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**Article 53 of the Charter of Fundamental Rights of the
European Union:
*Issues of Interpretation and Application***

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Board of Abbreviations

CFREU or the Charter/the EU Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
EAW	European Arrest Warrant
ECJ	European Court of Justice
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

*To my grandmother Despoina,
for her boundless love, constant support,
and the inspiration she has given me throughout my journey.*

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“I have learned that to live, you must be ready to die. And to be truly free, you must be ready to break the chains. You must live with your arms outstretched, ready to embrace the world. You must never be a slave to anyone, not even to your own heart.”

— **Nikos Kazantzakis, "Zorba the Greek"**

Summary

This thesis examines the interpretation and application of Article 53 of the EU Charter of Fundamental Rights (CFREU) especially in the context of the complex interplay between the primacy of EU law and the protection of national constitutional traditions in the field of fundamental rights. It incorporates in-depth analysis of both key CJEU case law and several scholarly works, which aims to offer a rather holistic view of how Article 53 is understood and applied across the EU legal landscape. Notable cases such as *Melloni* and *Åkerberg Fransson* are analyzed together with opinions by the Advocates General in these cases in an attempt to provide an essential insight into the evolution taking place in the application of the Article. This analysis is complemented by a review of academic perspectives based on books, articles, and legal commentaries that explore the implications of Article 53 of the Charter.

The methodology focuses on a critical review of the primary legal sources, including the judgments of the CJEU, and secondary sources, such as academic articles that analyze and comment on those decisions. This enables an in-depth analysis of Article 53, not only of the judicial reasoning by the Court but also of the more general academic discussions on its implications for fundamental rights protection in the European Union. The thesis also deals with the interaction between EU law, national constitutions, the European Convention on Human Rights (ECHR) and the international law, so as to underline the complex multilevel framework for fundamental rights protection in the EU.

Through an analysis of case law combined with theoretical research, this thesis argues that Article 53 holds considerable potential for a more flexible and pluralistic approach to the protection of fundamental rights, fostering judicial dialogue that respects both national constitutional identities and the primacy of EU law. Within this framework, I view Article 53 not only as a provision safeguarding the primacy of EU law but also as a key instrument for strengthening fundamental rights. This article should be interpreted in a way that reinforces the pluralism of the EU legal order while simultaneously promoting robust human rights protection.

Keywords

Article 53, Charter of Fundamental Rights, Court of Justice of the European Union (CJEU), Primacy of EU law, Fundamental rights, Judicial dialogue, National constitutional identities, Harmonization of law, Melloni case, Legal integration.

Introduction

The protection of fundamental rights¹ has long been a cornerstone of European culture, reflecting its deeply rooted value system and commitment to human dignity. This principle is integral to the development of the European legal framework and serves as a unifying force among its diverse Member States, underpinning the broader European integration project. This perception of human rights has been reinvigorated when, following the entry into force of the Lisbon Treaty on 1 December 2009, the Charter of Fundamental Rights of the European Union (the Charter) was granted the status of primary legislation, placing it at the same hierarchical level as the Treaties themselves². This important step evidenced the commitment of the European Union to signing the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and thus expanding its roles and responsibilities to the realm of human rights under the provisions of Article 6 TEU³. However, these attempts have been dogged by legal and institutional obstacles, particularly regarding the compatibility of the legal order of the European Union with the system set up by the European Convention on Human Rights. In 2014, the CJEU blocked the way because of concerns over certain articles in the draft accession agreement⁴.

The subsequent decade showed that the legal framework of protection of fundamental rights in the European Union was far from being well settled. Instead of the much-needed clarity, these developments brought about new significant legal obstacles. The most important one is the plethora of human rights protection

¹ Κανελλοπούλου Ν. (2019) *Συνταγματική θεωρία των θεμελιωδών δικαιωμάτων*, p. 220. (Translated by the author)

"On the basis of the above considerations, one can define fundamental rights as the rights that, in a state, are generally accepted as non-negotiable in the relationship between individual and power. They are the rules that regulate the relationship between the individual and power in its basic, essential dimension, which is the primary condition of common legal cohabitation. By clarifying that concepts non-negotiable, basic, and essential, or primary are concepts pre- or supra-legal, i.e., concepts historical and political."

² Article 6 par. 1, Treaty on European Union (TEU), states that "*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.*"

³ Article 17 of the Protocol 14 to the European Convention on Human Rights (2010) introduced an amendment to Article 59, adding a new paragraph 2: "*The European Union may accede to this Convention.*"

⁴ In its Opinion 2/13, issued on December 18, 2014, the CJEU evaluated whether the draft agreement on the European Union's accession to the ECHR aligned with EU law. After a thorough assessment, the Court identified several legal concerns, ultimately concluding that the agreement, in its proposed form, was incompatible with the EU Treaties.

instruments that exist in the EU legal order. Fundamental rights are thus protected by a variety of sources: the Charter, the national Constitutions of the Member States, the ECHR, the international law and the jurisprudence of various courts, including the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR). Because of this plurality of sources very important questions are rising, related to the relationship between each of them, in view of the established principle of the primacy of EU law⁵.

Within a legal framework in which protection of fundamental rights functions at three levels—national, EU, and international—the Charter, as the most recent addition to this multilevel structure, is crafted to integrate harmoniously. Its provisions are deliberately designed to respect the existing mechanisms for the protection of fundamental rights, enhancing safeguards within the EU's jurisdiction without supplanting established protections. This approach is codified in Article 53 of the Charter, under the heading of ‘‘Level of Protection’’, which reaffirms the Charter's role in supplementing, not replacing, current legal safeguards. It is actually the expression of this "constitutional pluralism" that characterizes the European Union. The provision states: *"Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."*

This article considers that the intensity of protection of a fundamental right may vary according to the environment in which it is to be guaranteed. It also acknowledges the possibility that in other regulatory texts for the protection of fundamental rights there may be rights or freedoms, which are not found in the Charter. That provision makes it

⁵ Unlike other key principles of EU law, the primacy of EU law is not explicitly stated in the EU Treaties. However, it is recognized in Declaration No. 17 attached to the Treaty of Lisbon, which refers to the case law of the CJEU in establishing this principle. *‘‘ It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL, 15 July 1964, Case 6/641 [1] there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.’’*

clear that the Charter is not the ultimate and a priori preferable level of protection of fundamental rights. On the other hand, Article 53 provides an assurance that the meaning of fundamental rights, as recorded elsewhere, will neither be altered nor diminished, and the entry into force of the Charter will not affect the protection of fundamental rights so far guaranteed or bring it to a lower level. In any case the Charter shall not restrict or adversely affect the human rights and fundamental freedoms recognized by EU law, international law, international agreements to which the EU or its Member States are parties, and national Constitutions.

Article 53, which is one of the general provisions set out in the last chapter of the Charter, corresponds to Article 53 ECHR⁶, although this connection is not mentioned in the Explanations relating to the Charter of Fundamental Rights of the European Union. Both declare that the functioning of their provisions will be parallel to any other legislation of similar importance, either under national or international law, and will not eliminate the protection of fundamental rights, as enshrined in other texts on fundamental rights. Nonetheless, it is good to mention that the term ‘fundamental freedoms’ in EU law has an exclusive connotation, referring primarily to the free movement provisions of the TFEU, which are considered both ‘*fundamental freedoms*’ and ‘*fundamental rights*’ within the EU legal framework. This dual interpretation is not present in the ECHR, where the term ‘fundamental freedoms’ does not include the same scope or reference to free movement rights

Similar guarantees to those provided in Article 53 of the Charter are also found in international law, particularly in the two UN covenants; the International Covenant on Civil and Political Rights (Article 5 par.2⁷) as well as the International Covenant on Economic, Social and Educational Rights (Article 5 par.2⁸). However, international law and international conventions, which guarantee fundamental rights, are not easily

⁶ Article 53 ECHR says: "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."

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

⁸ "No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent."

invoked by individuals before national and / or international courts and are rarely processed due to the characteristics of international law. It is therefore not considered very likely that issues of potential conflict with the EU level of fundamental rights will arise.

Many issues of interpretation and application of the Article 53 rise concerning the legal unity of the EU, the primacy of EU law and the national sovereignty. It is a complicated and difficult regulation, that has caused many problems especially during the discussions for the Constitutional treaty and was interpreted in various and not necessarily coordinated ways, depending on the point of view each time. Furthermore, the Explanations⁹ of the Charter concerning this article are laconic and they actually repeat its own text¹⁰, while its application has so far not given many useful examples with only some specific and impressive exceptions, which are analyzed below.

The interplay of national constitutional identities with EU law is one of the central considerations in academic discourses surrounding the application and interpretation of Article 53, commonly relying on and referring to the jurisprudence of the ECJ. More precisely, case law of the ECJ, including such judgments as *Melloni* and *Åkerberg Fransson*, has played a very important role in shaping the way EU law relates to national constitutional rights and, through that, has been important in forming the discourses on the future way of European constitutionalism.

This academic thesis is devoted to the analysis of the complex interaction between Article 53 of the Charter and the fundamental principles of European Union law, with particular emphasis on the inherent conflicts in the relationship between the primacy of EU law and the protection of fundamental rights. Through analyzing the context of Article 53 and relevant case law of the CJEU, we also draw on the opinions of various

⁹ *Explanation on Article 53 — Level of protection: "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."*

¹⁰ Bruno De Witte observes that the only significant addition in the Explanations to Article 53 is the inclusion of the term 'currently.' However, it remains unclear whether 'currently' refers to December 2000, when the original Charter and Explanations were adopted, or December 2007, when they were updated. He emphasizes that this temporal reference underscores that the Charter's adoption cannot justify any regression in the protection of fundamental rights offered under national or international law (*The EU Charter of Fundamental Rights: A Commentary*, par. 53.06).

scholars regarding the interpretation of this article, contributing to a broader understanding of its implications within EU law. The main objective is to determine whether Article 53 serves as a safeguard for fundamental rights in the multilevel legal order of the European Union or whether it can undermine the coherence and primacy of EU law. This research will consider to what extent the application of Article 53 has affected the process of constitutionalization in the EU and whether they have supported more integration of EU law, or presented further obstacles in the legal homogeneity of the Union. Last but not least, this analysis considers the significance of national constitutional identities in shaping the future framework of human rights protection within the European Union.

