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EUROPEAN AND NATIONAL STANDARDS OF PROTECTION:

AN ANALYSIS OF ARTICLE 53 OF THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

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1. Introduction

Respect for human rights constitutes one of the funding values of the European Union.[1] The 'centerpiece' of the current fundamental rights framework of the Union is article 6 TEU:[2]

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.
The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.
The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.
2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law

Since the Treaty of Lisbon, there are three formal sources of fundamental rights within the Union: the Charter of Fundamental Rights, the ECHR, and general principles of EU law. This thesis will focus on the first of the three sources.

The Charter was drafted by the so-called 'Convention' between 1999 and 2000.[3] While the mandate of the drafting body was mainly to 'codificate' rights already recognized in the sources already indicated by the European Council,[4] the final document of the Charter also included a number of innovative provisions and can be described as a 'distillation of the rights contained in the

[1] Article 2 TEU: *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.*
[2] P Craig – G De Burca, *EU Law: text cases and materials* (Oxford University Press 2011) p 363
[3] The name was chosen in order to underline the innovative composition of the drafting body, which comprised members from Government of the Member States, the Commission, the European Parliament and national parliaments. Moreover, during the process also NGOs and other independent experts were consulted in order to make the drafting of the text more inclusive and transparent. The Convention was launched in the European Council of Cologne of 1999 (Annex IV) and the working method can be find in the Annex to the European Council Conclusions of Tampere of the same year. The process formed a model for the ordinary treaty-revision procedure now envisaged by article 48 TEU: see Craig - De Burca (2011), p 394
[4] Sources included rights contained in the ECHR, common constitutional traditions of the member States, provisions of the European Social Charter and the Community Charter of Fundamental Social Rights of Workers. See Conclusion of the Cologne European Council, June 1999

various European and international agreements and national constitutions'.[5] The crucial question of the legal status of the Charter was, however, not solved by the Convention, but left to be decided during the Intergovernmental Conference of Nice in December 2000. In Nice, no agreement was reached between the Member States and the Charter was only 'solemnly proclaimed' by the Council, the Commission and the European Parliament; the question of the legal effect of the new document was further postponed to the Rome IGC of 2004. The 'Constitutional Treaty' foresaw an incorporation of the Charter in Part II of the text of the Treaty, but the failure of the process of ratification forced the Charter to stay in its 'legal limbo'.[6] Finally, with the Treaty of Lisbon the Charter acquired binding effect. However, in contrast with what was envisaged by the Constitutional Treaty, the Charter was not included in the text of the Treaties but remains a separate document.

The Charter does not operate in a legal vacuum, but in the already complex and 'multilevel' system of protection of fundamental rights in Europe.[7] Traditionally, protection has been offered at national level by State constitutions, which contain bills of rights and often give a specific Court the authority to interpret them.[8] In several cases, national constitutional courts may directly address questions of violations of fundamental rights through individual applications.[9] On top of the national protection, the ECHR operates establishing a minimum standard which has to be guaranteed throughout Europe, with the European Court of Human Rights entrusted to verify its respect. The ECHR has

[5] Craig – De Burca (2011), p 395

[6] While the Charter did not formally have any legal effect, Advocates General and the CFI started to cited it regularly. See Craig – De Burca (2011), p 394. The Charter started to be considered as an 'authoritative catalogue' of fundamental rights in the light of the inclusive process of drafting and the political approval by EU institutions and Member States. See K Lenaerts – P Van Nuffel, *Constitutional Law of the European Union* (Thomson Sweet & Maxwell 2005) p 732-733

[7] See for example A Torres Perez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (Oxford University Press 2009), in particular chapter 2; G Di Federico (ed.), *The EU Charter of Fundamental Rights. From Declaration to Binding Instrument* (Springer 2011); A Vosskuhle, 'Multilevel Cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund', 6 *European Constitutional Law Review* (2010) pp 175-198

[8] See Torres Perez (2009), p 27

[9] The two most relevant examples of this procedure are the German *Verfassungsbeschwerde* and the Spanish *amparo*. For an analysis of the procedure, see V C Jackson – M Tushnet, *Comparative Constitutional Law* (Foundation Press 2006), in particular Chapter VII on 'Constitutional Courts and Constitutional Adjudication'

traditionally constituted the 'European' system of protection. However, protection of fundamental rights already started to develop also within the European Union in the 1970s, even in the absence of a formal EU bills of right. However, at the end of the 1990s, it was felt necessary by the European institutions and by some Member States[10] to make protection of fundamental rights in the EU 'more visible' and not only hidden in the case-law of the Court of Justice.[11] In 1999, therefore, Member States started the process of affirming EU fundamental rights in a formal document which was concluded by the adoption of the Charter.

Together with the drafting of substantial rights and freedoms, it was necessary to put the new instrument in relation with the other layers of the system of protection of human rights.[12] In this work, attention will be given to the question of the 'level of protection', addressed by article 53 of the Charter:

> *Article 53 – 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, the Community 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.*

In particular, the focus will be on the relationship between the Charter and national constitutions as systems of protection of fundamental rights. At a

[10] In particular Germany stressed the need of having the protection affirmed in a formal document. The process of drafting the Charter started indeed on a German initiative in the European Council of Cologne

[11] See J Bering Liisberg, 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? Article 53 of the Charter: a fountain of law of just an inkblot?' (*Jean Monnet Working Paper* 4/01 2001), p 5

[12] As recognized by AG Bot in his Opinion on case Melloni, 'The drafters of the Charter could not have been unaware of the existence of a plurality of sources of protection for fundamental rights binding the Member States and therefore had to provide a way for the Charter to coexist with them. That is the main objective of Title VII of the Charter, which contains the general provisions governing its interpretation and application. From that point of view, Article 53 of the Charter supplements the principles stated in Articles 51 and 52 thereof, by pointing out that, in a system in which the pluralism of sources of protection of fundamental rights prevails, the Charter is not intended to become the exclusive instrument for protecting those rights and, also, that it cannot have the effect, on its own, of adversely affecting or reducing the level of protection resulting from those different sources in their respective fields of application.'. See Case C-399/11, *Criminal Proceedings against Stefano Melloni* [2013] ECR I-0000, Opinion of AG Bot, para 131

first glance, it is not completely clear what article 53 means in this respect and different interpretations have been advanced. These will be discussed in the second section, following an analysis of the drafting history of the article and a comparison with the similar provision contained in the ECHR. In Section 3, the focus will be on the case *Melloni*, in which for the first time the Court of Justice of the European Union was called by the Spanish Constitutional Court to give its interpretation of article 53 of the Charter. However, as it will be explained in detail later, the answer of the Court will most likely not close the debate. The final section is therefore dedicated to try to find a balance between the diverging interpretations, taking into account the judgment of the Court and reconstructing the meaning of article 53 of the Charter in the perspective of 'deference' and dialogue[13] between the Court of Justice and national courts.

2. Article 53 of the Charter: a controversial provision

2.1 Drafting History[14]

In the first drafts of the Charter's Title on horizontal provisions, the only concern relating to the level of protection issue was the relation between the new instrument and the ECHR. The Convention wanted to ensure that the protection of human rights in the Union was not inferior to the level guaranteed by the ECHR.[15] The question of the relationship between the Charter and national constitutions was advanced, only later, by the European Parliament in a resolution of April 2000, which stressed that the Charter should not 'replace or weaken Member states provision concerning fundamental rights'.[16]

[13] See for example Torres Perez (2009); A Rosas, 'Methods of Interpretation – Judicial Dialogue', in C Baudenbacher - E Busek (ed), *The Role of International Courts* (German Law Publishers 2008); M Cartabia, 'Europe and Rights: Taking Dialogue Seriously', 5 *European Constitutional Law Review* 1 (2009) pp 5-31; G. Martinico, ''Judging in the Multilevel Legal Order: Exploring the Techniques of 'Hidden dialogue'', 21 *King's Law Journal* (2010) 257; F Fontanelli - G Martinico - P Carrozza (ed), *Shaping Rule of Law through Dialogue. International and Supranational Experiences* (Europa Law Publishing 2010)

[14] The content of the paragraph is mainly drawed from Bering Liisberg (2001), pp 6-18

[15] See CHARTE 4123/1/00 REV 1 CONVENT 5, 15 February 2000, Article Z 'Level of Protection'

[16] CHARTE 4199/00 CONTRIB 89, 5 April 2000, Report by MEPs, Mr. Duff and Mr. Voggenhuber

To address the questions advanced by the EP, a new draft of article 53 was prepared and read: '*No provision of this Charter may be interpreted as restricting the scope of the rights guaranteed by .., the law of the Member States'*.[17] However, the reference to the 'law of the Member States' was considered problematic in the light of the principles of uniform application and primacy of Union law[18]. For this reason, the draft article was amended in the following draft by restricting the reference to 'Member States' constitutions'.[19]

In the following discussions, the debate focused mostly on the question of preserving the level of protection of the ECHR, while few amendments were proposed concerning the relationship between the Charter and national constitutions. The expression *'in the respective fields of application'* was included at a late stage[20] and Article 53 was finally adopted, together with the Charter, in October 2000. Concluding its work, the Convention prepared a document explaining each article of the Convention, which regarding article 53 reads:

> This provision is intended to maintain the level of protection currently afforded within their respective scope by Union law, national law and international law. Owing to its importance, mention is made of the ECHR. The level of protection afforded by the Charter may not, in any instance, be lower than that guaranteed by the ECHR, with the result that the arrangements for limitations may not fall below the level provided for in the ECHR.[21]

Moreover, on the same day a Declaration of the Commission stressed how the Charter was not intended to 'replace national constitutions' or to prevent the existence of instruments of protection of fundamental rights at national level.[22]

This short reconstruction of the drafting history of article 53 may help to identify two features of the provision: the first, as shown by the intervention of the EP, is its political aim and relevance, in particular as a guarantee to Member States that they did not need to amend their constitutions or renounce to national

[17] CHARTE 4235/00 CONVENT 27, 18 April 2000
[18] See Bering Liisberg (2001), p 9
[19] See CHARTE 4316/00 CONVENT 34, 16 May 2000
[20] The relevance of this reference will be discussed later in the section
[21] CHART 4473/00 CONVENT 49
[22] COM(2000) 644 final of 11 October 2000.

systems of protection of fundamental rights.[23] The second feature is that the provision was transformed during the works of the Convention: while the original draft only focused on the relationship between the EU and the ECHR, the final version has a more comprehensive and ambitious character. The final text recalls the wording of article 53 ECHR which inspired the drafters of the Charter and will be analysed in the following paragraph.

