in its statement that "in the unlikely case"⁷¹ of a hypothetical infringement by EU law of the Spanish Constitution which "is not remedied by the ordinary channels provided [by EU law]", the Constitutional Court would have to respect the principle of popular sovereignty and its expression in the Spanish Constitution. This is another way of saying: "Court of Justice, be sensitive and responsive to the imploration of values of national constitutions!" Evidently, the Constitutional Court found that the Court of Justice's judgment in *Melloni* necessitated making such a remark.

The particular dynamics of the "dialogue" in *Melloni*, may on the part of the Court of Justice perhaps be understood in the absence of clear Strasbourg case law concerning mutual recognition in the context of trial *in absentia* that would have given support to the point of the earlier Spanish constitutional case law. Under such circumstances, the Court was ready for a conflict with an embattled constitutional court like the Spanish, which is pretty much in competition with ordinary Spanish courts. That the Court of Justice is not likely to do the same with more powerful constitutional courts, like the Bundesverfassungsgericht, is shown by its case law on data protection,⁷² a legal field that the German constitutional court has declared to concern its constitutional identity at an early stage in its data retention judgment⁷³.

Conclusion

The preamble to the EU Charter of Fundamental Rights states that the Union "places the individual at the heart of its activities". That is not apparent from the Court of Justice's judgment in *Melloni*. The Court was evidently less concerned with protecting the

⁷⁰ Cf. Voto particular concurrente Magistrada doña Encarnación Roca Trías, 6922-2008 VPS1, para. 6.

⁷¹ This language is nearly identical to that of the Italian Constitutional Court in *Fragd*, footnote 63 above.

⁷² Most recently *Digital Rights Ireland and Seitlinger and Others*, (Joined Cases C-293/12 and C-594/12) ECJ Grand Chamber 8 April 2013.

⁷³ BVerfG (1 BvR 256/08) 2 March 2010, para 218, http://www.bverfg.de/entscheidungen/rs20100302_1bvr025608.html.

fundamental rights of individuals granted by primary law than with safeguarding the intentions of the legislators, notably governments, when they made secondary legislation. Its sheer concern for the primacy of secondary law, even though it was not directly effective, led it to a mode of judging which is more like that of making a statement than that of careful consideration of various arguments. As the Court's later judgment in *Siragusa* makes clear in an *obiter dictum*, citing *Melloni* as authority, the objective of fundamental rights protection is not the concern for the rights of the individual but "the need to avoid a situation in which the level of protection of fundamental rights varies according to the national law involved in such a way as to undermine the unity, primacy and effectiveness of EU law".⁷⁴

So the preamble to the Charter was wrong; it is not rights themselves that are important, primacy is the real issue. Fifty years after *Costa v ENEL*, the Court settles for absolute primacy as a greater concern than substantive rights. It is not the citizen and his rights that moves the Court, it is the primacy of EU law over national law, even non-directly effective EU secondary EU law over national constitutional law.

At the more specific legal context of Article 53 of the Charter, we in the meantime have to wonder what *Melloni* has brought. Although it has been suggested that the main purpose of this provision was that "existing regimes should not be applied and interpreted 'downwards' by invoking the language of the Charter"⁷⁵, this is precisely what the interpretation of Article 53 of the Charter in *Melloni* effected: the interpretation 'downwards' of the rights of the defendant under the Spanish Constitution by the Spanish Constitutional Court, which considered itself forced to do so under the influence of the Court of Justice's interpretation of the rights of defence under the Charter. For the moment, this has avoided overt constitutional conflict. But new material for an outbreak of such conflict is provided by the Court of Justice in *Melloni* itself.

Would there still be a way out? I agree with some commentators that the issue of constitutional identity still provides one way out, although there are clear objections as to the manner in which this was (or rather: was not) handled in *Melloni*. Instead of the language of some 50 or 40 years ago, when EU law still needed to establish itself in the Member State legal orders, the Court would at any rate have to revert to the different, more mature, subtle, balanced and nuanced ways of *Omega*, *Filipiak* and *Sayn-Wittgenstein*. But the chances of it doing so seem somehow reduced after *Melloni*.

In general terms of the constitutional situation in Europe, we may understand this state of affairs in terms of shifts within constitutional paradigms. The paradigm of rights prevailing in post-war western European states and in Middle and Eastern European Member States

⁷⁴ *Siragusa*, paragraphs 31-32.

⁷⁵ B. De Witte, "Article 53" in *The EU Charter of Fundamental Rights: A Commentary*, Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds.), (München/Oxford/ BadenBaden: C.H.Beck/Hart/Nomos 2014), p. 1524. Similarly Advocate General Bot in *Melloni*, para. 134: "The Charter thus cannot have the effect of requiring Member States to lower the level of protection of fundamental rights guaranteed by their national constitution in cases which fall outside the scope of European Union law. Article 53 of the Charter also expresses the idea that the adoption of the Charter should not serve as a pretext for a Member State to reduce the protection of fundamental rights in the field of application of national law."

since the Fall of the Wall, is in the context of European integration dominated by the paradigm that dominated the “long 19th century” of European constitutionalism, that of power allocation: the assertion of primacy is the main concern of the Court of Justice not only in the age of the early establishment of EU law (the 1960s and 1970s) but even in the 21st century. This may explain the strongly doctrinaire reflex in *Melloni*, that fits into a line of more or less recent cases like *Winner Wetten*, of which the polemic tone contrasts with the more irenic, accomodating and conciliatory approach of *Omega*, *Filipiak*, and *Sayn Wittgenstein*. It may also be an indication that the constitutional paradigm of the 21st century will unavoidably be neither that of rights or powers in the exclusive terms it had in the 19th century, but that of relations between constitutional orders.