1. The Interpretations of Article 53

1.1. A Provision of "Minimal Legal Impact" or A "Non-Regression" Clause

Article 53 of the Charter of Fundamental Rights of the European Union has occasionally been interpreted as a potential challenge to the primacy of EU law, due to its explicit reference to the Constitutions of the Member States. National Constitutions, together with the ECHR, have for many years been the source of the unwritten list of Fundamental Rights, which the ECJ has carefully and consistently drawn up. Even today, according to Article 6 par. 3 TEU¹¹, the constitutional traditions common to the member states are part of the general principles of EU law. Also, to the extent that the Charter recognises fundamental rights as they come from the constitutional traditions of the member states, those rights must be interpreted in accordance with those traditions (Article 52 par. 4 CFREU).

The debate about the meaning of the final words of Article 53 ("*constitutions of the Member States*") is closely attached to the essential jurisprudential dispute about the existence of national constitutional limits to the primacy of EU Law. The most significant aspect of this primacy is perhaps its absoluteness. Even the most insignificant piece of EU legislation is positioned above the most basic national constitutional provision. From the early years, in *Costa v. ENEL*, the Court made its position clear and emphatic by clarifying that Community law '*cannot be overridden by domestic legal provisions, however framed*'¹².

¹¹ Paragraph 3 of Article 6 of the TEU states: "*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.*"

¹² ECJ, 15 July 1964, *Costa v. ENEL*, Case 6/64,: "*The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5 (2) and giving rise to the discrimination prohibited by Article 7.*"And: "*The law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being*

Nevertheless, several legal scholars have raised the fear that national judicial bodies will invoke Article 53 to argue that the Charter does not diminish or compromise the level of protection established by their national Constitutional System¹³. Such an interpretation could encourage national Courts to review EU measures—like Directives or Regulations—against the constitutional standards of their domestic legal orders. This way the reference to the 'constitutions of the member states' in Article 53 seems to lead to their automatic predominance and the fundamental principle of the primacy of EU law¹⁴ over any internal legislative text is undermined.

In the article "*Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?*"¹⁵, Jonas Bering Liisberg disagrees with that idea. He claims that Article 53 has only limited legal effects and does not authorize national courts to override EU law by favoring their own constitutional rules. Liisberg argues that domestic courts cannot easily disregard European Union legislation solely on the ground of its conflict with their constitutional provisions, while Koen Lenaerts and Eddy De Smit, in their article "*A Bill of Rights for the European Union*"¹⁶, assert that Article 53 of the Charter lays down a rule that the level of protection of fundamental rights under EU law, as well as the level contained in Member States' constitutions, or even their broader legal systems, according to a combined reading of Article 53 of the CFREU and Article 53 of the ECHR, and international legal instruments recognized by the EU or its Member States, simply represents the minimum standards of protection to be upheld in all instances. The authors support the view that this provision prohibits

deprived of its character as Community law and without the legal basis of the Community itself being called into question."

¹³Groeben, H., Hatje, M., Schwarze, J. and Terhechte, J.P., 2023. *Europäisches Unionsrecht*, Band 1, Art. 53 GRC, Nr. 4. 6th ed. München: C.H. Beck.

¹⁴ CJEU, 1964 : Case 6/64, *Costa v. ENEL*.

¹⁵Liisberg, J.B., 2001. *Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? Article 53 of the Charter: A Fountain of Law or Just an Inkblot?* Jean Monnet Working Paper 4/01, p.41.

¹⁶ Eddy De Smijter, Koen Lenaerts (2001), *A "Bill of Rights" for the European Union*, 38, Common Market Law Review, Issue 2, pp. 273-300,

any infringement of fundamental rights protections found in the constitutions of Member States or other recognized legal instruments.

Liisberg argues that Article 53 of the EU Charter (which corresponds to the European Convention on Human Rights) should be interpreted as a provision committed to upholding fundamental standards of protection. His assessment aligns with the views of Catherine Van de Heyning¹⁷, who similarly argues that Article 53 of the Charter should be analyzed in the context of the ECtHR's jurisprudence. This case law holds that such clauses have limited legal effect; however, they do not confer broad State immunity. While both scholars present convincing arguments, one must also consider the wider implications of these interpretations, particularly as they affect the legal protection frameworks of the Member States.

E. Sachpekidou, in her analysis of Article 53 of the Charter, contributes to the debate by addressing the hypothetical existence of an "*unwritten second paragraph*" to the Article. She proposes that such an implicit addition would condition the application of the first paragraph, with the proviso that national constitutional priorities must not undermine the primacy, uniformity, or effectiveness of EU law¹⁸. Alternatively, Sachpekidou argues that Article 53 may confer a priority to Member States to protect fundamental rights at the national level over those of the Union, but only in areas where there is discretion given to the Member State. In such scenarios, the state must establish that the EU approach interferes with its national identity. Whereas, following the gradual integration of the EU and national legal order, such conflicts would hardly be likely, such conflicts cannot be completely excluded either.

Building on this viewpoint, ECJ President Koen Lenaerts offers an additional interpretation of Article 53, describing it as a "*stand-still*" or *non-regression* clause¹⁹.

¹⁷ Van de Heyning, C. (2011a) *Fundamentele Rechten Verdwaald in complexiteit*.

¹⁸ These insights are drawn from her commentary in the book *Κατ' άρθρο ερμηνεία του Χάρτη των Θεμελιωδών Δικαιωμάτων της Ευρωπαϊκής Ένωσης* (translated into English by the author as *Article-by-Article Interpretation of the Charter of Fundamental Rights of the European Union*), published in Athens by Nomiki Bibliothiki in 2020.

¹⁹ Lenaerts, K. (2012). *Exploring the limits of the EU Charter of Fundamental Rights*. *European Constitutional Law Review*, 8 (3), 375–403, p. 402.

He argues that this provision plays a crucial role in ensuring that the level of fundamental rights protection within the EU legal framework remains stable and is not weakened. Lenaerts believes that this approach is essential for preserving the autonomy of EU law, especially in its dealings with external legal systems.

Through the combination of Articles 52(3)²⁰ and 53 of the Charter, Lenaerts supports that Article 53 acts as a ‘*shield*’ against external changes that would change the balance of protection of fundamental rights in the EU. For example, if the European Court of Human Rights were to expand rights beyond those recognized under EU law, it would potentially threaten the constitutional identity of the EU and undermine its legal autonomy. By qualifying Article 53 as a *stand-still* provision, Lenaerts underscores its role in the protection of the EU legal order from external influences which may undermine its constitutional autonomy.

Lenaerts' argument is actually based on a combined reading of Articles 52(3) and 53 of the Charter. He points out that if the European Court of Human Rights were to increase the level of protection for a particular fundamental right or broaden its scope beyond that of the EU law, it would undermine the legal autonomy of the EU. The EU legal order is thus protected against the external influences undermining its constitutional independence by the interpretation of Article 53 as a *stand-still* provision.

Like Koen Lenaerts, Vasilis Tzemos²¹ underlines the crucial role played by Article 53 in safeguarding the equilibrium between the European Union's legal order and the general context of fundamental rights protection. According to both authors, Article 53 serves as a check against any potential backsliding in the standard of rights protection provided for within the EU system. The latter author qualifies this provision as an

²⁰ Art. 53(3) of the EU Charter states:

‘*In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.*’

²¹ Τζέμος Βασίλης (2019) *Ο Χάρτης των Θεμελιωδών δικαιωμάτων της ΕΕ: Ερμηνεία κατ' άρθρο*; see the commentary on the article 53 of the EU Charter.

integrative one that functions flawlessly within the already well-established international, European, and constitutional systems of human rights law.

Both interpretations are compatible with the understanding of Article 53 as a guarantee of strong and stable protection of fundamental rights in the EU, which cannot be disturbed or diminished by national systems or international legal developments. Taken together, their analyses bring out the importance of the article in ensuring that the integrity of the European Union legal order is maintained and that it coexists harmoniously with the wider human rights regime. This twofold role ensures that the Charter will function to supplement, not supplant, existing legal safeguards.

1.2 . Article 53 under the scope of Constitutional Pluralism

Since the collapse of efforts to establish a single European Constitution, constitutional pluralism has found its place within the legal framework of the European Union. After the failure of the proposed European Constitution in 2005, which was rejected by voters in referenda held in France and Netherlands, a single unified Constitution for Europe also fell from favor. But the debates about this failed *constitutionalization* process brought about a more flexible understanding of what relationship EU law should have to national legal orders.

Instead of a single codified European Constitution a pluralist structure has developed organically by which both national constitutional orders and EU law coexist. Such a model stresses the dialogical relationship between national constitutional courts and the CJEU, where both sets of actors have specific (but not equivalent) functions in the protection of fundamental rights. Only this model allows interpretations that protect national constitutional identities, which is an important aspect of preserving fundamental rights. This concept highlights the principle of shared authority and continuous legal interaction, wherein both EU law and national legal systems play a role in shaping the legal framework of the European Union. In this pluralistic setting, the relationship between EU law and national law does not take a strictly hierarchical form. While the primacy of EU law is a central principle of the Union's legal order, constitutional pluralism allows for recognition of the constitutional identities of the Member States and their role in safeguarding fundamental rights. It fosters a legal

dialogue where national courts have a voice in the domestic implementation of EU law, and where the CJEU substantively engages with national legal traditions.

The concept of constitutional pluralism is extensively explored in the works of Peter Häberle, as well as in the analysis of his theories, such as those presented in Kotzur's "*Peter Häberle on Constitutional Theory: Constitution as Culture and the Open Society of Constitutional Interpreters*"²². Häberle describes the European Constitution as the product of two connected processes: "constitutionalization" of the Union and "Europeanization" of national constitutions. These processes can be viewed as two sides of the same coin, symbolizing the interaction between European Union Law and the national legal systems in the process of creating a common European constitutional culture. Häberle's concept of osmosis illustrates this dynamic very effectively: the EU and national legal orders are interacting with each other, adapting to one another, giving rise to a common constitutional framework. This process of osmosis contributes to the development of a Common European Constitutional Law, where legal systems of the national and the EU level function in symbiosis rather than isolation.

The provisions of Article 53 of the Charter of Fundamental Rights of the European Union enshrine this pluralistic vision. Originally viewed as a provision to reassure Member States that the Charter would not replace their constitutions and would not erode national sovereignty, Article 53 has been reinterpreted to play a much broader role within the EU legal order. This ensures that the level of protection for fundamental rights in the Member States is safeguarded, even while these rights are being harmonized in the EU legal order. Concurrently, Article 53 reinforces the principle of primacy of EU law by encouraging substantive dialogue between the CJEU and national courts. It encapsulates the balance between respect for national constitutional traditions and the basic principles of EU law.