2.2 A comparison: article 53 of the ECHR

Article 53 ECHR – Safeguard for existing human rights
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 ECHR was the first international human rights treaty to contain a 'safeguard clause' and inspired the drafters of the EU Charter but also of other international documents which today contain similar provisions.[24] The article reflects a fundamental character of the Convention, namely the fact that it works as minimum standard instrument of protection, establishing only a minimum floor which leaves Member States free to go further and protect fundamental rights at a higher level. However, there is little case law of the Court on the provision, and there is a certain degree of confusion about the precise meaning and purpose of the article, which may explain why the ECtHR is reluctant to refer to it.[25]

Firstly, the Court excluded that individuals may invoke article 53 to support a claim that a fundamental right guaranteed only under national law or another international treaty was violated.[26] It is clear from the case law that claims have to be directly based on provision of the ECHR and that the Court

[23] See Bering Liisberg (2001), p 16.
[24] Ibid, p 20. Similar provisions may be found today in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and in the International Covenant on Civil and Political Rights (ICCPR)
[25] Ibid, p 21
[26] Ibid, p 21

cannot apply other instruments: applications based on article 53 have therefore been declared incompatible *ratione materiae* with the ECHR[27] Moreover, the use of article 53 has generally not been considered necessary in order to 'legitimize' dynamic interpretations of provision of the Convention.[28] In other cases, respondent governments invoked article 53 when human rights of national or international origin were in conflict with rights guaranteed by the Convention:[29] the Court in these cases gave weight to the conflicting interests advocated by the governments, but without basing its reasoning on article 53, which was not decisive for the outcome of the cases.[30]

-Scholars have not paid particular attention to the provision, which has been rarely object of analysis:[31] in general, they tend to agree on the simple principle that ECHR provisions are only minimum standards; in case of conflict between the Convention and national or international more favourable provisions, individuals are entitled to the protection offered by the national or international instrument.[32]

If compared to article 53 of the Charter, the provision of the ECHR presents, along with some discrepancies in the use of language,[33] one relevant difference: while article 53 ECHR mentions 'national law' in general, article 53 of the Charter refers only to 'national constitutions'.[34] The question to discuss is whether the meaning of article 53 of the Charter in the European Union system may be simply derived from the correspondent provision of the ECHR. The two systems indeed present several different characteristics which question a simple

[27] See Commission decisions *Markoupolou et al. v. Greece*, App. 20665/92, 20666, 20668, 21732, 21991-92, 21991, 21999, and 22219/93, April 6, 1992, and *M.K. et al v. Greece*, App. 20723-24/92, 22213-18 and 22220-27/93, December 1, 1993.
[28] Bering Liisberg (2001) p 21
[29] See in particular cases *Golder v UK* (1975) A-18; *Open Door Counseling v. Ireland (*1992) A-246; *Jersild v Denmark* (1994) A-298; *and Gustafsson v Sweden* (1996) Reports 1996-II,, Vol. 9
[30] Bering Liisberg (2001) p 24. However, article 53 is frequently referred to in dissenting and concurring opinion of judges in the mentioned cases as well as in other instances.
[31] In R CA White – C Ovey, *The European Convention on Human Rights* (Oxford University Press 2011), one of the most relevant books on ECHR law, article 53 is mentioned only once (at p 120), in the context of the derogations in emergency situations provided by article 53
[32] Bering Liisberg (2011) p 26
[33] Article 53 ECHR is time-neutral ('may be ensured') and takes into account other conventions to which 'any', and not 'all' of the Member States is party. See Bering Liisberg (2011) p 20
[34] The more general reference to national law, as seen in paragraph 1, was proposed during the work of the Convention but abandoned at a later stage.

translation of article 53 ECHR in the EU legal order. While the Council of Europe is a traditional international organization, the EU differs from other international treaties and constitutes a 'new legal order of international law'.[35] Provisions of EU law may have direct effect[36] and two fundamental features are primacy and uniform application in the Member States.[37] The principle of primacy also applies against national constitutional law protecting fundamental rights.[38]

Therefore, while in the system of the Convention which does not present primacy or uniform application as distinct characteristics, there is no reason for the ECtHR to be concerned if a State provides a higher level of protection of a fundamental right recognized by the ECHR at the national level, unless this constitutes a violation of another fundamental right, the situation is considerably different in the EU legal order and the role of the two Courts is different.[39] While the ECtHR shall only ascertain whether a contracting party does not fall beyond the minimum standards of protection provided by the Convention, this seems not to be possible for the Court of Justice, unless article 53 of the Charter could be constructed as a exception to the principles of primacy and uniform application. Would it be possible to read the article in this sense? These questions will be analysed in the following paragraph.

2.3 An exception to primacy?

The existence of a provision such as article 53 in the context of the EU legal order is more problematic to understand than in other, more traditional, contexts, such as the ECHR context or other international human rights

[35] Case C-26/62, *Van Gend en Loos* [1963] ECR 1
[36] Concept affirmed in the *Van Gend en Loos* case and further developed by the Court of Justice during the following years.
[37] Case C-6/64, *Costa v. Enel* [1964] ECR 585
[38] Case C-11/70, *Internationale Handelgesellschaft* [1970] ECR 1125
[39] The ECHR may be described as a example of 'local standards', a model in which a core group of right is protected, establishing a minimum standards below which the parts to the Convention shall not fall, but at the same time presupposes that national standards or other international standards may afford better protection and take priority over it. See A M Widmann, 'Article 53: Undermining the Impact of the Charter of Fundamental Rights', 8 *Columbia Journal of European Law* 2002, p 347

treaties.[40] The article has been interpreted by some authors as modifying the pre-existing structure of the relations between the EU and the Member States,[41] and constituting a 'threat' to the principle of primacy of EU law.[42] These arguments are based in particular on the strict wording of the provision, as underlined by Widmann. Emphasizing how it resembles 'safeguard clauses', which can be found within several human rights instruments, the author acknowledges that the express meaning of the clause is to provide for a system of protection similar to the ECHR: a core set of rights is guaranteed against EU institutions, but national constitutions and international agreements may prevail over it and offer higher protection.[43] The only 'distinguishing feature' of article 53, when compared with similar provisions, is the reference to the 'respective fields of application', which seems to 'acknowledge the multiple levels of activity within the EU systems',[44] but which, as discussed later, cannot help to solve the question of the true meaning of the article. She therefore concludes that the allowance for 'diverging local protection', provided by article 53, is a *violation* of the principle of primacy, which requires the Union standard to apply, even if it provides a level of protection inferior to national or international standards.[45] In her view, primacy requires supranational standards to always prevail.

Another author describing article 53 as an exception to the primacy of EU law is Leonard Besselink. He describes the provision as an official recognition of the exception to Union law's primacy, which the constitutional courts of Germany and Italy have tried to affirm, the former with the so-called *Solange* doctrine[46], the latter with the case-law on *controlimiti*.[47] The same conclusion has been reached by Alonso Garcia: the Charter would only set a floor of protection,

[40] P Carrozza, 'The Member States', in S Peers – A Ward (ed.), *The European Union Charter of Fundamental Rights* (Hart Publisher 2004), p 45
[41] Ibid, p 45
[42] In particular, Bering Liisberg (2001)
[43] Widmann (2002) p 348-349
[44] Ibid, p 349
[45] Ibid, p 351. The author rejects the argument that, since the minimum standard of the Charter would still prevail, the Charter would not challenge primacy, but simply allow for an 'upward violation'. The allowance would however undermine the notion of 'uniformity' which is inherent in the principle of primacy
[46] See the judgments of the *Bundesverfassungsgericht* of 29 May 1974, *Solange I* (2 BvL 52/71) and of 22 October. 1986, *Solange II* (2 BvR 197/83)
[47] See in particular the judgments of the *Corte Costituzionale* of 27 December 1973, *Frontini* and of 21 April 1989, *Fragd*

above which Member States would be free to enforce national constitutional rights.[48] Primacy of EU law would therefore not be absolute, but would find its inherent limits in the protection of fundamental rights at national constitutional level.[49] Human rights law of the EU cannot restrict or lower the standard of protection afforded by national Constitutions and ultimately the 'highest' level of protection, irrespectively of the source of protection, which may be national, European or international, shall always apply.[50]

Is this conclusion really feasible? If, at a first glance, the strict wording of the provision might lead the interpreter towards a recognition of the exception, a more accurate analysis of the text may already cast some doubts on this interpretation. As underlined by Liisberg, the fact that the article specifically says that 'nothing *in this Charter*' may restrict rights affirmed in national constitutions, is noteworthy.[51] Article 53, therefore, does not explicitly exclude that other Union provisions of the Treaties could have the same effect. Liisberg reinforces this argument looking at the drafting history of the provision and in particular to the amendment proposed by MEP Bonde:[52] it is different to say that nothing *in this Charter* may restrict fundamental rights as protected by national constitutions, and to acknowledge a general safeguard. While the argument alone may not be fully convincing, considering today that the Charter has the 'same legal value as the Treaties'[53], and may be excessively formalistic, it may lead to avoid an interpretation solely based on the wording of the provision.

Looking at the drafting history of the provision, Liisberg notices how no real discussion of the issue of primacy took place during the works of the Convention. The absence of a debate on what would constitute an exception to one of the fundamental principles of EU law, according to the author, shows how

[48] R Alonso Garcia, 'The General provisions of the Charter of Fundamental Rights of the European Union', 8 European Law Journal 4 (2002) p 513. The author based his interpretation of the analogous clauses contained other international treaties protecting human right
[49] L Besselink, 'The Member States, the national Constitutions and the Scope of the Charter', *8 Maastricht Journal 1* (2001), p 80
[50] See the reconstruction of the arguments of Besselink by Carrozza (2004), p 45
[51] Bering Lisberg (2001), p 33.
[52] The proposal read: 'Nothing in the law of the Union, the Treaties and this Charter […]'. See Bering Lisberg (2001), p 11.
[53] See Article 6 TEU

that was not the intention of the drafters.[54] Moreover, the provision is the result of a compromise between conflicting intentions and has mainly a political meaning, namely a signal sent to the Member States that the Charter was not intended to replace national constitutions.[55] As a final argument, Liisberg underlines that to create an exception to primacy was probably out of the mandate of the Convention, which was limited to the creation of a document containing a list of fundamental rights and not included a reconsideration of the general structure of the EU legal order.[56] Therefore the fact that article 53 may call into question the primacy doctrine seems 'highly unlikely', even if its general wording 'preserves the existing tension between the autonomy of the EU legal order on the one hand, and the claims of Member States to the authority of their fundamental constitutional provisions, on the other'.[57]

Ultimately, the interpretation of article 53 as an exception to the principles of primacy and uniform application has been excluded by the Court of Justice in the Melloni case.[58] The case will be fully analysed in the following section, but it seems clear that the CJEU would consider the whole structure of EU law compromised if such exception was allowed. The creation of a 'conflict rule', recognizing that the EU would work only as a minimum level of protection, would generate tension in the EU legal order and undermine the uniformity and efficacy of EU law.[59] Therefore the EU level of protection of fundamental rights should be, in contrast with the ECHR, both a minimum floor and a maximum 'ceiling', in any case where the application of the national standard would lead to an infringement of EU law.