As previously analyzed, this dialogical approach is fundamental to constitutional pluralism. Scholars and judges, such as Koen Lenaerts, emphasize the fact that Article

²² Kotzur, M. (2018) *Peter Häberle on constitutional theory: Constitution as culture and the open society of constitutional interpreters*.

53 is, in essence, a "stand-still" or non-regression clause that ensures the level of fundamental rights protection in the EU legal order is not lowered²³. In the view of Lenaerts, Article 53 is a provision that will protect the EU legal order from external influences, but at the same time would encourage substantive interaction between the national and EU legal systems. This interpretation is in line with the concept of constitutional pluralism, which allows for a joint development of fundamental rights protection based on mutual respect and dialogue.

Kanellopoulou-Malouchou²⁴ develops further Häberle's view by elaborating on the cultural aspect of this interaction. She views the Europeanization of national constitutions as a cultural phenomenon contributing to the affirmation of a European identity. In her view, Article 53 acts as the major protective clause for fundamental rights within this pluralistic framework, ensuring that the rights enshrined in national constitutions are not undermined by EU law. This approach again underlines the complementary nature of national and EU legal systems where integration enhances the overall protection of fundamental rights.

Lenaerts Koen underlines that the implementation of Article 53 the Court should take into account the constitutional pluralism as it had already been defined on previous cases like *Omega*²⁵ and *Sayn-Wittgenstein*²⁶. These decisions demonstrate the importance of judicial dialogue in reconciling EU law with national constitutional traditions. In *Omega*, the ECJ recognized the role of national courts in protecting fundamental rights, particularly where national measures were compatible with EU principles but reflected distinct constitutional values²⁷. In *Sayn-Wittgenstein* case, the

²³ Koen Lenaerts (2012), *Exploring the Limits of the EU Charter of Fundamental Rights*, *European Constitutional Law Review*, 8(3).

²⁴Κανελλοπούλου Ν. (2021) *Συνταγματική θεωρία των θεμελιωδών δικαιωμάτων: Για τον μετασχηματισμό του Δικαίου*.

²⁵ Case C-36/02 *Omega* [2004] ECR I-9609.

²⁶ Case C-208/09 *Sayn-Wittgenstein* [2010] ECR I-13593.

²⁷ In Case C-36/02, paragraph 36; 'It should be recalled in that context that, according to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures, and that, for that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for

Court also recognized the importance of national identity in the interpretation and application of EU law.

Furthermore, Aida Torres Pérez has made an in-depth analysis of this collaborative framework and pleaded for an interpretation of Article 53 that would seek to reconcile the primacy of EU law with the enhanced protection provided by national constitutions²⁸. The author argues that the EU should have a system that allows it to be flexible and considerate of the diversity of the EU Constitution. The first goal is to ensure the process is coherent in EU law. Therefore, the comparative reasoning and dialogical engagement approach must be endorsed by the ECJ and national courts, which according to the author will both systems focus on the interpretation and protection of fundamental rights. This, as a result, guarantees there is a kind of *legal deal* in the EU that takes into account the constitutional identities of the Member countries and their sovereignty. Constitutional pluralism in Article 53 of the Charter becomes an imperator of constructive judicial dialogue between the ECJ and national courts and mutual respect. As Torres Pérez states: ‘*Dialogue does not work to eliminate conflict, but rather it manages conflict over time in a process of constant, mutual accommodation*’.

This type of interaction designated in Article 53 is meant to form a balanced strategy, guaranteeing that the primary role of EU law is preserved in the framework of common constitutional identities of Member States. Under this scope, the constitutional pluralism describes the interaction of the complicated legal structures of the European Union through which aim to the protection of fundamental rights and over time these operate upon and become a common – even not written- European constitutional identity.

the protection of human rights on which the Member States have collaborated or to which they are signatories. The European Convention on Human Rights and Fundamental Freedoms has special significance in that respect (see, inter alia, Case C-260/89 ERT [1991] ECR I-2925, paragraph 41; Case C-274/99 P Connolly v Commission [2001] ECR I-1611, paragraph 37; Case C-94/00 Roquette Frères [2002] ECR I-9011, paragraph 25; Case C-112/00 Schmidberger [2003] ECR I-5659, paragraph 71)’.

²⁸ Aida Torres Pérez (2009) *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication*.

In conclusion, Article 53 of the EU Charter of Fundamental Rights has seen various academic interpretations especially for its provision for the national Constitutions, further depicting its intricate role in balancing the primacy of EU law with the protection of fundamental rights. As Jonas Bering Liisberg observes, the Article has a narrow legal consequence in that it does not confer any competence on national courts to set aside EU law with reference to national constitutional norms. Where, in turn, Koen Lenaerts perceives Article 53 as a kind of *non-regression clause* intended to shield the protection of the fundamental rights within the EU legal order from internal and external retrograde developments, including decisions of the European Court of Human Rights.

While scholars such as E. Sachpekidou discusses the possible flexibility of Article 53 in the sense of allowing Member States to apply national constitutional rights only within discretionary areas of retreat respecting legal uniformity and primacy of the European Union. In coexistence with the general theory of constitutional pluralism established by such theorists as Peter Häberle and Aida Torres Pérez. Häberle's idea of legal "osmosis" explains how European Union law and national constitutions interact symbiotically in such a way that they would work together for the good of one constitutional culture. Torres Pérez emphasizes that such judicial dialogue between national courts and the CJEU must be pursued as a conflict-resolution strategy, enhancing mutual respect for the protection of fundamental rights and freedoms.

In other words, Article 53 bridges legal primacy of the EU with constitutional traditions of the member States: a non-regression clause, a mechanism of dialogue, or a safeguard of pluralistic interaction which assures evolution in the legal order of the EU, while keeping respect for the diversity in constitutional systems of its Member States. The dual role played by Article 53 perpetuates a moving equilibrium between harmonization and differentiation and reinforces a robust and inclusive scheme of protection of fundamental rights.

2 The CJEU's Approach to Article 53

2.1. *The Melloni Case*

In February 2013, the ECJ delivered a landmark judgment in the case of *Stefano Melloni v. Ministerio Fiscal*, which further developed the case law around the principle of primacy of EU law²⁹. The judgment of the Court (Grand Chambre) came as a response to the first-ever request for a preliminary ruling from the Spanish Constitutional Court, which sought the ECJ's interpretation of the right to a fair trial under both the Spanish Constitution and Article 47 of the EU Charter. The case related to the tension between national constitutional protections and those imposed by EU law, most specifically regarding the European Arrest Warrant (EAW).

In details, the case concerned Mr. Melloni, an Italian national accused of bankruptcy fraud, who resided in Spain. In 1993, the Tribunale di Ferrara in Italy issued two arrest warrants requesting his extradition. The High Court of Spain's Criminal Division (*Sala de lo Penal de la Audiencia Nacional*) approved the extradition, but Melloni fled after being released on bail. Consequently, the Italian courts tried him in absentia, resulting in a ten-year prison sentence. Melloni's conviction was upheld on appeal, and a further challenge before the Supreme Court of Italy (*Corte Suprema di Cassazione*) was dismissed. Following this, in 2004, a European Arrest Warrant (EAW) was issued by the Italian Public Prosecutor's Office to enforce the sentence.

When Melloni was eventually arrested in Spain, he opposed a constitutional complaint (*recurso de amparo*) before the Spanish Constitutional Court. He argued that his surrender would violate his right to a fair trial under Article 24(2) of the Spanish Constitution, as his conviction in absentia denied him the opportunity to contest the decision. According to Spanish constitutional jurisprudence, the right to a fair trial necessitates the possibility of reviewing judgments made in absentia, particularly in serious criminal cases like *Melloni's*, to protect the core of the fundamental right to a fair trial. This judicially defined constitutional standard is therefore more protective of

²⁹ Case C-399/11 *Stefano Melloni v Ministerio Fiscal* (Judgment of 26 February 2013).

the rights of the accused than the standard laid down by the Framework Decision 2002/584³⁰ on the EAW and particularly by its Article 4a(1), which limited the national authority's ability to deny the execution of an EAW for absentia convictions. It stipulated that extradition could not be refused if the individual was actually aware of the trial and had been represented by legal counsel, either chosen by them or appointed by the State. In *Melloni*'s case, he was fully informed of the trial proceedings, since he was represented by two lawyers chosen by himself throughout all stages of the trial. Therefore, under this Framework Decision, his physical absence did not constitute grounds to contest the surrender.

Given this conflict, the Spanish Constitutional Court paused the proceedings and referred three questions to the Court of Justice of the European Union (CJEU) for a preliminary ruling on 9 June 2011. The first question asked whether Article 4a(1) of the Framework Decision prevented national authorities from conditioning an EAW's execution on the possibility of reviewing an in absentia conviction to ensure the defendant's rights of defense. The second question sought clarification on whether, if the first question was answered affirmatively, Article 4a(1) aligned with the rights to an effective remedy and a fair trial under Article 47 of the Charter of Fundamental Rights of the European Union (CFREU) and the rights of defense under Article 48 of the Charter.

The third question raised by the Spanish Constitutional Court, contingent upon an affirmative response to the second, requested clarification from the CJEU as to whether Article 53 of the Charter of Fundamental Rights of the European Union allows the Member States to make the surrender of a person convicted in absentia conditional upon a possibility to review the trial in the Member State of issue³¹. The question essentially asked whether Article 53 give the opportunity to the Member States to apply a higher

³⁰ Framework Decision 2002/584/JHA of 13 June 2002, [2002] OJ L190/1, later amended by Framework Decision 2009/299/JHA of 26 February 2009, [2009] OJ L81/24.

³¹This is the precise way the preliminary question was posed by the Tribunal Constitucional in *Melloni*: "*Does Article 53, interpreted systematically in conjunction with the rights recognised under Articles 47 and 48 of the Charter, allow a Member State to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the requesting State, thus affording those rights a greater level of protection than that deriving from European Union law, in order to avoid an interpretation which restricts or adversely affects a fundamental right recognised by the Constitution of the first-mentioned Member State?*".

standard of protection than the one established by EU law, in order to avoid an infringement of a fundamental right guaranteed by their own constitution. This third question was very important, since it gave the CJEU the chance to discuss how Article 53 interacts with the principle of primacy of EU law not only in this particular case, but generally.

In his Opinion for the *Melloni* case the Advocate General Bot provided substantial insight into how European Union law interrelates with national constitutional systems³². His view focuses on the symbolic and political importance of Article 53 within the pluralist legal order, in combination with Articles 51 and 52 of the Charter³³. Advocate General Bot interpreted Article 53 as preventing an executing judicial authority from imposing, under its national constitutional law, a condition for the execution of an EAW which requires the person concerned to have the right to a retrial in the issuing Member State. He explained that this option cannot be justified under Article 4a(1) of the Framework Decision on the EAW, which sets out the legal criteria applicable in such cases. His reasoning emphasized the primacy of EU law in ensuring consistency in the application of the EAW framework and in avoiding unilateral deviations by Member States.

In his view, Article 53 is not a self-standing provision; it rather complements the provisions of Articles 51 and 52 of the Charter³⁴. This article is important to strengthen the variety of protection of fundamental rights in the European legal order, to ensure that the Charter may not lower the level of protection granted by national constitutional arrangements or other legal frameworks. Conversely, it reinforces the existence of other

³² Opinion of Advocate General Bot, delivered on 2 October 2012, case C-399/11, ECLI:EU:C:2012:600, par. 136; ‘‘*In the light of my interpretation of Article 53 of the Charter, I therefore propose that the Court rule that that article is to be interpreted as meaning that it does not allow the executing judicial authority, pursuant to its national constitutional law, to make the execution of a European arrest warrant subject to the condition that the person who is the subject of the warrant be entitled to a retrial in the issuing Member State, where the application of that condition is not authorised by Article 4a(1) of the Framework Decision*’’.

³³ *Ibid*, par. 128-129;

‘‘128. Those points having been made, it is now necessary to identify the role of Article 53 of the Charter within the Charter.

129. In so doing, I think we must not underestimate the political and symbolic importance of that article. Furthermore, the article must, in my view, be read in close conjunction with Articles 51 and 52 of the Charter, which it complements.’’

³⁴ *Ibid*, par. 131-132.

sources of protection of rights and highlights the supplementary role of the Charter. Advocate General Bot also explained that Article 53 does not establish an obligation on the part of the Member States to lower their constitutional standards for the protection of fundamental rights in areas outside the scope of EU law³⁵. It is further important to emphasize that the Member States cannot use the Charter as a pretext for lowering their national protection in fields which are regulated solely by national law, but only in the field of application of European Union Law. This interpretation confirms the idea that the scope of the Charter's application is limited to situations coming under EU law and does not include the ability to overrule or weaken the national constitutional standards in other cases. In the discussion of potential tension between EU legislation and the constitutional identity of Member States, Bot refers to Article 4(2) TEU, which authorizes the Member States to challenge features of secondary EU legislation they believe to be threatening to the core of their national identity³⁶, since the aim of the Charter through Article 53 is not to replace their national constitution in the protection of fundamental rights, but to make a supplementary safeguard within the field of application of EU law.

Nonetheless, he noted that no such conflict existed in the *Melloni* case. It followed, therefore, that the provisions of the Framework Decision took precedence, thus preventing the application of additional national provisions, such as a guarantee for retrials, beyond those imposed by EU legislation. In his Opinion, Advocate General Bot has repeated the primacy of EU law, while recognizing the diverse framework of fundamental rights protection within the Union. His interpretation of Article 53 reflects a subtle approach that balances the need for coherence in the application of EU legal norms with respect for national constitutional identities. It is worth carefully considering Advocate General Bot's Opinion, as it provides a particularly illustrative perspective on the ongoing debate surrounding the application of Article 53 of the Charter. His view demonstrates how EU law allows for the coexistence of different legal orders while preventing unilateral divergences that might undermine the Union's objectives

³⁵ Ibid, par. 133.

³⁶ Ibid, par. 134.

This principle was firmly reinforced by the CJEU in its judgment in the *Melloni* case, since it has categorically rejected the argument by the Spanish Court that national constitutional standards could impose additional requirements on the execution of the EAW³⁷. The Court has thus reaffirmed that allowing Member States to apply national constitutional conditions not foreseen in the relevant EU legal framework (Framework Decision 2009/299) would run counter to the very important principles of mutual trust and recognition that are the cornerstone of judicial cooperation within the EU. This way, the effectiveness of the Framework Decision would definitely be undermined, as it is precisely intended to ensure the smooth and uniform application of the EAW across Member States³⁸. The Court has reaffirmed that although Article 53 of the Charter allows Member States to apply their national standards of fundamental rights protection, this cannot be done in a way that undermines directly the primacy, unity, or effectiveness of EU law!³⁹ The CJEU decision in *Melloni* was anchored in its interpretation of Article 53, which indeed recognizes that it is a matter of the competence of Member States to apply standards of national protection of fundamental rights when giving effect to EU law, provided that this does not detract from the level of protection assured by the Charter as interpreted by the CJEU or the general principles of Union law.

Moreover, the *Melloni* judgment has added another layer to the principle of primacy by underlining the unity of EU law. The Court clarifies that the EU legal order must be coherent and consistent in all Member States to maintain its primacy and effectiveness. As already mentioned, the Court emphasized that allowing Member States to impose additional constitutional requirements in areas already harmonized by EU law would undermine the unity of EU legal norms and erode mutual trust between Member States, which is crucial for the functioning of mechanisms like the EAW. In this way, the

³⁷ See Judgment of the Court of Justice of the European Union in Case C-399/11, *Melloni*, 26 February 2013, point 3 of the operative part: "*Article 53 of the Charter of Fundamental Rights of the European Union must be interpreted as not allowing a Member State to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by its constitution.*".

³⁸ *Ibid.*, paragraph 62-63.

³⁹ *Ibid.*, paragraph 60: "*It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.*".

judgment in *Melloni* reinforced the integrity of the primacy of EU law, clarifying the boundaries within which national constitutional protection may be applied in EU law cases.

All in all, the arguments put forward by Advocate General Bot and the CJEU regarding the preservation of the Area of Freedom, Security, and Justice, as well as their interpretation of Article 53 of the Charter, are reasonable, especially considering the importance of harmony in judgments for European integration. However, it appears that both the CJEU and, to a lesser extent, the Advocate General should have offered further justification for their conclusions, given the sensitivity of fundamental rights protection. While a consensus among all Member States has been reached at the EU level, this cannot ensure that the level of human rights protection is adequate, nor that the primacy of EU law is sufficient to override national protections, when needed. Otherwise, Member States' governments could easily bypass their own constitutional human rights principles by enacting EU legislation. However, in the *Melloni* judgment, the CJEU provided a relatively brief ruling, endorsing an absolute interpretation of the primacy of EU law without explaining in detail the distinctions between cases where national fundamental rights standards should apply and where they should not. For this reason, the *Melloni* judgment can be criticized, but the same time its crucial role for the interpretation of Article 53 of the Charter after the Lisbon Treaty is recognized. In this context, the Court's reaffirmation of the principle of mutual trust and legal unity ensures that the EAW framework—and, by extension, similar EU legal mechanisms—achieves its purpose in fostering judicial cooperation within the EU. This ruling, alongside other key decisions such as *Åkerberg Fransson*, highlights the relationship between national constitutional rights and EU law, illustrating the difficult balance between national sovereignty and the overarching principles of EU law.

2.1.2. The Åkerberg Case

On 26 February 2013, in fact on the same day that the *Melloni* judgment was handed down, the CJEU delivered its ruling in the so-called *Åkerberg Fransson* case⁴⁰. The two judgments have, since then, been examined together, as they represent the first time the CJEU interpreted the horizontal provisions of the Charter—namely Articles 51, 52, and

⁴⁰ Case C-617/10, *Åklagaren v Hans Åkerberg Fransson*.

53—following the establishment of the legal binding force of the Charter. In the case of *Åkerberg Fransson*, the Court further expanded Article 51(1)⁴¹, which limits the applicability of the Charter to situations where Member States are implementing EU law. It stated that the Charter would apply, not only in the cases of direct implementation by the Member States of EU law, but also in those situations in which national measures are somehow connected with EU rules, especially those that serve the purpose of protecting the Union's financial interests. This broader interpretation emphasizes the relevance of the Charter in a wider range of circumstances where national actions intersect with EU law objectives, thus providing a more comprehensive protection of fundamental rights.

The *Åkerberg Fransson* case concerned Mr. Åkerberg Fransson, who faced both administrative penalties and criminal charges in Sweden for tax evasion and failing to report employer contributions for 2004 and 2005. His actions caused significant losses to the Swedish State and social security system. Initially, he was penalized administratively, but later, criminal proceedings were initiated based on the same facts. Mr. Fransson argued that this violated the EU principle of *ne bis in idem*, which prevents individuals from being tried or punished twice for the same offense, as guaranteed by Article 4 of Protocol No. 7 of the European Convention on Human Rights⁴² and Article 50 of the Charter⁴³.

⁴¹ Art. 51 par. 1 of the EU Charter states:

"The provisions of this Charter are addressed to the institutions, bodies, offices and agencies 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 and respecting the limits of the powers of the Union as conferred on it in the Treaties."

⁴² Article 4 of Protocol No.7 of the European Convention on Human Rights:

1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which they have already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
3. No derogation from this article shall be made under Article 15 of the Convention.

⁴³Article 50 of the EU Charter states: No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which they have already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

The important point in this case was the CJEU's jurisdiction, since several Member States, such as Sweden, Denmark, and the Czech Republic, along with the European Commission, argued that the case did not involve the implementation of EU law. They supported that the Swedish acts were based only on national law. In addition, Advocate General Cruz Villalón, in his Opinion⁴⁴, highlighted that the competence of the Union to ensure fundamental rights in the context of national actions required a clear and specific direct connection to EU law. He argued that for the provisions of the Charter to apply, EU law must play a principal role in each individual case⁴⁵. In his opinion, national measures could only trigger the applicability of the Charter if they were closely linked to EU objectives. For example, the Advocate General conceded that cases of VAT fraud, a matter covered by EU law, could justify the application of the Charter's protections. However, in this instance, he concluded that the link between the national measures and EU law was not strong enough to justify the jurisdiction of the CJEU, and therefore the Swedish national legal framework should apply.

In contrast, the CJEU decided that it had jurisdiction to interpret the matter under EU law and gave an extensive interpretation of the meaning of "*implementation of Union law*" in Article 51(1) of the Charter. The Court held that the national tax penalties and criminal proceedings were closely connected to the protection of the EU's financial interests, particularly in efforts to combat VAT fraud, such that they fell within the scope of EU law. The CJEU emphasized that the application of EU law ipso facto triggers the application of the fundamental rights guaranteed by the Charter. The Court thus reaffirmed the case law according to which, even when national measures are only indirectly linked to EU objectives, the application of the Charter may be triggered, with the consequence of widening the scope of application of the fundamental rights' protection provided by EU law. This ruling marked a serious extension of the scope of understanding of the applicability of the Charter in respect of national legal systems, particularly in areas related to economic interests, such as VAT.