[54] Bering Liisberg (2001) p 32
[55] Ibid, p 35-38
[56] Ibid, p 35
[57] Craig - De Burca (2011) p 399
[58] See case *Melloni*, para 56-57 of the Judgment
[59] Torres Perez (2009), p 60

2.4 Other interpretations

a) Rights recognized by *all* Member States Constitutions

If article 53 of the Charter cannot be interpreted as an exception to primacy and uniform application of EU law, what other alternatives are conceivable? Firstly, the formulation of article 53 might be interpreted as referring only to rights and freedoms which are recognized by *all* Member States constitutions, in line with the formulation used in article 53 for international agreements,[60] or as implying the concept of 'constitutional traditions common to the Member States', which can be find today in article 6 TEU.[61]

Such an interpretation, however, can easily be rejected: firstly, the wording of the provision clearly excludes so, because no reference to elements of commonality are present. Moreover, it is possible to look at the drafting history, which shows on the one hand, that it was imagined to insert a reference to 'national law of the Member States', which does not imply any 'uniformly existent law of all the Member States', [62] and on the other hand that restricting the scope of article 53 to 'common constitutional traditions' was proposed but excluded.[63]

b) 'Uniform moveable standards'

The concept of uniform moveable standards was proposed by Leonard Besselink in an article pre-dating the drafting of the Charter.[64] Such a system would afford to individuals the maximum level of protection which can be found through a comparative analysis of the constitutional traditions of each Member

[60] Article 53 Charter: 'International agreements…to which *all* the Member States are party'
[61] E Vranes, 'The Final Clauses of the Charter of Fundamental Rights – Stumbling Blocks for the First and Second Convention' (European Integration Online Papers, 7/2003)
[62] Besselink (2001) p 74.
[63] Vranes (2003) p 12
[64] L Besselink, 'Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union' (1998) *35 Common Market Law Review 629*. However, the same author does not endorse the solution in the article of 2001 concerning the interpretation of article 53 of the Charter.

State. The ECJ should therefore find the highest national standard, transform it into a common European standard and finally apply it in the concrete case.

Article 53 of the Charter does not endorse such approach. In first place, the wording of the provision does not require the Court to do a comparative analysis of 28 different legal systems, based on unidentified criteria and limits, which would be almost impossible on a practical level. Moreover, the idea of one Member States 'imposing' its national maximum standard to the others runs counter the concept of European integration itself:[65] the CJEU would privilege the approach of one State over the others and such specific standards of protection might not be the most suitable in the context of the EU legal order.[66] Such interpretation would therefore 'hinder the development of an EU catalogue of rights best suited for the [Union] as a whole'.[67] Ultimately, this solution should be excluded because it would make impossible to solve cases of conflict of rights.

It is not always possible, indeed, to 'measure' the level of protection of fundamental rights, to 'quantify' them.[68] In several cases, different rights conflict: a typical example is the possible clash between fundamental rights of privacy and of freedom of expression.[69] In other cases, two different aspects of the same right may be in contrast: within the context of the fundamental rights to life, the protection of the life of the mother and the protection of the unborn child

[65] Vranes (2003) p 12

[66] See B de Witte, The Past and Future Role of the European Court of Justice in the Protection of Human Rights', in P Alston (ed), *The EU and Human Rights*, Oxford, OUP, 1999, pp 859-897 and J H H Weiler, *The Constitution of Europe.* 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration, (Cambridge University Press, 1999) pp 110-112

[67] Torres Perez (2009) p 162.

[68] See in particular R Dworkin, *Taking Rights Seriously* (Harvard University Press 1977), where at p 270 the author states that 'it is very difficult to think of liberty as a commodity'; a similar approach is followed by J H H Weiler, 'Eurocracy and Distrust', 61 *Washington Law Review*, 1986; however, the latter argues that a quantification is possible when individual interests are protected against the government. Only when rights of individuals collide, it is not possible to talk in terms of quantified level of protection

[69] See for example ECHR Cases 24 June 2004, *Von Hannover v Germany* [2004] (Application no. 59320/00 and *von Hannover v. Germany* No. 2 (application no. 40660/08), 7 February 2012. See also E Reid, 'Rebalancing privacy and freedom of expression. (European Union)', 16 *Edinburgh Law Review* 2, 2012

may lead to different conclusions.[70] In such cases, therefore, it would not be possible to find a 'maximum level of protection' within different legal systems and apply it generally.

According to Widmann, one of the problematic features of article 53 is precisely that the provision assumes that fundamental rights are 'quantifiable'. The logic behind it would therefore be that rights can be ranked and assessed in terms of higher and lower protection and that there will be 'no irreconcilable conflict between Charter rights and those protected by national constitutions', or that in any case the Charter rights could be interpreted in a way to ensure that no conflict arises.[71] This idea is a 'misconceived paradigm'[72] and the provision fails to provides any guidance to address issues of conflict, which, on the contrary, are likely to arise.

c) Different fields of application

Another important option to analyse is whether the expression 'in their respective field of application', a distinguishing feature of article 53 when compared to similar provision in other international instruments, may help to solve the situation. According to Besselink, the expression call for an 'armistice between EU and national law': the Charter would not interfere with national constitutions and conversely national constitutions would not interfere with the Charter, suggesting separate fields of application.[73] To understand whether this interpretation may help to address discussions concerning article 53, it is necessary to look at the field of application of the Charter and to the eventual overlap with national constitutional law.

[70] See for example ECHR Case *Vo v France* (2005) 40 EHRR 12 as discussed in J Pichon, 'Does the Unborn Child Have a Right to Life? The Insufficient Answer of the European Court of Human Rights in the Judgment Vo v. France', 7 *German Law Journal* 4 (2006), pp 433-444
[71] Widmann (2002) p 353
[72] Ibid, p 353
[73] Besselink (2001) p 75

The field of application of the Charter is determined by article 51(1):

> *Article 51*
> *Scope*
> *1. 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. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.*

The drafting of this provision was one of the most controversial issues discussed by the Convention,[74] and its meaning is not immediately clear, in particular because it is in contrast with the case law of the Court of Justice, which has recognized that respect of fundamental rights as defined in the Union context binds the Member States when they act 'within the scope of EU law', and not 'only when they are implementing Union law'. Moreover, the text of the explanations of the Charter uses a third, different expression ('acting in the context of [Union] law') but at the same time refers to the case-law of the Court in cases *Wachauf*[75] and *ERT*[76] and does not clarify the situation.

The Court tried to clarify the situation in *Akerberg Fransonn.*[77] It did so by linking the wording of article 51 with its previous case-law, and by referring to the Explanations of the Charter: the Court stated that the article of the Charter 'confirms the Court's case-law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union'.[78] As a consequence, 'fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law…and the applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter'.[79]

In the light of the provision of the Charter and of the case-law of the Court of Justice, therefore, it is clear that fields of application of the Charter and

[74] See Torres Perez (2009) p 23
[75] Case C-5/88 *Wachauf* [1989] ECR I-2609
[76] Case C-260/89 *ERT* [1991] ECR I-2925
[77] Case C-617/10, *Åkerberg Fransson* [2013] ECR I-0000
[78] Ibid, para 19
[79] Ibid, para 21

of national constitutions are not completely separate and that certain state acts are bound at the same time by constitutional and EU fundamental rights.[80] The existence of article 53 itself support the evident overlapping between fields of application: what would be the sense of the provision if the Charter might not, at least potentially, conflict with national constitutions? [81] Since the two fields overlap, the insertion of the expression 'in the field of application' cannot reduce the problematic character of article 53.[82] The tactic of 'armistice', of division of competences could not work.

d) An 'inkblot'

Since it seems difficult to find a concrete legal meaning for article 53, some authors conclude that it constitutes only an 'inkblot', to adopt the definition used by Liisberg: he affirms that the intention of the drafters was to insert the article only for a political purpose, in order to make clear that national constitutions would not be replaced by the Charter.[83] The provision would therefore represent only a politically valuable safeguard to guarantee that the new instrument could not be used to 'cut down protection', but no independent legal effects should be attached to it. According to Widmann, article 53, based on the un-appropriate model of article 53 ECHR, will prove 'practically ineffective' because it fails to address the issues created by the supranational nature of the EU system.[84]

However, such conclusions were reached before the Treaty of Lisbon, when the Charter was not a binding instrument and only had a symbolic nature. Today the question is certainly more meaningful and to simply dismiss it does not solve the question of the relationship between the Charter and national constitutions. This is shown by the decision of the Spanish Constitutional Court to refer a question on the correct interpretation of article 53 of the Charter to

[80] Torres Perez (2009) p 36
[81] Besselink (2001) p 75
[82] See conclusions of Bering Liisberg (2001) pp 33-34
[83] Ibid, p 32
[84] Widmann (2002) p 356

Court of Justice in case Melloni. The following paragraph will analyse the answer to the Court in its judgment.

3. The *Melloni* case

3.1 Background of the case: the proceedings before national courts and the preliminary reference of the Spanish Constitutional Court

It is important to analyse the *Melloni* case for two main reasons: first and foremost, in the judgment the Court of Justice for the first time gave its interpretation of article 53 of the Charter; secondly, the case indicates how 'potential conflicts [..] might emerge by the overlap of systems of rights protection when parallel rights are interpreted differently'. [85] Moreover, it constitutes the first preliminary reference of the Spanish Constitutional Court to the Court of Justice.[86]

The case concerned the compatibility between fundamental rights, in particular the right to a fair trial and rights of defence, and the execution of a European Arrest Warrant. The EAW, established by the Framework Decision 2002/584/JHA, provides a mechanism for judicial cooperation in the area of freedom, security and justice and replaces the old procedures for extradition. It is based on the principle of mutual recognition by Member States of judicial decision. Its implementation and execution caused 'constitutional conflicts' in several Member States.[87]

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[85] A Torres Perez, '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) *8 European Constituional Law Review*, p 114

[86] See ibid, p 119, where the author analyses this first preliminary reference in terms of 'dialogue' between national courts and the CJEU. The reference of the Spanish Constitutional Court follows after a short period the first preliminary reference by the Italian Constitutional Court in case *Regione Sardegna*

[87] Ibid, p106. See for example J Komárek, 'European Constitutionalism and the European Arrest Warrant: In Search of the Limits of 'Contrapunctual Principles'', 44 *Common Market Law Review* (2007); E Guild (ed.), *Constitutional Challenges to the European Arrest Warrant* (Wolf Legal Publishers 2006); O Pollicino, 'European Arrest Warrant and Constitutional Principles of the Member States: A Case Law-Based Outline in the Attempt to Strike the Right Balance between Interacting Legal Systems', 9 *German Law Journal* (2008)

The facts of the case are as follows: Mr. Melloni was issued an EAW by an Italian court in 2004, following his sentencing to 10 years of imprisonment for bankruptcy fraud. He was arrested in 2008 by the Spanish police and the competent Spanish court decided to execute the arrest warrant and surrender him to the Italian authorities. Mr. Melloni filed an individual complaint (the so-called 'recurso de amparo'[88]) to the Spanish Constitutional Court against the order of the Court, based on the fact that the Italian proceeding was made *in absentia* and affirming that to surrender him without the possibility to challenge the order before a court, would amount to a violation of the right of a fair trial under the Spanish Constitution.

The Spanish Constitutional Court decided to refer three questions to the Court of Justice. The main concern of the Court, underlying the preliminary reference, was the possibility to condition to execution of the EAW on the grounds of the protection of the right to a fair trial under the national constitution.[89] The first and second questions respectively related to the interpretation of the Framework Decision,[90] and its validity in the light of the rights to judicial remedy and fair trial (article 47 of the Charter of Fundamental Rights) and the rights of defence (article 48 of the Charter). The third question was directly concerned with the interpretation of article 53 of the Charter: the Spanish Constitutional Court asked whether the provision may be used to

'make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review in the requesting State, thus affording those rights a greater level protection than that deriving from European Union law, in order to avoid an interpretation which restricts or adversely affects a fundamental right recognized by the constitution of the first-mentioned Member State'.[91]

The Spanish Court went further and suggested three interpretative options. According to the first one, article 53 of the Charter should be interpreted in the same way as article 53 ECHR as providing only a minimum level of

[88] Guaranteed by Article 53 of the Spanish Constitution
[89] Torres Perez (2012) p 110
[90] In particular Article 4a(1) of the Framework Decision, and whether it allows MS to make in some cases the execution of a EAW conditional in order to guarantee the rights of defence of the individual
[91] Case *Melloni*, Para 26 of the Judgment

protection: therefore, when state constitutions guarantee a higher level of protection than the Charter, national courts may apply the national standards over EU law. In practice, this interpretation would have allowed Spanish courts to make the execution of the EAW conditional in the light of the constitutional right to a fair trial. The second interpretation of article 53 envisages it as a provision defining the scope of the Charter and determining that, when EU law applies, it is the Charter to determine the level of protection which must be guaranteed.[92] According to the Spanish CC, this interpretation would deprive article 53 of a independent legal meaning vis-à-vis article 51 of the Charter (the scope-of-application provision) and would recognize that the Charter might result in a reduction of the level of protection of constitutional fundamental rights in the Member States.[93] The third interpretative option, although not formulated in detail, amounts to a combination of the previous two. Depending on the concrete circumstances of the case or of the 'specific problem of protection of fundamental rights at issue'[94] article 53 could operate as a minimum level of protection (option 1) or imposing a uniform, common standard (option 2). This 'third way' of interpretation was not fully taken into account by the Court of Justice in the judgment, but it suggests a creative reading of the provision which will be discussed in Section 4 of the thesis.

3.2 Melloni in Luxembourg: the opinion of the Advocate General and the Judgment of the Court

The Court of Justice delivered its judgment on the 26th February 2013. Having established, answering to the first question, that article 4a(1) of the EAW Framework Decision precludes national authorities to making the execution conditional to a review in case of *in absentia* trial,[95] and that the provisions of the Framework Decision respect fundamental rights as provided by article 47 and 48(2) of the Charter,[96] the Court went to analyse the third question.

[92] See Opinion of the AG General on Case *Melloni*, para 93
[93] Ibid, para 93
[94] Ibid, para 95
[95] Case *Melloni*, para 46 of the Judgment
[96] Ibid, para 54

While the Opinion of the Advocate General dedicated large space to the interpretation of article 53, and for this reason it is better to analyse it separately, the judgment of the Court is striking for its brevity, which can be explained by the high political sensitivity of the question.[97] The Court strictly focused on the first of the interpretations envisaged by the Spanish Constitutional Court, namely the option which would give 'general authorization to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when the standard is higher than that deriving from the Charter and, where necessary, give it priority'[98] over EU law. In the view of the Court such an interpretation cannot be accepted.[99] The Court based its conclusion on the principle of primacy, a 'essential feature of the EU legal order'[100]: such principle would be undermined if a Member State was allowed to 'disapply EU legal rules which are fully in compliance with the Charter'.[101] According to the Court of Justice, article 53 only:

'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.'[102]

Therefore, article 53 cannot be interpreted as allowing Spain to make the surrender conditional, in order to avoid the adverse effect on the constitutional fundamental rights.

The Court reached the same conclusions of the Advocate General regarding the concrete circumstances of the case. However, the AG Opinion offers a more comprehensive discussion on article 53. According to AG Bot, the first interpretation proposed by the Spanish Constitutional Court 'should be firmly rejected'.[103] To give priority to constitutional norms protecting human rights would be a violation of several fundamental principles of EU law: first of

[97] As imagined before the judgment by Torres Perez (2012) p 118
[98] Case *Melloni*, para 56 of the Judgment
[99] Ibid, para 57
[100] Ibid, para 59
[101] Ibid, para 58
[102] Ibid, para 60
[103] Opinion of AG Bot on Case *Melloni*, para 96

all, a infringement of primacy, since it is 'settled case-law that recourse to provisions of national law, even of a constitutional order, to limit the scope of European Union law would have the effect of impairing the unity and efficacy of that law and consequently cannot be accepted'.[104] Moreover, it would prejudice uniform and effective application of EU law in the Member States[105], and undermine the principle of legal certainty.[106]

Bot then reflects on how the level of protection should be evaluated within the EU legal system. According to the AG, it is not possible to reason only in terms of higher and lower level of protection, but it is necessary to take into account the 'specific nature' of EU law. Since fundamental rights reflect 'choices of a society as regards the proper balance to be achieved between the interest of individuals and those of the community to which they belong',[107] when the determination is carried out at European level, it cannot be disregarded giving priority to national constitutional rules. In the case at stake, therefore, attention should be given to the 'specific interests' which motivated the action of the EU in the field of EAW: protection of fundamental rights had to be fixed at a level which would not compromise the effectiveness of the whole mechanism.[108]

The AG distinguishes cases where, such as in the Framework Decision establishing the EAW, 'there is a definition at European Union level of the degree of protection',[109] and other cases where such common definition is missing. In the first type of case, the determination of the level of protection correspond to a balance between two needs, sometimes diverging, namely to ensure effectiveness of EU action and to provide adequate protection. In the second type of case, on the other hand, Member States have 'more room for manoeuvre' in applying a national determined level of protection.[110]

[104] Opinion of AG Bot on Case *Melloni,* para 98
[105] Ibid, para 101
[106] Ibid, para 104
[107] Ibid, para 109
[108] Ibid, para 119
[109] Ibid, para 124
[110] Ibid, para 125-127

Therefore, what is the meaning of article 53 of the Charter? Bot firstly recognizes its' 'political and symbolic importance',[111] referencing to the already analysed conclusions of Bering Liisberg.[112] The AG gives particular weight to 'field of application' argument: the article would therefore 'confirm that the Charter imposes a level of protection for fundamental rights only within the field of application of European Union law'[113], while outside the scope of EU law the Charter cannot require Member States to lower the level of protection of fundamental rights, neither to replace their constitution with the new common instrument. In conclusion, article 53 'cannot undermine the primacy of European Union law since the assessment of the level of protection for fundamental rights to be achieved is carried out within the framework of the implementation of European Union law'.[114]

The last paragraphs of the Opinion are dedicated to the question of national and constitutional identity, which are completely absent in the judgment of the Court. Bot mentions article 4(2) TEU which provides:

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.

The provision has already been mentioned by the Court of Justice in several judgments,[115] and it has been established that a Member States may challenge a provision of secondary law which adversely affects its national identity.[116] However, according to Bot, the conditions for application of the provision are not met in the case at stake.