⁴⁴ Cruz Villalón, A.G., 2012. *Opinion of Advocate General Cruz Villalón* delivered on 12 June 2012 in Case C-617/10 Åklagaren v Hans Åkerberg Fransson. See par. 25.

⁴⁵ *Ibid.*, par. 45.

The CJEU's reasoning in this case is particularly significant for how it connected national measures to the framework of EU law. In paragraph 29 of its judgment, the Court stated ‘*That said, where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised (see, in relation to the latter aspect, Case C-399/11 Melloni [2013] ECR, paragraph 60.)*’’. The Court refers to the judgment in *Melloni*, stating that, where the Member States' actions are not totally dictated by the provisions of EU law, national courts can apply their own standard of protection of fundamental rights that they consider appropriate. Nonetheless, this is always on condition that the level of protection provided for by the Charter, together with the primacy, unity, and effectiveness of EU law, is not impaired.

Additionally, the Court referred to the duty of loyal cooperation outlined in Article 4(3) of the Treaty on European Union (TEU), which requires Member States to ensure the proper collection of VAT and prevent tax evasion. It explained that this obligation was part of the Union's efforts to safeguard its financial interests, as reflected in Article 325 TFEU. The Court stated: "*The fact that the national legislation upon which those tax penalties and criminal proceedings are founded has not been adopted to transpose Directive 2006/112 cannot call that conclusion (that tax penalties and criminal proceedings for tax evasion constitute implementation of EU law) into question, since its application is designed to penalise an infringement of that directive and is therefore intended to implement the obligation imposed on the Member States by the Treaty to impose effective penalties for conduct prejudicial to the financial interests of the European Union.*"⁴⁶

In the case at hand, the CJEU asked the Swedish courts to decide whether the dual penalties—tax and criminal—imposed on *Åkerberg Fransson* were in line with the

⁴⁶ Ibid, par. 29

constitutional standards of Sweden. If the Swedish judiciary finds these sanctions incompatible with national safeguards, it is still the case that the measures must satisfy the conditions imposed by EU law, which requires them to be "*effective, proportionate, and dissuasive*." This approach thus depicts the Court's attempt to strike a balance between respect for national legal traditions and the need to ensure both the consistent application and effectiveness of EU legislation. The *Åkerberg Fransson* ruling is of notable importance as it clarifies the relationship between domestic regulations and European Union legislation, especially in the context of safeguarding the financial interests of the EU. The Court's reasoning builds upon Articles 51-53 of the Charter of Fundamental Rights of the European Union, emphasizing the Charter's horizontal provisions as central to this case. It highlights the principle that national provisions transposing EU law must respect the fundamental rights guaranteed by the Charter, irrespective of how harmonized those provisions may be. This, of course, evidences the willingness of the Court to take a closer look into the case, guaranteeing, in this case, those rights within the broader canvas of EU law. This decision not only consolidates the unity and primacy of EU legal principles but also reflects the broader ambition of the CJEU to integrate national systems into the cohesive structure of European law, thus reinforcing mutual trust and the effective protection of fundamental rights across all Member States.

2.2 . The impact of Melloni and Åkerberg Fransson

The *Melloni* and *Åkerberg Fransson* judgments, delivered by the Court of Justice of the European Union in February 2013, represent significant moments in the development of the relationship between European Union law and national constitutional frameworks in the field of the protection of fundamental rights. While these decisions have been praised by some as necessary for the uniform application of EU law, they have also raised concerns about national sovereignty and the limits they impose on the ability of national courts to defend fundamental rights.

As Tzanetis observes in his book⁴⁷, the combination of the *Åkerberg Fransson* and *Melloni* rulings suggests that the CJEU acknowledges a particularly broad scope of application for the Charter of Fundamental Rights, which extends not only to national legislation fully determined by EU law (*Melloni*), but also to legislation that incidentally serves EU law objectives (*Åkerberg Fransson*). By expanding the scope of EU law, the CJEU positions itself as the principal guarantor of fundamental rights within the EU, claiming jurisdictional authority not only over national supreme courts but also over the ECHR, as the Charter, as primary EU law, takes precedence even over the European Convention on Human Rights (ECHR). This deep penetration of EU law into the regulatory domains of national legal orders alters the power balance between the CJEU and national Supreme Courts, creating the risk of further marginalizing the latter in the sensitive area of fundamental rights protection. The "*compromise move*" by the CJEU to accept the coexistence of national and EU fundamental rights within the expanded scope of EU law has not alleviated national concerns, nor has it prevented conflicts between the CJEU and the Supreme Courts of certain Member States. The co-definition of fundamental rights content by both national and EU law equally weakens the national sovereignty of Member States, as the CJEU maintains its primacy of control in such cases.

In details, the *Melloni* case addressed the European Arrest Warrant (EAW) and examined the extent to which Spain could decline to implement the EAW on the grounds that Melloni's entitlement to a fair trial, as protected by the Spanish Constitution, had been infringed. The CJEU has therefore held that, in the context of fully harmonized EU law, such as the EAW framework, national constitutional protections cannot override or restrict the application of EU law. In its interpretation of Article 53 of the Charter of Fundamental Rights, the Court has thus made clear that Member States cannot invoke higher national standards of fundamental rights protection when these come into direct conflict with EU law. This way, the judgement in *Melloni* reinforced the principle of the primacy of EU law, particularly in areas of

1. ⁴⁷ Τζαννετής, Α. (2020). *Η προστασία των θεμελιωδών δικαιωμάτων του εκζητούμενου*. Αθήνα: Π.Ν. Σάκκουλας, p. 113-114.

full harmonization. The CJEU emphasized that national courts must not apply national constitutional protections that would undermine the effectiveness, unity, or primacy of EU law. This judgment is significant in clarifying the relationship between EU law and national constitutional rights, particularly regarding judicial cooperation under the European Arrest Warrant. However, the decision has been controversial, with scholars arguing that it limits the ability of national courts to interpret and apply fundamental rights based on national constitutional traditions. For instance, Leonard F.M. Besselink criticizes the *Melloni* judgment as proof that the Court, in the name of the unity, primacy, and effectiveness of EU law, is ready to trample the basic constitutional rights of the Member States. He further criticizes the CJEU for showing little interest in fostering genuine judicial dialogue with the Spanish Constitutional Court⁴⁸.

However, it is useful to take into consideration that the *Melloni* judgment was issued during a period when European Union legislation was extending into domains that had previously been exempt from Union oversight. This development resulted in an increasing ongoing conflict between the EU's pursuit of consistency and the obligation of national constitutional courts to safeguard fundamental rights. The CJEU's ruling addressed that tension by affirming the supremacy of EU law in fully harmonized areas, precluding the possibility of Member States using national constitutional standards as grounds for challenging EU law. The concept of *unity* in EU law stands at the core of the *Melloni* ruling. The Court stressed that EU law should be viewed as an integrated system in which all provisions, including those requiring national implementation, are given precedence over any conflicting national laws. This principle of primacy has since become one of the fundamental elements of EU legal doctrine, reinforcing the idea that EU law forms a coherent legal order that is supreme to national legal orders. Under this scope, the CJEU emphasizes that Article 53 is not merely a *non-regression* clause but extends beyond this interpretation, functioning under certain conditions as a '*pluralist*' or '*best protection*' clause.

On the other hand, the *Åkerberg Fransson* case adopted a more flexible approach. As already mentioned, the CJEU ruled that the Charter of Fundamental Rights applied

⁴⁸ Besselink, L.F.M. (2014) *The Parameters of Constitutional Conflict after Melloni*, European Law Review 2014,39(4), 531-552.

whenever Member States acted within the scope of EU law, even in areas not fully harmonized by EU legislation and national courts could apply their own constitutional protections in non-harmonized areas, as long as these did not conflict with the level of protection guaranteed by EU law. This judgment allowed for greater flexibility, enabling Member States to maintain their constitutional identities and protect fundamental rights within areas not fully harmonized by EU law. Simultaneously, it underscored the Court's commitment to thorough analysis to safeguard the proper implementation of EU law.

Fransson's judgement broadened the scope of what constitutes the *implementation of Union law*. The judgment extended the reach of EU law, suggesting that actions by Member States could be considered as implementing EU law even when they were not fully harmonized by EU legislation. This broad interpretation of implementation has drawn criticism, particularly from national courts concerned about EU overreach into areas traditionally governed by national legal systems⁴⁹. In subsequent cases, such as *Cruciano Siragusa v Regione Sicilia*⁵⁰, the CJEU began to nuance this position, establishing a higher threshold for national measures to be considered as implementing EU law. Nevertheless, *Fransson* remains relevant to the application of the Charter and has created a debate among courts and scholars.

In conclusion, in both *Melloni* and *Fransson*, the Court of Justice of the European Union balances the delicate balance between upholding EU law and respecting national constitutional identities. While the *Melloni* judgment explicitly re-confirmed the primacy of EU law, especially in fully harmonized areas, it did so at the expense of narrowing national constitutional safeguards to the effect that Member States have to

⁴⁹ In April 2013, the German Constitutional Court examined whether the German Counter-Terrorism Database Act infringed upon fundamental rights under both the German Constitution and the Charter. In its judgment, the court referred to the *Fransson* case, expressing concern over the broad connection to Union law established therein, and cautioned that it might invoke its ultra vires doctrine if the reasoning in *Fransson* were applied unconditionally: "The ECJ's decision in the case Åkerberg Fransson ... does not change this conclusion. ..., this decision must not be read in a way that would view it as an apparent ultra vires act or as if it endangered the protection and enforcement of the fundamental rights in the Member States. The decision must thus not be understood and applied in such a way that absolutely any connection of a provision's subject-matter to the merely abstract scope of Union law, or merely incidental effects on Union law, would be sufficient for binding the Member States by the Union's fundamental rights." See BVerfG, Judgment of the First Senate of 24 April 2013 - 1 BvR 1215/07, par. 1-233, ECLI:DE:BVerfG:2013:rs20130424.1bvr121507.

⁵⁰ Case C-206/13 *Cruciano Siragusa v Regione Sicilia*. See par. 20-22.

apply EU law even when this violates in a way their standard of protection of fundamental rights. In contrast, *Fransson* does not rely explicitly on Article 53 of the Charter, but its underlying principles are part of the implicit reasoning of the Court. *Fransson* allowed for some flexibility, focusing on the fact that national measures, in particular those affecting EU's financial interests, could remain incompatible with the protection of fundamental freedoms while still varying according to their degree of connection to the EU law. These judgments together highlight an evolving approach by the CJEU, one that gives evidence of a nuanced interpretation of the Charter's provisions, where protection of fundamental rights is not absolute but must be aligned to the overarching goals of EU integration and unity.

3. CJEU v. ECTHR

3.1. Opinion 2/13: The Exclusive Competence of the CJEU and the Autonomy of EU Law

The process of the European Union's accession to the European Convention on Human Rights suspended in December 2014 when the Court of Justice of the European Union issued Opinion 2/13⁵¹, declaring that the draft treaty concerning the EU's accession to the ECHR was actually incompatible with EU law. This ruling was pivotal, as it emphasized the need to preserve the autonomy of EU law, particularly its exclusive competence to interpret and apply its provisions. The CJEU argued that the draft agreement failed to adequately account for the specific legal structure of the EU and the unique nature of EU law, which, according to the Court, led to a potential undermining of the autonomy of the EU legal order.

Central to the Court's reasoning was the failure of the proposed treaty to include provisions ensuring that the rights granted to EU Member States under the ECHR, especially those corresponding to the rights enshrined in the EU Charter of Fundamental Rights, would not conflict with EU law's fundamental principles.⁵² In particular, the CJEU raised concerns that such rights, if interpreted under the ECHR without aligning with EU law, could distort or limit the protections guaranteed by the Charter. Furthermore, the Court stressed that if both the CJEU and the European Court of Human Rights were to exercise judicial review over the same issues, EU institutions would be required to navigate conflicting legal interpretations, thereby diminishing the coherence and uniformity of EU law. The Court explicitly referred to *Melloni* and *Fransson* to support that the draft agreement did not contain a provision to ensure that the powers conferred on the Member States “*with respect to the rights recognised by the Charter that correspond to those guaranteed by the ECHR*” would be limited, as provided for under the ECHR, to no more than the extent ‘*which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and*

⁵¹ Opinion of the Court 2/13 of 18 December 2014.

effectiveness of EU law are not compromised ‘‘⁵³. Otherwise, the EU institutions would have been under parallel external control of two different judicial bodies, each with its understanding of their case law: CJEU and ECtHR. The CJEU went further to hold that the consideration of the EU and its Member States as separate independent parties to the ECHR would be destructive of the mutual trust of the Member States and of the fundamental equilibrium of the EU and of the autonomy of its legal order. Furthermore, the Court pointed out that the possibility for Member States to ask for advisory opinions from the ECtHR, once the ECHR would become an integral part of EU law, would undermine the autonomy and effectiveness of the preliminary ruling procedure before the CJEU⁵⁴.

The CJEU also warned that treating both the EU and its Member States as independent contracting parties to the ECHR would weaken the mutual trust that is vital to the functioning of the EU. This mutual trust is essential for ensuring that EU law is respected and applied uniformly across the Member States. The Court argued that any external judicial oversight that could potentially conflict with or challenge EU law would undermine this trust and, by extension, the integrity of the EU legal system. In addition, the CJEU expressed concerns about the potential interference with the preliminary ruling procedure, since the possibility of Member States seeking advisory opinions from the ECtHR could disrupt this procedure, further undermining the effectiveness and autonomy of EU law.

The significance of Opinion 2/13 lies in its lasting impact on the EU's relationship with the ECHR. Following the opinion, the EU's accession process has been stalled, despite ongoing efforts by EU institutions to address the concerns raised by the CJEU. Nevertheless, the depth of the CJEU's objections, rooted in the core of EU law, suggests

⁵³ Ibid, par. 188–189: “*In so far as Article 53 of the ECHR essentially reserves the power of the Contracting Parties to lay down higher standards of protection of fundamental rights than those guaranteed by the ECHR, that provision should be coordinated with Article 53 of the Charter, as interpreted by the Court of Justice, so that the power granted to Member States by Article 53 of the ECHR is limited — with respect to the rights recognised by the Charter that correspond to those guaranteed by the ECHR — to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised. However, there is no provision in the agreement envisaged to ensure such coordination.*”

⁵⁴ Ibid., par. 199

that the possibility of the EU acceding to the ECHR in the near future remains uncertain. Opinion 2/13 has become a key example of the CJEU's strong commitment to preserving the autonomy of EU law, a principle it has consistently upheld in its jurisprudence. This doctrine of autonomy ensures that EU law remains supreme and coherent within the Union, shielding its interpretation and application from external influence. In relation to the ECHR, Article 53 of the Charter functions as a safeguard, requiring that while Member States may adopt higher standards of fundamental rights protection under the ECHR, these standards must not undermine the primacy, unity, or effectiveness of EU law, thereby maintaining the autonomy of the EU legal system.

Critics of the CJEU's approach argue that the Court's insistence on the autonomy of EU law may undermine the protection of human rights, particularly those enshrined in the ECHR. These critics contend that the principles of EU law autonomy and mutual trust should not be allowed to obstruct the broader goals of human rights protection under international law⁵⁵. In their view, the EU's legal sovereignty should not be an impediment to ensuring that EU citizens are afforded the full range of rights protected by the ECHR. Nonetheless, the CJEU's approach underscores the importance of maintaining the coherence of the EU legal order, particularly in light of its foundational principles, such as the primacy and uniformity of EU law. However, critics argue that the CJEU's emphasis on EU law autonomy will undermine the protection of fundamental rights under the ECHR, as legal sovereignty should not stand in the way of the higher objective of protecting fundamental rights.

3.2. The Achmea case

The reasoning developed in *Melloni* and *Fransson*, and further elaborated in Opinion 2/13, was extended significantly in *Achmea*⁵⁶. In this case, the CJEU ruled that intra-EU bilateral investment treaties (BITs) are incompatible with EU law. This judgment

⁵⁵ As an example of such opinions, see Douglas-Scott, S., *Opinion 2/13 and the 'elephant in the room': A response to Daniel Halberstam*, *Verfassungsblog*.de, 13 March 2015.

⁵⁶ C-284/16, *Slowakische Republik v Achmea BV*, ECR 158.

followed a preliminary ruling request from the German Federal Court of Justice and the submissions of sixteen EU Member State governments.

The judgment of the Grand Chamber was opposite to the opinion of Advocate General Wathelet⁵⁷, who concluded that neither intra-EU Bilateral Investment Treaties (BITs) nor the Investor-State Dispute Settlement (ISDS) clauses contained within them were in breach of EU law. Specifically, AG Wathelet argued that the BIT did not constitute discrimination based on nationality, as it did not grant preferential treatment to Dutch investors in violation of Article 18 TFEU. Additionally, he maintained that the arbitral tribunal established under Article 8 of the BIT could be considered a “*court or tribunal of a Member State*” under Article 267 TFEU, thus enabling it to request preliminary rulings from the Court of Justice of the European Union (CJEU) on EU law matters. Finally, AG Wathelet highlighted that investor-state disputes, unlike intra-Member State disputes, fell outside the scope of Article 344 TFEU, as they did not involve the interpretation or application of the EU Treaties.

The analysis by the Court started with the statement that EU law is based upon common values shared among the Member States, rooted in mutual trust regarding such recognition and as an expression of the principle of sincere cooperation. Based on the latter, it is for the Member States to ensure its observance and implementation in their territory⁵⁸. Grand Chamber also invoked the principles of primacy and direct effect by characterizing EU law as an interconnected system of rules and principles, establishing reciprocal obligations both among the EU and its Member States and between Member States themselves⁵⁹. The Court determined that such a tribunal established under the BIT of Slovakia and the Netherlands can be obliged to interpret or apply provisions of EU law, including such related to fundamental freedoms. However, under EU treaties, EU law interpretation and application can only be made within the sole jurisdiction of the CJEU, and the national court is under a duty to refer such issues to the Court. The arbitral tribunal, being not a court of a Member State, was incompatible with EU law because it undermined the autonomy of the EU legal order. This judgment led to a multilateral treaty among the EU Member States, which was adopted in October 2019

⁵⁷ Wathelet, A.G., 2017, *Opinion of Advocate General Wathelet*, delivered on 19 September 2017.

⁵⁸ C-284/16, *Slowakische Republik v Achmea BV*, par. 34.

⁵⁹ *Ibid*, par.33.

and signed by most of the Member States in May 2020, terminating the existing intra-EU BITs⁶⁰.

3.3. *The Tarrico Saga*

In the *Tarrico I*⁶¹ case, the CJEU's Grand Chamber, in its decision of 08.09.2015, addressed an issue that brought to the forefront the interaction between national criminal law and EU law, particularly in the context of combating VAT fraud affecting the EU's financial interests. It concerned a request for a preliminary ruling from an Italian court in criminal proceedings against a criminal network which had evaded VAT through the sale and purchase of champagne bottles. In particular, the Italian court explained that the national statutes of limitation will prevent recovery of the tax involved due to the complexity and length of the investigations. Because the case involved financial interests of the European Union, the preliminary question was about whether EU law imposed an obligation on Italy to increase these limitation periods in such a way as to infringe the principle of criminal legality, enshrined in Article 25(2) of the Italian Constitution. The question arose because the Italian Constitutional Court had explained that Italy's limitation rules for criminal offenses are substantive and not procedural, and the query was whether those rules could be adapted to ensure effective penalties for violations affecting the EU's financial interests.

The CJEU's judgment in *Tarrico I* placed significant emphasis on the primacy of EU law, especially in protecting the EU's financial interests. The Court held that the national rules on limitation periods could hinder the fulfillment of Member States' obligations under Article 325(1) and (2) TFEU, which mandate Member States to effectively combat fraud affecting the financial interests of the EU. Specifically, the CJEU pointed out that if national rules allowed for longer limitation periods for offenses affecting a Member State's financial interests compared to those involving EU funds,

⁶⁰ EU Member States signed an agreement for the termination of intra-EU bilateral investment treaties. Available at: https://ec.europa.eu/info/publication/200505-bilateral-investment-treaties-agreement_en.