[111] Opinion of AG Bot in Case *Melloni*, para 129
[112] Bering Liisberg (2001)
[113] Opinion of AG Bot in Case *Melloni*, para 133
[114] Ibid, para 135
[115] Case C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13693; Case C-391/09 *Runevic-Vardyn* [2011] ECR I-03787; Case C-51/08 *Commisison v Luxembourg* [2011] ECR I-04231
[116] Opinion of AG Bot in Case *Melloni*, para 139

3.3 Comments and open questions

Notwithstanding its striking brevity, the judgment of the Court contains several important aspects. The first element is the insistence of the Court on primacy, unity and effectiveness of EU law, with a strong conception of these principles intended to strongly preserve the *acquis communitaire*. The insistence might be explained by the fact that the Court approached the question of interpretation of article 53 with a particular, and not necessarily accurate, frame of mind. In paragraph 56 of the judgment, the Court refers to '*the* interpretation envisaged by the national court' and then discuss the possibility that article 53 might work as an exception to the primacy of EU law. However, the Spanish Constitutional Court proposed three different interpretations of the provision: the Court, having rejected the first one, did not discuss the second and the third. The insistence on primacy does not seem fully convincing because it might be said that in article 53 of the Charter there would be reasons to nuance, or at least re-discuss, the traditional conception of primacy.[117] The judgment therefore reflects the traditional concerns of the CJEU with primacy and uniformity. Moreover, the Court and the AG did not give any criteria to determine when and how these principles are not compromised. In particular, the AG Bot, who in the Opinion distinguished between two types of situations, does not clarify when the second type occurs and gives Member States more room for manoeuvre; it may seem that it happens when national authorities have some form of discretion in the implementation of EU law, but this is not clarified neither in the Opinion nor in the Judgment.[118]

A second noteworthy element is the construction of the Court of paragraph 60. The Court derives its conclusion as they were taken directly from the wording of the article ('Article 53 of the Charter *confirms*') but this does not correspond to the real reasoning of the judges. The interpretation given by the Court in the paragraph is based on a debatable assumption which should be more

[117] J Morijn, 'Akerberg and Melloni: What the ECJ Said, Did and May Have Left Open' (2013) <http://eutopialaw.com/2013/03/20/akerberg-and-melloni-what-the-court-said-did-and-may-have-left-open>

[118] N De Boer, 'Uniformity or Deference to National Constitutional Traditions in the Protection of Fundamental Rights' (2013) <http://europeanlawblog.eu>

thoroughly justified. It seems that the Court tried to 'neutralize' article 53: a possible reading would be that domestic standards can apply only as long as they are the same standards of the EU.[119] In addition to this, considering the insistence of the AG on reference to the different 'fields of applications', article 53 seems to lose its independent meaning vis-à-vis article 51: it may constitute only a reaffirmation of the limited scope of the Charter but, in the view of the Court, does not add anything more.[120]

The third element to underline is the strict link with the facts of the case.[121] Both in the judgment and in the AG Opinion, it is noted that the Framework Decision constitutes a harmonization of the field, reflecting the consensus reached by all the Member States. To cast doubts on the uniformity of standards of protection of rights, as defined in the Decision, would therefore undermine the principles of mutual trust and mutual recognition which are at the basis of the piece of legislation. Furthermore, *in absentia* trials were dealt with by the EU legislator directly, and it is somewhat assumed by the Court that the high Spanish Constitutional standards were part of the discussion during the drafting of the Framework Decision. In general, the Court seemed willing to avoid far-reaching conclusions on article 53, acknowledging that the issue was particularly sensitive. It is ponderable as to whether the relevance of the judgment should be reduced only to cases where there is reason to believe that the relevance and applicability of national constitutional standards has been explicitly considered in the EU legislative process.[122]

Several elements of the judgment therefore do not seem fully persuasive. Ultimately, the outcome of the case allows the Court to preserve primacy and autonomy of the EU legal order, but it is probably less desirable if analysed from a fundamental rights perspective. The Court of Justice endorsed a system of protection in which the EU works as a maximum, reducing national autonomy

[119] F-X Millet, 'EU Demoicracy in the Light of Melloni and Akerberg Fransson. The case for cosmopolitan constitutionalism?' (2013) <http://centers.law.nyu.edu/jeanmonnet/activities/enl/documents/EUDemoiCracyintheLightofMelloniandAkerbergFransson.pdf>
[120] De Boer (2013)
[121] Morijn (2013)
[122] Ibid

and, in some cases, such in *Melloni*, asking national authority to disregard national standards and ultimately reducing the level of protection of fundamental rights. This is furthermore questionable in the light of the fact that the Court takes the compliance to the ECHR as a 'end-point'[123] and does not seem willing to go further than that level. Since the ECHR only establishes a minimum level of protection, if the EU concretely wants to aim for a high level of protection of fundamental rights, it should not always restrain at the level guaranteed by the ECHR. The risk, especially when taking in account that the scope of application of EU law is constantly growing, would be to undermine the overall level of protection of rights in Europe. Moreover, national courts, and in particular constitutional courts, might also be tempted to use means of 'resistance' to counteract to the decision of the Court and avoid to reduce the national level of protection of fundamental rights.[124]

In conclusion, it is possible to presume that the judgment most likely would not bring to an end the discussions concerning the interpretation of article 53 and generally on the relationship between national constitutions and EU law. In particular, the absence of any criteria to determine how and when primacy is not compromised, or to distinguish the second type of cases in the Opinion of the Advocate General, could lead other national courts to ask clarifications to the Court of Justice. Moreover, the strict link with the facts of the cases casts other doubts on the real scope of the judgment. In this light, it is even more interesting to analyse the 'third way' of interpreting article 53 as envisaged by the Spanish Constitutional Court.

4. A third way to interpret article 53

4.1 'Third way': content and reasons

As analysed in the previous sections of the paper, the meaning of article 53 of the Charter has been object of several discussions. The interpretations advanced

[123] See the part of the judgment dealing with the second question of the Spanish Constitutional Court (para 47-54).
[124] Morijn (2013).

have followed two main lines: on the one hand, some authors have concluded that the provision constitutes an exception to the principle of primacy of EU law;[125] on the other hand, a second line of interpretation denied the possibility of providing such an exception, and understood article 53 as a purely political and symbolical provision, without any real legal meaning.[126] Different interpretations based on particular features of the provision have been considered unable to effectively contribute to the discussion.[127]

However, a third way to interpret article 53 is possible. As suggested by the Spanish Constitutional Court in the reference in case *Melloni*, such interpretation 'involves a combination of the previous two'.[128] Depending on the circumstances of the case, article 53 could operate as establishing only a floor of protection, and allowing national courts to maintain the higher level of constitutional protection, or as imposing a uniform standard throughout the EU.[129] The solution to the problem of the meaning of article 53 should therefore not be given in abstract, but would depend on the specific circumstances which surround the particular problem of protection of fundamental rights at stake. In its preliminary question to the CJEU, the Spanish Constitutional Court referred to two cases decided by the Court of Justice which may support such third way of interpreting article 53. In the first place, the Spanish Court referred to paragraph 37 and 38 of the *Omega* case,[130] where the CJEU stated that: '*It is not indispensable in that respect 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'*.[131] The Court added that: '*the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State'*.[132]

[125] See in particular Besselink (2001) and Alonso Garcia (2002)
[126] Among the others, Bering Liisberg (2001)
[127] See Section 2.4 above
[128] Torres Perez (2012) p 117. See also Gonzaleg Pascual (2012), p 171
[129] Torres Perez (2012) p 117
[130] Case C-36/02 *Omega* [2004] ECR I-09609
[131] Case *Omega*, para 37
[132] Ibid, para 38

Furthermore, the Spanish Constitutional Court mentioned case *Pupino,* which at paragraph 60 reads as follows: *'It is for the national court to ensure that … the application of those measures is not likely to make the criminal proceedings against Mrs. Pupino, considered as a whole, unfair within the meaning of Article 6 of the Convention, as interpreted by the European Court of Human Rights'.* These references to the case-law of the Court are quite cryptic and vague,[133] but they might be read in terms of 'deference'.[134] Such concepts will be analysed in detail in the following paragraph.

This different reading of article 53 finds support elsewhere as well. In his interpretation of the provision, CJEU judge Koen Lenaerts sees it not as a 'rule of conflict', but 'as a rule which seeks to strengthen the primacy of EU law by demanding from the ECJ that it state the reasons why it decided to follow (or depart from) the level of fundamental rights protection provided for by the member states' constitutions.'[135] In this sense, Lenaerts endorses the approach followed by Azoulai.[136] Article 53 would therefore ask the Court of Justice to start a dialogue with national courts, and would be an expression of 'constitutional pluralism'.[137] In contrast to what was proposed by other authors,[138] article 53 shall not be interpreted as a codification of the Solange approach, but in the light of the rulings of the CJEU in *Omega* and *Sayn-Wittgenstein*: the provision requires the CJEU to 'pay due homage to the constitutional traditions common to the Member States', but it would not automatically allow for an exception to primacy, without taking into account the 'essential elements' of EU law, when a national constitution offers a higher level

[133] Torres Perez (2012) p 117 and Gonzalez Pascual (2012) p 172. Nonetheless, in the following paragraph it will be further analysed what such references could mean, with a focus on the concept of deference

[134] Torres Perez (2012) p 117 and Gonzalez Pascual (2012) p 172

[135] K Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights', 8 *European Constitutional Law Review* 3 (2012) p 398

[136] L Azoulai, 'L'article II-113', p 689, L. Burgorgue-Larsen et al. (ed.), *Traite etablissant une Constitution pour l'Europe. L'architecture constitutionnelle, Partie II – La Charte des droits fondamentaux de l'Union, Commentaire article par article* (Bruylant 2005)

[137] Lenaerts (2012). On the concept of constitutional pluralism, see among others K Lenaerts – J A Gutierrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law', 47 *Common Market Law Review* (2010), pp 1629-1669; A Vosskuhle (2010); N Walker, 'The Idea of Constitutional Pluralism' *Modern Law Review* (2002)

[138] See Besselink (2001) and Alonso Garcia (2002)

of protection than that guaranteed at EU level.[139] In conclusion, this interpretation proposes another form of deference to national courts: 'in so far as the essential interests of the EU are not adversely affected by national measures implementing EU law, the ECJ defers to the member states the question of determining the level of protection of fundamental rights they consider consistent with their national constitution'.[140]

Such interpretation of article 53 finds also support in the work of Torres Perez.[141] According to the author, the provision should be interpreted along the line of deference from the CJEU to state courts, in order to maintain more protective standards in interpreting fundamental rights. To avoid the unproductive opposition between the two main lines of interpretation, if the interpreter wants to give real legal content to the provision, without directly clashing with the principle of supremacy, he should read article 53 as containing 'a self-restraint mandate to the CJEU in applying the Charter'.[142] The CJEU should therefore defer the issue to state courts if the level of constitutional protection of the fundamental right at stake is higher, and there are no other rights or general interests that should prevail in the particular case. At the same time, Torres Perez underlines how it would not be possible to interpret article 53 as a 'conflict rule',[143] allowing state courts alone to make the national constitutional right prevail over the parallel EU rights when they review state acts within the field of application of EU law, without taking into account the consequences for the efficacy of EU law and the need for uniform application.[144] In other words, it should be the CJEU that determines whether article 53, in a particular case, requires deference to a national court, balancing the existence of a national higher standard of fundamental rights' protection, with the need to ensure efficacy of EU law.

Such third way may be considered appealing for several reasons. In the first place, it allows us to overcome the situation created by the opposition between

[139] Lenaerts (2012) p 399
[140] Ibid, p 399
[141] Torres Perez (2009)
[142] Ibid, p 176
[143] As seen, the same conclusion is reached by Lenaerts (2012)
[144] Torres Perez (2012) pp 61-62

the two other interpretations, which leads to an unattractive alternative: either reading article 53 as an exception to the fundamental principles of primacy and uniform application,[145] or concluding that the provision does not have a concrete legal content. Moreover, the third way allows us to transform a purely abstract approach to the interpretation of the provision, into an alternative based on the concrete circumstances of the case, looking at the substance of the fundamental right dispute. This option therefore reduces the risk of an overall reduction of the level of protection of rights which may arise from the orientation adopted by the Court in the Melloni case.[146] This proposed interpretation leaves room for a certain degree of diversity in fundamental rights' interpretation at the national level, diversity which is beneficial for the system of protection of rights: firstly, the nature of fundamental rights itself, as particular choices of a society regarding the appropriate balance between interests of the individuals as against those of other individuals or of the community,[147] suggests giving to domestic courts the possibility to formulate their conclusions, since they are located closer to the different societies. Furthermore, in the case of conflicting rights, when a balance is needed, domestic courts are in the best position to evaluate the particular circumstances of the case.[148] Moreover, creative interpretation of fundamental rights by national courts may promote the development of fundamental rights protection, inspiring other courts and leading to an overall increase in the level of protection.[149] In conclusion, the third interpretation would reduce the risk of using means of 'resistance' by national courts, which might be tempted to use in order to preserve the national higher level of protection of fundamental rights.

[145] Such solution was ultimately excluded by the Court of Justice in *Melloni*, as discussed above

[146] See Section 3.3 above, in particular the critique to the approach of the CJEU to take protection of fundamental rights in the ECHR as an end-point, transforming a minimum standard of protection in a 'ceiling'

[147] A M Widmann (2002) p 353. See also J Weiler (1986) p 1128 and Opinion of AG Bot in case *Melloni*, para 109

[148] In general, national courts are better equipped to adjudicate on fundamental rights issues: see C Paraskeva, 'Returning the Protection of Human Rights to Where They Belong, At Home', 12 *The International Journal of Human Rights* 3 (2008) p 422.

[149] Torres Perez (2009) p 83-92, lists three main sets of arguments in favour of diversity in fundamental rights' adjudication: (i) democratic self-government of political communities; (ii) protection of individual liberty; (iii) experimentation leading to innovation

4.2 The concept of 'deference'

According to the Spanish Constitutional Court's reference in *Melloni*, as well as for the mentioned authors, the third way of interpretation of article 53 of the Charter calls for 'deference' from the CJEU to national courts in adjudication of fundamental rights. In this paragraph, the concept of 'deference' will be examined: how does deference work? What does the reference to cases such *Omega*, *Pupino* and *Sayn-Wittgenstein* mean?

According to the definition of Torres Perez, 'deference is a doctrine that governs the extent to which courts will exercise their power of review upon state action or will restrain themselves'.[150] Both at national and supranational level, such doctrine reflects democratic concerns: at the latter level, in particular, it reflects the fact that supranational courts are called to review decision taken by democratic states.[151] In the context of the ECHR, the 'margin of appreciation' doctrine may be considered an expression of deference.[152] In the EU, deference 'would indicate when a decision about the meaning of rights is better taken at the state level, as a matter proper for each state community to decide, or when an interpretive decision at the supranational level is required'.[153] In this sense, deference would be an expression of the 'subsidiarity principle'.[154]

As it is evident from the case-law of the CJEU, the application of EU fundamental rights does not completely exclude the application of domestic rights.[155] When the CJEU is called to interpret and apply EU law, it has to do so in conformity with EU fundamental rights, as required by article 2 and 6 TEU; however, when EU law leaves room for Member States' action, national fundamental rights can be applied, as long as they do not infringe other rights

[150] Torres Perez (2009), p 168
[151] Ibid, p 169
[152] See P G Carrozza, Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights, 73 Notre Dame Law Review (1998) p 1920
[153] Torres Perez (2009) p 169
[154] Ibid, p 170
[155] See for example Case C-135/08, *Rottmann* [2010] ECR I-1449, para 55

protected by EU law or generally lead to an infringement of EU law.[156] The Court of Justice should therefore give to national courts the equivalent of the ECtHR 'margin of appreciation', in particular when a decision concerns the application of EU fundamental rights in a national legal system, and 'allows for the expression of differences between the Member States'.[157]

However, since the EU and the ECtHR differ a great deal in what concerns nature and institutional structures, it would not be possible to simply translate the margin of appreciation doctrine in the EU. The solution to two different questions seems to be particularly problematic: firstly, who should determine what the most appropriate level for decision is? Secondly, which criteria should guide it in the exercise of deference? Such difficulties are recognized by Torres Perez: according to the author, the determination of the most appropriate level for decision should be for the CJEU; for what concerns the criteria for assessment, she believes that they should derive from the overall distribution of authority between national and supranational systems which underline the EU structure. Moreover, from a substantive point of view, deference could be used as an instrument to allow for higher constitutional standards of protection.[158]

Deference thus falls into the broader concept of 'dialogue' or 'conversation' between supranational (in Europe, both the CJEU and the ECtHR) and national courts. Even if 'a model of dialogue does not necessarily leads to deference', when dialogue is exercised within a pluralistic framework, where the values of state autonomy are recognized, it may illustrate how in certain cases deference to national courts is appropriate.[159] There seems to be a tendency

[156] See J Kokott – C Sobotta, 'The Charter of Fundamental Rights of the European Union after Lisbon', EUI Working Papers AEL 2010/6 (2010) p 12
[157] Ibid, p 12. The authors propose two different form of scrutiny of rights: when acts of EU institutions are concerned, the review should more stringent, while when States' acts are involved, the CJEU should take into account that parallel domestic fundamental rights apply and leave a margin of appreciation. This would give to national courts the possibility to autonomously develop their own domestic rights, and in turn this would be beneficial for the overall protection of rights in the EU
[158] Torres Perez (2009), pp 173-174
[159] Ibid, p 176

nowadays to describe the relationship between courts in terms of dialogue,[160] a tendency which led the President of the German Constitutional Court to speak about a 'multi-level cooperation of European Constitutional Courts'.[161] For what concerns fundamental rights protection, the recent trend may be explained by the fact that, nowadays, the context is entirely different from the early days of *Solange* and *controlimiti*, when relationships between courts were mainly described in terms of power struggle or 'war of courts' and protection of rights was not directly provided at EU level.[162] Since the Treaty of Lisbon and the entry into force of the Charter, fundamental rights form an integral part of the EU legal system and consequently national constitutional courts are less concerned with the interferences of the supranational legal order, today equally engaged in fundamental rights protection.

Signals of a tendency towards dialogue, as well as expressions of deference to national courts, may be found in several recent judgments of the CJEU. Such cases were mentioned by the Spanish Constitutional Court in its reference to the Court of Justice and by several authors interpreting article 53 of the Charter. The first and most discussed example is the *Omega* case. According to Torres Perez, the judgment shows how the CJEU might 'accommodate diverse levels of protection deferring to the states the decision about the interpretation of the right at stake'. In Omega, the Court was called to review the legitimacy of the ban of German authorities of a laser machine-gun game, on the ground that the activity to 'killing people' was violating the principle of human dignity. The case therefore concerned the compatibility of the prohibition of a economic activity 'for reasons arising from the protection of fundamental values laid down by the national constitution' with EU law, and whether restrictions to fundamental freedoms should be based 'on a legal conception that is shared by all Member States'.[163] The Court recognized that respect for human dignity is a general principle of law which is protected under EU law and justify a restriction to

[160] See Torres Perez (2009), which considers dialogue as the source of the Court of Justice legitimacy in adjudicating fundamental rights. See also note 13 above
[161] Vosskhule (2010)
[162] M Claes, 'Negotiating Constitutional Identity or Whose Identity is it Anyway?', in iM Claes (ed), 2012, p 208
[163] Case *Omega*, para 23

fundamental freedoms;[164] although in Germany such a principle 'has a particular status as an independent fundamental right',[165] it does not receive the same level of protection in all the Member States. This lack of a common conception shared by all the Member States, however, does not exclude the legitimacy of the restriction to economic activity provided by the German authorities: the fact that other Member States do not recognize such a broad scope of the concept of human dignity does not preclude Germany to do so.[166] In the absence of a Union regulation, it is left to Member States' discretion to determine whether the protection of human dignity, 'a fundamental interest of society that can only be defined with reference to cultural conceptions', requires to restrict a determinate activity.[167] It is not for the Court to harmonize national cultural conceptions.

In the case, therefore, the CJEU restrained itself: it did not set an interpretation of the concept of human dignity for the whole Union, and at the same time did not extend the higher German standard all over the EU legal system, recognizing the importance of diversity.[168] The case is an expression of 'tolerance towards national solutions' of the conflict between protection of human dignity and economical freedoms.[169] In this light, it is possible to understand what the Spanish Constitutional Court and the authors mean when they refer to *Omega* in their interpretations of article 53: the possibility, already recognized by the CJEU, when facing a national higher standard of protection, to respect such standard, avoiding the imposition over a Member State a common, and possibly less protective, one, and to self-restrain, deferring the question to a national court. This approach would therefore depart from the traditional and strictly hierarchical one, followed by the CJEU since *Internationale*

[164] Case *Omega*, para 34-35
[165] Ibid, para 34
[166] Ibid, para 37-38, mentioned by the Spanish Constitutional Court in its reference in case *Melloni*
[167] T Ackermann, 'Case Note on Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs GmbH* v. *Oberbürgermeisterin der Bundesstadt Bonn*, Judgment of the Court of Justice (First Chamber) of 14 October 2004, nyr', 42 *Common Market Law Review* (2005) p 1117
[168] Torres Perez (2009) p 171
[169] Ackerman (2005) p 1120. However, according to Claes (2012) pp 228-229, even if such case is normally described as a judgment on 'constitutional identity' and as recognizing diversity among different constitutional systems in the Member States, it is framed in a different way which 'resembles the traditional line of cases on national institutional autonomy'. The particular feature of *Omega* is that 'exception is made to the normal application of EU law, on ground that are particular to one … state'.