⁶¹ Case C-105/14, *Taricco and Others*.

this could interfere with the proper functioning of EU law. As the Court reasoned: "*A national rule in relation to limitation periods for criminal offences ... which provided ... that the interruption of criminal proceedings concerning serious fraud in relation to value added tax had the effect of extending the limitation period by only a quarter of its initial duration – is liable to have an adverse effect on fulfilment of the Member States' obligations under Article 325(1) and (2) TFEU if that national rule prevents the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union.*"⁶²

Thus, the Court held that national courts must ensure that EU law is effectively applied, which might necessitate disapplying national laws if they obstructed EU obligations. Once again, full effectiveness of (a part of) EU law, namely the financial interests of the EU, was deemed to override fundamental rights standards (e.g. legality) in a rather narrow stance. However, the CJEU was careful to stress that fundamental rights, particularly the rights of the accused, must still be respected⁶³. This was particularly significant given the potential conflict with the rights enshrined in the Charter of Fundamental Rights of the European Union, especially Article 49⁶⁴, which guarantees the principles of legality and proportionality in criminal law. Furthermore, while the Court upheld the priority of EU law in the protection of the EU's financial interests, it also maintained that national courts must balance this priority with the protection of fundamental rights, ensuring compliance with both EU law and national constitutional principles. In this context, *Taricco 1* fully aligns with *Melloni*, as both decisions accept the absolute primacy of EU law over national constitutional law. This stance has been strongly criticized in theory, with scholars arguing that the principle of

⁶² *Ibid.*, ruling 1.

⁶³ *Ibid.*, par. 53

⁶⁴ Article 49 of the EU Charter of Fundamental Rights states:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that shall be applicable.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.

3. The severity of penalties must not be disproportionate to the criminal offence.

legality is flagrantly violated when limitation provisions, which are undoubtedly included in the substantive conditions of criminality, are changed by EU law *ex post facto*.

In *Tarrico II*⁶⁵, a year after the decision in *Tarrico I*, the Italian Constitutional Court sought further clarification from the CJEU regarding the subject of constitutionality and the application of the judgment in cases where national criminal law involved substantive rather than procedural elements, which raised questions about the disapplication of national laws that lacked a sufficiently clear legal basis for such disapplication. Specifically, the Constitutional Court asked, *inter alia*, whether the principles of *Tarrico I* required the disapplication of Italian criminal law provisions under Article 325(1) TFEU, even in situations where it was unclear whether such disapplication could be justified by the terms “*significant number of cases*,” and whether this principle applied even when the national rules in question were deemed substantive criminal law provisions⁶⁶.

The CJEU responded with a more deferential approach in *Tarrico II*, taking care to acknowledge the national constitutional norms and the principles of legality and non-retroactivity, which are common to the constitutional traditions of EU Member States, as articulated in Article 6(3) TEU. The *M.A.S. and M.B.* decision subtly corrects the *Tarrico I* ruling without overtly criticizing it. While the CJEU still holds that national statutes of limitations can violate Article 325 TFEU if they lead to the dismissal of criminal claims, it has also acknowledged that Article 325 does not mandate that Member States disregard statutes of limitations for offenses already committed, respecting the principle of legality. This balanced approach suggests the Court's intention to avoid a direct conflict with the Italian Constitutional Court, ultimately protecting the ongoing process of harmonizing criminal law across the EU.

The Court also referred to *Åkerberg Fransson* case and to Article 53 of the Charter, which safeguards the protection of rights in a way that recognizes the specific

⁶⁵ C-42/17, *M.A.S., M.B.*

⁶⁶ *Ibid*, par. 16,17,20

constitutional traditions of Member States.⁶⁷ In the context of Tarrico II, this provision helped the CJEU ensure that its rulings would not infringe upon the established legal principles of Member States. The Court's deference to the Italian Constitutional Court in this case underscores the importance of respecting national legal systems, particularly when those systems involve fundamental constitutional principles like the protection of rights in criminal law. Then, the CJEU concluded that if the national court assesses that the nonapplication of the domestic provision leads to a situation of uncertainty, concerning the determination of the applicable limitations' regime, which violates the principle of the precision of the applicable law, there is no obligation to disapply the national rule. In this context, the Court of Justice stated that "*if the national court were thus to come to the view that the obligation to disapply the [national] provisions at issue conflicts with the principle that offences and penalties must be defined by law, it would not be obliged to comply with that obligation, even if compliance with the obligation allowed a national situation incompatible with EU law to be remedied*" (par. 61 of the judgement).

All in all, in both Tarrico I and Tarrico II, the CJEU upheld the necessity of enforcing EU law, especially with regard to safeguarding the financial interests of the Union. However, it balanced this with a deep respect for the fundamental legal traditions of Member States. In Tarrico I, the Court focused on ensuring the effective enforcement of EU obligations, while in Tarrico II, it allowed greater latitude for national courts to assess whether disapplying national laws would infringe upon the principles of legality and non-retroactivity, core components of Member States' constitutional frameworks. This more flexible approach in Tarrico II demonstrates the Court's recognition of the limits of EU law in relation to national legal traditions and can be useful for the interpretation of Article 53 of the Charter.

In Tarrico cases the CJEU has consistently relied on Article 53 of the Charter as an implicit safeguard, so that its rulings do not affect the protection of fundamental rights at the national level. Article 53 acts as a '*safety net*', ensuring that EU law does not erode the rights enshrined in the constitutions of Member States. Although the Court does not refer in detail to how Article 53 applies under its judgment, it utilizes this

⁶⁷ Ibid, par. 47-48

provision as an indirect tool to safeguard those rights that might be affected by the same interpretations. This provision is the major safeguard in a complex area of EU jurisprudence as described in the so called *Tarrico saga*, where the Court navigates between potential contradictions in the attempt to balance its promotion of the primacy of EU law with respect for the essential principles of the Member States' legal systems. In this way, Article 53 helps ensure that the protection of fundamental rights is maintained, even when there is tension between the enforcement of EU law and the constitutional values of the Member States. While *Tarrico I* highlights the Court's firm stance on safeguarding EU financial interests and ensuring that national legal provisions do not obstruct the effective enforcement of EU law, *Tarrico II* can be seen as a careful compromise, where the CJEU, while maintaining its ultimate authority over EU law, allows for a limited degree of flexibility in the application of EU principles within national legal systems, all while affirming the overarching primacy of EU law.

3.4. Balancing EU Financial Interests and National Legal Traditions

In continuing from the *Tarrico saga*, it is possible to observe that the CJEU has faced complex issues arising at the interface of the national legal traditions and EU law, specifically in the field of criminal law provisions having a direct effect on the financial interests of the EU. As witnessed in the previous cases, the CJEU has maintained the primacy of EU law, specifically in guarding the financial interests of the Union, while balancing this with consideration for the essential rights of citizens under national constitutions and the European Union's Charter of Fundamental Rights. Harmonization of national law with European Union law, and notably the criminal law rules such as statutes of limitation, is a necessary component of such balance.

The CJEU's strategy in the *Tarrico* cases and its emphasis on effective enforcement of EU financial interests brings us to discuss another associated and similarly significant legal development within the context of VAT fraud and the broader phenomenon of interaction between national criminal law and EU law, namely the challenge of harmonization of national rules in the field. In this context, it is good to mention the Opinion of Advocate General Bobek⁶⁸, delivered in case C-310/16

⁶⁸ Opinion of AG Bobek delivered on 25 July 2018, case C-310/16, par. 70-95.

(Dzivev), since he addresses the delicate balance between protecting the EU's financial interests, particularly in VAT fraud cases, and respecting national legal systems, especially when fundamental rights are involved. Bobek emphasizes that while effective protection of the EU's financial interests is critical, national legal rules may still play a role, particularly where fundamental rights like the principle of legality and the right to privacy are at stake.

Although some harmonization of criminal law, including VAT fraud offenses, has occurred at the EU level, full harmonization is lacking, which presents challenges for Member States aligning their national laws with EU standards. Bobek acknowledges that EU law does not mandate uniformity in every aspect of criminal law but instead focuses on specific areas, such as VAT fraud and its impact on EU financial interests. When national measures conflict with EU obligations, the key issue is whether the national law provides sufficient clarity and specificity to align with EU standards. He notes that EU law may displace national rules, but only when they are closely connected to EU measures, as seen in cases like *Melloni* and *Åkerberg Fransson*. In cases like *Dzivev*, however, national laws may still be applicable as long as they do not obstruct the effective enforcement of EU law.

Like in *Tarrico II* case, Bobek's approach highlights the need for flexibility in applying EU law, ensuring that Member States can enforce EU obligations while respecting their constitutional principles. His perspective reflects a balanced approach, acknowledging the importance of both protecting EU financial interests and safeguarding individual fundamental rights. Bobek emphasizes that while harmonization in criminal law, particularly in VAT fraud, does not require uniformity in all aspects, the lack of full harmonization allows national discretion, provided national rules align with EU objectives, especially protecting the EU's financial interests, without undermining fundamental rights or legal certainty⁶⁹.

⁶⁹ Ibid, par. 80 “ *The closer a situation is to a clearly defined requirement of EU law, the less discretion there is on the part of the Member State and the more uniformity there will be. Conversely, the further a case moves from a clear and specific rule of EU law, while still being within the scope of EU law, the greater the discretion on the part of the Member States, thus enabling greater diversity. Reverting to a metaphor already employed in a slightly different context, (51) but capturing the same idea: the closer*

Agreeing with the view of the Advocate General, the Court ruled that the collection of evidence in criminal proceedings remains under national competence but must align with EU law, specifically Article 325 TFEU. It affirmed that although Member States are required to combat fraud against the EU's financial interests, national courts must respect fundamental rights, such as the right to privacy. In this case, the Court ruled that evidence obtained through unlawful interception of telecommunications—authorized by a court without jurisdiction—could be excluded. This decision was in accordance with the Advocate General's view of balancing effective EU law enforcement with the protection of fundamental rights.

one is to a lighthouse, the stronger the light from that source, blinding all other sources. The further one moves from the lighthouse, the less light there is, gradually blending (in) with light from other sources.”

4. Understanding Article 53 of the Charter and its potentials

The Court of Justice of the European Union has consistently emphasized that Article 53 of the EU Charter of Fundamental Rights is not an illustrative provision without any legal effect but, rather, an integral and dynamic part of the EU legal order. It plays a decisive role in the protection of fundamental rights within the European Union due to the balance between national, international, and EU-level legal commitments, since it shapes the legal plegma of fundamental rights protection in the EU. While the case law interpreting Article 53 remains relatively limited, a number of key cases shows its profound impact. As analyzed above, these cases highlight how Article 53 provides both the harmonization and protection of fundamental rights throughout the EU while at the same time protecting the legal frameworks of the Member States. It keeps a fragile balance between the primacy of the law of the EU and respect for the rights provided in national constitutions, as well as in the international level.