Handelsgesellschaft, where the Court affirmed the primacy of EU law on national law 'however framed', including therefore national constitutional law.[170]

It is more complex to understand why the Spanish Constitutional Court referred to the judgment of the CJEU in *Pupino*. The case is not traditionally considered an example of deference to national courts. In the judgment, the Court extended some features of 'traditional' EU law to the former third pillar.[171] Having affirmed the duty to interpret national law in conformity with Framework Decisions, and remarked that Framework Decisions 'must … be interpreted in such a way that fundamental rights, including in particular the right to a fair trial … are respected'[172], the Court of Justice, in paragraph 60, mentioned by the Spanish Constitutional Court in its reference, entrusted the national court in ensuring respect of fundamental rights during national proceedings. A relevant role for national courts is certainly envisaged by the CJEU, but it does not include the possibility to apply national higher standards. More than expressing deference, mentioning the *Pupino* case, the Spanish Constitutional Court tried to remark how the protection of fundamental rights should always be ensured by national courts, even in the context of Framework Decisions under the former third pillar, which were at stake in *Melloni* as well.

The third case mentioned in the context of interpretation of article 53 Charter in terms of deference is *Sayn-Wittgenstein.* The case concerned the legitimacy of the decision of Austrian authorities not to recognize the change of name of Ms Sayn-Wittgenstein on the basis of the constitutional provision on equality and prohibition of noble names. The CJEU acknowledged that the

[170] See Torres Perez (2009) p 50

[171] Para 43 of the Judgment: 'The principle of conforming interpretation is binding in relation to framework decisions adopted in the context of Title VI of the Treaty on European Union. When applying national law, the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues'. According to C Lebeck, 'Sliding Towards Supranationalism? The Constitutional Status of EU Framework Decisions after Pupino', 8 *German Law Journal* 5 (2007) p 526, the 'constitutional relevance' of the judgment is that it consists in an attempt to give supranational character to the form of cooperation under the third pillar which was intended as purely intergovernmental at the time of the judgment Such conclusions should be reconsidered after the 'depillarisation' of the Treaty of Lisbon, at least for what concerns the form third pillar

[172] Case *Pupino*, para 59

decision constituted a restriction to the freedom of movement of the applicant;[173] it then proceeded to review whether there was a justification for the decision of national authorities, according to the standard examination of objectives of the restriction, whether less restrictive measures were foreseeable and whether the measure was proportionate. Firstly, the Court established that the national legislation at stake constitutes 'implementation of the … general principle of equality before the law of all … citizens';[174] it then considered the principle of equal treatment as a general principle of EU law, protected by article 20 of the Charter of Fundamental Rights,[175] and therefore concluded that the objective of observing such a principle was compatible with EU law.[176] Addressing the questions of the existence of less restrictive measures and of proportionality, the Court referred to its conclusions of paragraphs 36-38 of *Omega*, analysed above and already considered as an expression of deference to national courts and of the recognition of diversity between Member States.[177] This brought the Court to determine that the measure was not disproportionate and therefore the refusal was compatible with EU law.[178]

The judgment is particularly interesting because it was the first case in which article 4(2) TEU on 'constitutional identity' was accepted as a justification for a restriction of one of the fundamental freedoms of EU law.[179] To refer to *Sayn-Wittgenstein* in the context of article 53 of the Charter opens the relevant question of the possible connections and relationship between article 53 and article 4(2) TEU. This point was briefly touched upon by AG Bot in his opinion in *Melloni,*[180] and will be discussed in the following paragraph.

[173] Case *Sayn-Wittgenstein*, para 70
[174] Ibid, para 88
[175] Article 20 EU Charter of Fundamental Rights - Equality before the law: '*Everyone is equal before the law*'
[176] Case *Sayn-Wittgenstein*, para 89
[177] Ibid, para 90-91
[178] Ibid, para 93-94
[179] L Besselink, 'Case Note on Case C-208/09, *Ilonka Sayn-Wittgenstein* v. *Landeshauptmann von Wien*, Judgment of the Court (Second Chamber) of 22 December 2010, nyr, *49 Common Market Law Review* (2012) p 672
[180] See Opinion of AG Bot in case *Melloni*, para 137- 142

4.3 Article 53 of the Charter and article 4(2) TEU

The concept of 'national identity' was first introduced into the EU legal framework by the Maastricht Treaty.[181] The meaning of the provision was rather vague and unclear, and, since it was not justiciable, and thus never acquired real legal meaning.[182] The drafters of the Constitutional Treaty elaborated on this concept, and the provision envisaged by them is today reproduced in article 4(2) TEU.[183] The new, 'formal' version of constitutional identity has received particular attention from several authors: it has been defined as re-conceptualizing 'the relationship between EU law and domestic constitutional law and [leading] to a more nuanced understanding beyond the categorical positions of the ECJ on the one side .. and that of most domestic constitutional courts on the other'.[184] According to a first line of interpretation, the provision would confirm the case-law of national constitutional courts on *controlimiti*, 'overcoming the idea of absolute primacy' and 'permitting domestic constitutional courts to invoke, under certain limited circumstances, constitutional limits to the primacy of EU law.'[185] A second line of interpretation reads the article in a different way: not as confirming the theory of *controlimiti*, and therefore not allowing for an unilateral refuse by national constitutional courts to apply EU law on the ground of the protection of national constitutional identity; but as 'part of primary EU law', the ultimate interpretation of which is for the CJEU.[186] In other words, the respect for national constitutional identity is a EU law matter and the Court, when necessary, should provide exception to the uniform application of EU law, without limiting its general primacy.[187] To allow

[181] Article F(1) of the Maastricht Treaty: '*The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy*'
[182] Claes (2012) pp 216-217
[183] However, as Claes notices, the context in which the provision operates changed from Rome to Lisbon, because the clause on primacy was deleted from the corpus of the Treaty and appears only in a Declaration to the Treaty. The stature on the obligation to respect national identities therefore changed because it is no longer counterbalanced by the clause on primacy. See Claes (2012) p 220
[184] A Von Bogdandy and S Schill, 'Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty', 48 *Common Market Law Review* 5 (2011), p 1418
[185] Ibid, p 1419. A similar approach is followed also by L Besselink, 'National and Constitutional Identity before and after Lisbon'; 6 *Utrecht Law Review* 3 (2010), pp 36-49
[186] Claes (2012) p 221
[187] Ibidem, p 221. On the other hand, to allow for unilateral review powers, providing national exception to the absolute primacy of EU law, would not require or provide for any dialogue between courts: according to that interpretation, 'where identity comes in, conversations ends':

national courts to unilaterally delineate the concept of constitutional identity would give them a way of escaping from their EU law obligations, through a 'broad and flexible' formulation of the concept.[188]

The second line of interpretation requires forms of dialogue and interaction between the CJEU and national courts, because what pertains to national identity is to be determined by reference to the national legal systems, over which the Court of Justice does not have jurisdiction.[189] Courts should therefore engage in a process of 'negotiation' over the content and the extent of national or constitutional identity:[190] the 'substantive content of the identity should be defined by national actors on the basis of domestic criteria',[191] but it is ultimately for the CJEU to decide whether a claim based on article 4(2) is valid 'as a matter of EU law' and can justify non-compliance or derogation from EU law obligations.

The case law of the Court of Justice seems to support this second line of interpretation of article 4(2) TEU. Explicit reference to the article has been made in the already discussed *Sayn-Wittgenstein* and in other two cases.[192] Instead of giving to national courts a unilateral power to disapply EU law, the CJEU has retained the last word in adjudicating cases concerning national or constitutional identity. Moreover, it did so by translating these claims into classic EU formulas of public policy and proportionality.[193] This attitude of the Court of Justice has been criticized for 'downplaying ... the constitutional issue at stake',[194] giving it

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see Claes (2012) p 226. See also C Van de Heyning, 'The European Perspective: from lingua franca to a common language', in M Claes (ed.), 2012, p 203: respect of national identity does not imply an absolute derogation from EU law, and is limited by the requirement of proportionality.

[188] Van de Heyning (2012) p 202

[189] Claes (2012), pp 221 - 231

[190] Ibid, p 230. Van de Heyning (2012) also remarks the function of article 4(2) as establishing a 'common language' for CJEU and national courts

[191] Van de Heyning (2012) p 202. Article 4(2) indeed enables differentations between the Member States, because the content of fundamental constitutional principles is country specific. Moreover, national actors are better equipped to determine substantive content of the national identity

[192] In *Runevič-Vardyn*, where national identity, based on constitutional nature of the Lithuanian language, constituted a valid defence for national authorities who invoked it; and in *Commission v Luxembourg*, where on the contrary the CJEU refused the appeal of Luxembourg based on national identity

[193] Claes (2012) p 229

[194] Besselink (2012) p 682

only a subsidiary role.[195] Therefore, it is questionable whether the CJEU, in these cases, fully embraced the concept of constitutional identity.[196]

Having identified the context in which article 4(2) TEU operates, it is possible to discuss its relevance in relation to article 53 of the Charter. In the first place, reading the former provision not as an exception to primacy, but as providing for dialogue between national and European courts, respecting primacy but possibly allowing for an exception to uniform application of EU law, may help in reconsidering the provision of the Charter. Discussions on article 53 were mainly concerned with its effect on the principle of primacy, both on the side of those who read it as an exception to such principle, confirming the Solange or controlimiti case-law and establishing a minimum floor of protection, and on the side of those denying this possibility, looking at it as a 'threat' to primacy.[197] However, since Lisbon, article 53 of the Charter is itself part of primary EU law and shares the same characteristics as Treaty law. Therefore, a different reading of the provision should be possible: looking at the discussed interpretation of article 4(2) TEU as a 'model', a similar conclusion may be reached. Article 53 of the Charter would not allow national courts to unilaterally detract from EU law, neither would it be considered a purely symbolical provision because primacy is not touched upon. However, as the 'third way' suggests, it could, according to the particular circumstances of the case, give to national courts the possibility to derogate from uniform application of EU law and express national diversity. As article 4(2) TEU, the Charter provision may be considered an expression of dialogue, and a similar 'division of work' could be established: national courts should determine what constitute a higher level of protection of a fundamental right at the constitutional level,[198] while the Court of Justice should have the last word in determining whether the derogation is possible in the concrete case.