Article 53 enshrines the pluralistic nature of EU law, in that Union's respect for the fact that Member States have different standards concerning the level of protection afforded to fundamental rights. The standards stem from national constitutions, which also continue to bind the State both internally and at the EU level. The Court's interpretation of Article 53 reflects a recognition that EU-wide fundamental rights protection cannot be uniform; instead, it must accommodate in a way the diverse constitutional traditions of each Member State. This pluralistic approach, while preserving national legal traditions and enhancing the legitimacy of the CJEU's judgments, can sometimes place the Court itself in a difficult position, as it struggles to reconcile conflicting national and EU standards of fundamental rights protection and at this point, the safeguard lies in Article 53 of the Charter.

Despite this pluralistic approach, the interpretation given by the Court of Article 53 is nonetheless firmly anchored in the principle of the primacy of EU law, one of the cornerstones of the EU jurisprudence. The latter principle means that, in cases of conflict, EU law takes precedence over national law, including national constitutional provisions. While interpreting Article 53, the Court always ensures that the primacy of EU law remains intact. It holds that Member States can apply national standards for

fundamental rights protection only in areas where EU law does not fully govern their actions. Even in these instances, national standards may be invoked only if they do not undermine the level of protection provided by the Charter or compromise the primacy, unity, and effectiveness of EU law.

This dual approach, combining the pluralistic future of the protection of fundamental rights in the EU with the perennial supremacy of EU law, places Article 53 in a central position to develop judicial dialogue between national and EU courts. Such reasoning of the Court allows the Member States to apply higher national standards in cases where EU law leaves discretion, so long as such standards do not detract from the fundamental protection guaranteed by the Charter or interfere with the supremacy and effectiveness of EU law. This is evident in cases such as *Melloni*, where the conflict between national constitutional rights and EU secondary legislation, such as the European Arrest Warrant, was resolved by emphasizing the importance of respecting EU law's harmonizing provisions. In *Melloni*, the Court of Justice supported that national constitutional protections could not override the European Arrest Warrant Framework Decision, despite the Spanish Constitutional Court having found a higher standard for fundamental rights protection. For this reason, the case is a clear example of the Court's approach to harmonization, according to which the national provisions cannot have precedence where EU legislation has directly harmonized an area of law. The interpretation of the Court therefore reinforces the importance of unity in the application of EU legislation, which is particularly vital in so-called areas of harmonisation, such as the internal market and judicial cooperation, for the functioning of the Union. Yet, the challenges arising at present have already been highlighted, particularly as national constitutional traditions often conflict with the need for EU-wide coherence. Looking to the future, these difficulties are likely to intensify, especially with the EU's enlargement plans, which will bring more Member States with their own constitutional traditions into a rapidly evolving, unified space shaped by technology and political changes.

The approach taken in the *Melloni* case, where the CJEU limited the role of national courts in applying higher standards of fundamental rights protection, raises significant concerns regarding the role of national constitutional identity within the EU. Fundamental rights are at the core of each Member State's legal identity and are

enshrined in their constitutions. National courts' reluctance to fully accept EU interpretations, as seen with the Spanish Constitutional Court in *Melloni*, reveals a broader issue of democratic legitimacy. National constitutional rights, rooted in the democratic processes of Member States, should not be so easily overridden by EU secondary legislation. This undermines the idea of judicial dialogue and risks sidelining national courts' responsibility to protect fundamental rights according to their constitutional principles.

The CJEU's stance, particularly in cases like *Melloni* and *Åkerberg*, raises the question of whether judicial dialogue between national courts and the CJEU is truly meaningful or merely a procedural formality. By limiting the application of higher national standards, the CJEU risks undermining the democratic control of fundamental rights protection at the national level, making its interpretation of Article 53 appear as a barrier to deeper engagement with national constitutional identities. This presents a risk of eroding the balance between EU law supremacy and national legal orders, leaving national courts with less room to assert their role in safeguarding fundamental rights. By limiting the application of higher national standards, the CJEU risks undermining the democratic control of fundamental rights protection at the national level, making its interpretation of Article 53 appear as a barrier to deeper engagement with national constitutional identities. This presents a risk of eroding the balance between EU law supremacy and national legal orders, leaving national courts with less room to assert their role in safeguarding fundamental rights.

In order to give better consideration to these concerns, it is possible that the CJEU might adopt a more flexible interpretation of Article 53, one which took greater account of national constitutional protections for fundamental rights. That could enable national courts, without derogating from EU standards, to apply higher standards, as EU law allows, at least insofar as such protection does not undermine an effective application of EU law. This would be respectful of the principle of the primacy of EU law yet enable national courts to continue playing an active role in the protection of fundamental rights within the EU legal order. An exceptional example for such an approach is given by the

*Omega*⁷⁰ case, in which the CJEU enabled a derogation from EU law's primacy in order to protect the higher national standard of human dignity. Aida Torres Pérez underlines that ‘‘in *Omega*, the effectiveness of the freedom to provide services was compromised, yet the CJEU conceded that the restriction to the free provision of services was justified in order to protect human dignity in Germany, where the principle of human dignity is protected at a higher level than in other member states’’⁷¹. This case thus demonstrates that, in defined circumstances, the CJEU will allow national law to take precedence over EU law in protection of the fundamental rights. Specifically, in its decision the CJEU clarified that national courts are competent to determine the elements that constitute a state's constitutional identity, but it is for the CJEU to determine how a potential violation of the constitutional identity affects the application of EU law.⁷²

The interpretation given by the CJEU to Article 53 has to change in order to develop a closer judicial dialogue between the EU and national legal systems. Such a pluralistic approach, where the interpretation of fundamental rights involves national courts, does not undermine the primacy of EU law. On the contrary, it strengthens the EU's commitment to respecting the national identities and constitutional traditions of its Member States, ensuring that fundamental rights are protected in a balanced and legitimate manner across the Union. However, this balance depends not only on the application of Article 53 of the Charter by the CJEU, but also on interaction with the Member States. Currently, Member States are still often cautious towards the primacy of EU law, fearing the development of a unified constitutional identity for the EU. It comes from the fear of contradictory approaches between EU-level harmonization and the core provisions within their national constitutions-mostly those protecting fundamental rights.

This makes the Court reconsider the case law already issued on Article 53 to ensure more flexibility in the application of higher national standards for the protection of

⁷⁰ Case C-36/02: *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*.

⁷¹ Perez A.T. (2014) *Melloni in three acts: From dialogue to monologue*.

⁷² Case C-36/02, par. 39.

fundamental rights and interaction with provisions of the ECHR and international treaties or agreements that may offer a higher or more specific level of protection in some situations. This approach would strengthen the role of national courts and international legal frameworks in safeguarding fundamental rights, while promoting a more authentic and dynamic judicial dialogue between the legal order of the EU law, the constitutional traditions of the Member States, and global human rights instruments.

The reference to and application of Article 53 in conjunction with Articles 51 and 52 of the Charter appears as a critical safeguard for achieving the necessary balance in each case. The multilevel legal frameworks under which fundamental rights are protected should neither be dismissed but rather invited by the Court. This will enable the EU legal framework to reflect various points of view without jeopardizing the primacy and integrity of the Union's law. It would further assure that fundamental rights will be fully and efficiently protected, taking into consideration all the developments that make the legal and social environment increasingly complex, without renouncing the foundations on which the EU is based.

5. Conclusion

Following critical analysis of opinions of numerous scholars and jurists concerning Article 53 of the Charter of Fundamental Rights, as well as the analysis of the relevant CJEU judgments cited in this thesis, it can be argued that interpretation and application of the article significantly influence the evolving legal order of the European Union. While not a frequently cited provision, it appears to reflect the Union's commitment to ensuring fundamental rights, while at the same time working to confront the complexities of legal pluralism within its Member States. This provision, at the very core of the debate concerning the balance of powers between EU law and national constitutional traditions in the field of the protection of fundamental rights, actually calls for EU law primacy while, nevertheless, taking care to ensure the rich diversity of legal identities and traditions that every Member State enjoys. The CJEU's restrictive approach towards Article 53 has, however, raised serious concerns regarding its impact on judicial dialogue, national sovereignty, and multilevel protection of fundamental rights.

The emphasis of the Court on the primacy of EU law has prevented the national courts from applying higher standards of protection, even for areas where EU law has not yet fully harmonized the legal framework. While this approach aims to maintain uniformity and prevent fragmentation within the Union, it risks marginalizing the valuable contributions of national constitutional courts to the protection and development of fundamental rights. The principles of pluralism and judicial dialogue, essential to the EU's legal order, may be weakened if national courts are reduced to mere executors of EU law rather than active participants in shaping its interpretation. Moreover, this tension is not limited to internal EU dynamics but also affects the Union's interaction with international human rights frameworks and especially with the European Convention on Human Rights.

The accession of the EU to the ECHR, imposed by Article 6 TEU, has not been realized up to now, thus making the protection of fundamental rights incoherent within Europe. Article 53 of the Charter, read in conjunction with Articles 52(4) of the Charter and 4(2) TEU, calls for a more integrative approach. This provision indicates that not only is respect due to national constitutional identities, but there is also an obligation to

engage meaningfully with international human rights instruments. This dual role of Article 53—acting as a bridge between EU law and international law while respecting national traditions—reflects its essential aim, which is not limited to securing the primacy of EU law. The present analysis does not adopt such a shortsighted view but instead regards the function and, even more so, the dynamic potential of this article with optimism, as a pivotal clause designed to maximize the protection of fundamental rights.

The interpretation and application of Article 53 should not be approached as a legal riddle with a singular, definitive solution but rather as a complex and evolving puzzle, where each piece—the EU legal framework, national constitutional traditions, and international human rights standards—retains its distinct characteristics while interconnecting within a broader multilevel legal order. This intricate dynamic necessitates an interpretation that is both flexible and context-sensitive, allowing for the coexistence of different legal traditions while ensuring legal certainty and coherence within the European Union. The case law of the CJEU, in development, must thus aim at an interpretation of Article 53 that is more differentiated and sensitive to the complexity of a multilevel legal order. Greater flexibility should be allowed to national courts to apply higher standards of protection, especially in those areas where EU law leaves gaps or is not detailed. It is by facilitating this interaction-between EU law, national constitutional traditions, and international human rights standards-that Article 53 can serve as a powerful safeguard to attain balance, coherence, and legitimacy in the protection of fundamental rights. It does not need a retreat from EU primacy but rather a reconstruction of its role: one respectful of the core of national constitutional identity, inspired by international norms, and respectful of the coexistence and cooperation between the legal orders for the protection of fundamental rights. This requires, in the end, that the interpretation and application of Article 53 must reflect the Union's foundational values of democracy, pluralism and mutual trust, ensuring that the protection of fundamental rights is both effective and equitable across the Member States.

Annexes

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