[195] Van Bogdandy - Schill (2011) p 1424
[196] Van de Heyning (2012) p 200
[197] As already discussed above, to the first group belong authors such as Besselink (2001) and Alonso Garcia (2002); for the second line of interpretation, see Bering Liisberg (2001)
[198] In this sense, according to A Albi, 'An Essay on How the Discourse on Sovereignty and on the Co-operativeness of National Courts has Diverted Attention from the Erosion of Classic Constitutional Rights in the EU', in in M Claes (ed.), 2012, pp 69-70, article 53 is a window of opportunity for 'substantive co-operative constitutionalism', expressing the need for a more proactive role for national constitutional courts in judicial dialogues with the CJEU, in ensuring the quality of substantive constitutionalism in EU law

Along with the possible reading of article 4(2) as a 'model' for the interpretation of article 53 of the Charter, a more substantive interrelation exists between the two provisions. Such topic was briefly touched upon by AG Bot in his opinion on case Melloni: the AG firstly considered that the condition for the application of article 4(2) were not met in the case;[199] he then distinguished cases where 'protection for a fundamental right' is at stake, and cases consisting in 'attack on the national … or constitutional identity of a Member State'.[200] Cases concerning protection of fundamental rights by a national constitution therefore do no automatically envisage an application of article 4(2); however, a closer reading of the words of the AG does not exclude that such a situation could happen in certain cases. It is true, indeed, that a particularly higher standard of protection of a fundamental right in a national constitution may fall within the scope of the constitutional identity of such state:[201] examples of rights belonging to the constitutional identity are linguistic rights in Belgium, equal treatment in the Netherlands, human dignity[202] and freedom of persons not to be totally recorded and registered in Germany.[203] There is therefore a substantive interplay between article 53 of the Charter and article 4(2) TEU: when the higher level of protection of a fundamental right provided by a national constitution belongs to the constitutional identity of a Member State, should the Court of Justice take into account this fact and be more sensible to the arguments of national courts? If the 'third way' of interpretation of article 53 is accepted, does the interplay with article 4(2) TEU play a role in analysing the concrete circumstances of the case at stake?

[199] It is interesting to notice that Bot seems to acknowledge that what constitutes national identity is to be determined by the Member State, or at least that national authorities have a fundamental role in such determination: see Opinion of AG Bot in case *Melloni*, para 141

[200] Ibid, para 142

[201] See L Besselink, The Protection of Fundamental Rights post-Lisbon – The Interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and National Constitutions, FIDE Report <http://www.fide2012.eu/index.php?doc_id=94> (2012), p 6

[202] As the Court of Justice recognized in *Omega*

[203] As determined by the German Constitutional Court in its judgment on Data Retention, where the Court concluded 'That the free perception of the citizen may not be completely captured and subjected to registration, belongs to the constitutional identity of the Federal Republic of Germany', BVerfG, 1 BvR 256/08, 2 March 2010, para 218

4.4 In search of criteria

As discussed in the previous paragraphs, according to the 'third way' of interpretation, article 53 of the Charter may work either as providing a exception to uniform application of EU law, or requiring EU standards to prevail 'depending on the characteristics of the specific problem of protection of fundamental rights and the context in which the assessment of the level of protection which must prevail is made'.[204] It is therefore necessary to look at which criteria may play a role when the CJEU is called to analyse the particular circumstances of a case.

Firstly, the Court should look at the nature of the fundamental right at stake. Since the CJEU does not have jurisdiction to interpret national constitutional law, it is for national courts to determine the content of the substantive right at national level and what constitute the higher level of protection. Furthermore, it is for the national courts to consider whether the particular level of protection belongs to the national constitutional identity of a Member State. As a first answer to the questions discussed in section 4.3, the interplay between article 4(2) TEU and 53 Charter should play a role in the determination by the Court of Justice, even if it cannot be considered the only relevant factor in this determination. This first phase therefore provides for a form of dialogue between national courts and the CJEU: the former has to frame in the preliminary reference the specific characteristics of the fundamental right at stake; the Court of Justice should be respectful of such determinations and of the exclusive jurisdiction of national courts on domestic law, but at the same time review wheter such analysis is sufficiently concrete and not only a way to escape from EU law obligations.

In the second place, the CJEU, still looking from a fundamental rights perspective, should verify whether the higher level of protection does not violate other fundamental rights protected at EU level. As discussed in Section 2, article

[204] Opinion AG Bot in case *Melloni*, para 95

53 fails to take into account cases of conflict of rights;[205] however, such a situation may arise in several situations, and the Court of Justice could not tolerate a violation of a EU fundamental right by a national court in order to protect another right, only on the ground that a national constitution provides a higher level of protection.

Having analysed the situation from a fundamental rights' point of view, the Court of Justice should take into account the specific interests of Union action in that field and the nature of the fundamental principles of EU law. Such criteria were already sketched by AG Bot in his opinion in case *Melloni*.[206] Bot distinguishes cases where there is a definition at EU level of the degree of protection, and cases where there is no common definition.[207] In the first type of case, the setting of the level of protection is achieved by balancing the need to respect fundamental rights and aim towards a high level of protection with the need to guarantee the effectiveness of EU action and the objectives of the action concerned.[208] In the second set of cases, Member States may enjoy more room for manoeuvre, and in certain cases to allow for a derogation from uniform application would not render EU law completely ineffective.[209] Moreover, another factor which may play a role is proportionality: the Court should address whether to require a derogation from EU law is really the only way to guarantee the higher level of protection afforded by the national constitution.[210]

The CJEU is therefore called to a delicate exercise of balancing different factors and circumstances. The benefits of accommodating a certain degree of diversity in fundamental rights' adjudication have been already discussed above. The task of the Court is to find a way to guarantee and promote such diversity, on the one hand, and to preserve the efficacy of EU law and of the overall

[205] Widmann (2002) p 353
[206] See in particular Opinion of AG Bot in case Melloni, para 108
[207] Ibid, para 124
[208] Opinion of AG Bot in case *Melloni*, para 125
[209] See also Torres Perez (2009) p 57: the authors recognizes that a certain degree of diversity in the interpretation of rights does not necessarily challenge the efficacy of the EU piece of legislation
[210] Van de Heyning (2012) p 203, lists proportionality as one of the criteria in adjudicating cases of national identity. The concept may help also in cases concerning only article 53 of the Charter

process of integration, on the other hand.[211] None of the factors indicated above should prevail alone: only through a careful analysis of all the aforementioned factors, the Court should, in conclusion, decide whether to be deferential to national courts or to apply a uniform European standard.

5. Conclusion

The meaning and content of article 53 of the Charter of Fundamental Rights of the European Union has been discussed at length throughout this text. The provision addresses a vital issue concerning the system of fundamental rights protection in the European legal order: the relationship, and division of competences, between the EU and the Member States in terms of determining the level of protection of rights. The CJEU, on the one side, and, on the other side, national courts, in particular - where existent - national constitutional courts, both play a crucial role in this determination.

Notwithstanding its relevance, the question was not carefully addressed during the process of drafting of the Charter by the Convention. At the time, drafters mainly considered the issue of the relationship between the Charter and the ECHR. Only after the intervention of the EP, it was agreed to address the relationship between the new document and national constitutions. Article 53 ECHR, as well as other 'safeguard clauses' contained in other international treaties, served as models for the drafters, but the specific characteristics of the EU legal order impede the derivation of the meaning of article 53 Charter from such provisions. Section 2 of this thesis contains an analysis of the two 'traditional' lines of interpretation of article 53, exposing its controversial character and the impossibility for scholars to agree on its meaning. Several authors have concluded that it represents an exception to the principles of primacy and uniform application of EU law; others, and in particular Bering Liisberg, have excluded this exception, *de facto* depriving the provision of a concrete real meaning.

[211] See Torres Perez (2009) p 57

The issue came before the Court of Justice in the case *Melloni*, discussed in the Third Section of the thesis, which analyses the Judgment of the CJEU as well as the Opinion of the AG Bot, which contains a more detailed assessment of the questions of interpretation of article 53 brought by the Spanish Constitutional Court. The CJEU excluded that the provision constitutes a complete exception to primacy of EU law, but it did not completely clarify the situation, as discussed in the last paragraph of the Section. Moreover, as underlined above, several paragraphs of the judgments do not seem fully persuasive.

In particular, the judgment of the Court in Melloni did not clearly exclude the possibility of conceiving a third line of interpretation of article 53, which was analysed in Section 4 of the Thesis. The 'third way' involves a combination of the previously discussed two: depending on the circumstances of the case, article 53 may work as imposing a common standard, and asking national courts to renounce to a national higher standard of protection, or allowing for diversity and national level and asking to the CJEU to defer the question of adjudication to national courts. This interpretation of article 53 calls for 'deference' from the CJEU to national courts, a concept analysed in Section 4 of the Thesis through an analysis of the recent case-law of the Court of Justice; in conclusion, the interplay between article 53 of the Charter of article 4(2) TEU on national identity, and in particular constitutional identity was addressed.

Questions relating to the meaning of article 53 of the Charter therefore still remain remain still open, twelve years after its drafting by the Convention. The *Melloni* case has been the first opportunity for the CJEU to address the situation, but other similar cases will likely arise, as national courts and, especially, national constitutional courts, could want to clarify the 'extension' of Melloni. If the Court keeps its strong emphasis on primacy and uniform application of EU law, and confirms the interpretation of article 53 as envisaged in Melloni, national courts could be tempted to use means of resistance in order to keep national higher standards of fundamental rights protection. Another outcome would arise if the CJEU endorses the third line of interpretation of article 53 of the Charter. In this case, national courts and the Court of Justice may enter into

forms of dialogue of conversation between them, and analyse the situation not from an abstract point of view, but rather looking at the specific nature of the fundamental rights at stake. As discussed in section 4, cases such as *Omega* and *Sayn – Wittgenstein* may be an indication of the fact that the Court is changing its attitude, allowing for derogations to uniform application of EU law and recognising a certain degree of diversity at the national level.

This thesis illustrated the benefits of choosing the 'third way' of interpretation of article 53, which may be summarized as follows: firstly, it allows us to give a concrete legal meaning to the provision, without conflicting with fundamental principles of EU law such as primacy and uniform application; secondly, it takes directly into account questions of fundamental rights' protection, in particular reducing the discussed risks of lowering the overall level of protection of the EU legal order. A crucial step to proceed with the third way, would be to express the criteria for determining whether article 53, in a concrete case, should allow for the national standard to prevail, or ask the uniform European standard to apply. Elements to take into account have been sketched in the last Section of the thesis, but only the Court of Justice could clearly determine how to proceed with the overall assessment. Thus, it is possible to conclude that a 'third way' is a preferable alternative perspective on article 53, when compared with the traditional lines of interpretation; but it is yet to be seen whether the CJEU would be willing to follow this line, and how it may work in practice.

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