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Fields of application of the Charter of Fundamental Rights and constitutional dialogues in the European Union

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CENTRE FOR JUDICIAL COOPERATION

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Distinguished Lecture

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Abstract

This article is an extended version of a speech delivered during the Conference on Judicial Cooperation Techniques for the Protection of European Fundamental Rights: Past and Future Prospectives held in EUI on 9-10 May 2014. It deals with the possibility of maintaining coexisting national and Charter standards of fundamental rights and with the importance of cooperation between the ECJ and the national courts when fundamental rights protection is at stake.

In this article, possible approaches to the relation between the constitutional and Charter standards of fundamental rights are discussed, and the implications of the approach adopted by the ECJ are examined. Furthermore, the current and potential importance of the constitutional identity of the Member States is analyzed.

Keywords

ECJ, the Charter of Fundamental Rights, dialogue between EU and national courts, Åkerberg Fransson judgment, Melloni judgment

Introduction

Fundamental rights are – without doubt – an important element of the dialogue between the European Court of Justice (the 'ECJ') and the national courts, in particular the supreme and constitutional courts. It would be at the same time very difficult to find a more complex aspect of this dialogue, given that the fundamental rights debate concentrates not only on the correct interpretation of law but also and first of all on the division of competences between European and national judges. The reason for potential disputes related to these questions is rather simple and almost self-evident: the ECJ as well as the national constitutional courts are the very guarantors of the respect of fundamental rights and that function is enshrined in the ethos of each supreme jurisdiction.

In this sense the competence with regard to fundamental rights necessarily imparts the legitimization of the constitutional status of supreme national jurisdictions.

For the ECJ, fundamental rights are an extremely important part of the 'acquis communautaire' and an essential component of the European identity. Human rights have been introduced into the sphere of European law as a substantial element of the general principles almost 50 years ago[1]. However, from today's perspective, there is no doubt that the entry into force of the Charter of Fundamental Rights (the 'Charter') as binding law on 1st December 2009[2] had a specific symbolic significance for the European Union, as a clear confirmation of the trends developed by the jurisprudence. What is more, it helped a lot to stimulate further development of the legal order and the process of integration as a whole. It has been the starting point for a new stage of the human rights jurisprudence of the ECJ. Today, almost 5 years later, we may say that the quality, scope and frequency of the application of fundamental rights essentially changed the face of the Court's jurisprudence. The ECJ has become the court of human rights for the European Union. How significant the impact of the formal act of including the Charter into the legal order of the EU would be on the whole EU legal system, was difficult to foresee.

Taking into account fundamental rights in the interpretation and application of EU norms is a crucial factor for the shaping of the legal order because it opens new ways of legal reasoning and methodology. It also allows judges to recognize more easily the purpose of certain legal mechanisms and their interdependency. For these reasons, no supreme jurisdiction, neither at the national nor at the supranational level, may execute their functions without referring to fundamental rights and to the general principles of law. My personal experiences confirm this assumption.

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1 Cf. Judgment of 4 February 1959 in the case *Friedrich Stork et Cie v. High Autority*, (1/58) [1959] ECR 43 and the judgment of 12 November 1969 in the case *Stauder v. City of Ulm* (29/69) [1969] ECR 419.

2 [2012] OJ C362/02.

As a former constitutional judge, I can firmly say that the openness towards fundamental rights protection and to the general principles of law were – at the first stage after the collapse of the communist system in my country – the very vehicle of transformation of the legal system. At the time they created substantive 'added values' to the concept of the rule of law. A similar impact of fundamental rights on the role of constitutional jurisprudence has also been observed in other national orders, where the totalitarian rule has paralyzed democratic development of society for many years (in Germany, Spain, Hungary, etc.). No doubt the application of fundamental rights standards was the most important aspect of the role which these jurisdictions played in the national systems.

As a European judge, I should assert that references to the fundamental rights guaranteed by the Charter have not only become current practice in the jurisprudence but are also a necessary element of the interpretation and the application of European provisions. Judgments such as, in recent years, *NS*[3], *DEB*[4], *Åkerberg Fransson*[5], *Melloni*[6], *Jeremy F.*[7], *Trade Agency*[8] and many others, are good illustrations of this phenomenon. References made in the jurisprudence to the guarantees of fundamental rights are not simply ornamental. They influence the process of interpretation, of determination of the very content of particular norms, their extent and legal consequences, and thus they provide for the enlargement of the field of application of the European rules in the national legal orders.

When fundamental rights protection is taken seriously, both at the European and at the national level, we are confronted with competing jurisdictions, each of them embodying their own ethos of fundamental rights scrutiny[9]. Being founded on the same axiological background, the constitutional values and those expressed by the Charter are very similar. However, this common source does not ensure uniformity of the Member States' constitutional standards. The differences reside not only in the content of a particular guarantee but also in a diverse hierarchy established between particular rights and freedoms. The approach to the relations between the right to privacy on the one hand and to the freedom of expression on the other hand, constitutes a perfect example. The limitations of these rights determined by the principle of proportionality are not the same in all national legal orders and

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3 Judgment of 21 December 2011 in joined cases *N.S. and Others* (C-411/10 and C-493/10) [2011] ECR I-0000.

4 Judgment of 22 December 2010 in case *DEB v Bundesrepublik Deutschland* (C-279/09) [2010] ECR I-13849.

5 Judgment of 26 February 2013 in case *Åkerberg Fransson* (C-617/10) [2013] ECR I-0000.

6 Judgment of 26 February 2013 in case *Melloni* (C-399/11) [2013] ECR I-0000.

7 Judgment of 30 May 2013 in case *Jeremy F*. (C-168/13).

8 Judgment of 6 September 2012 in case *Trade Agency* (C-619/10) [2012] ECR I-0000.

9 The specific issues related to the application of the standards enshrined in the European Convention of Human Rights ('ECHR') and the relations between ECJ and ECtHR after envisaged ratification of the European Convention by the European Union are not the subject of my analysis in this essay. The topic merits a separate presentation.

the scope of the admissible interferences with these rights depends on the axiological concepts accepted in a given national legal system.[10]

The European legal space is based on a pluralism of national legal systems, including a diversity of fundamental rights standards guaranteed by the constitutional provisions of each Member State. The idea of diversity is beautiful and at the same time very appealing because it allows – at least theoretically – to combine completely different components: on the one hand, the concept of a more and more integrated European space of law and, on the other hand, the national and constitutional identity of each Member State.

Nevertheless, diversity is not only extremely difficult to achieve in practice but also carries a risk to the coherence and effectiveness of EU law. A greater margin of autonomy allowing to shape the standards of basic rights protection seems more risky for the coherence and the effectiveness of the European rules and vice versa. The fragility of the equilibrium between the two above mentioned components (coherence and pluralism) is reflected in the recent jurisprudence of the constitutional courts. It is not necessary to describe in detail the well-known and largely discussed decisions of the German Federal Constitutional Court issuing a 'warning' aimed at preventing interferences with the German constitutional identity, that the ECJ's *ultra vires* jurisprudence going beyond the competencies attributed to that jurisdiction could constitute[11]. Less known but very strong and clear in their messages are the relatively recent decisions of the Czech[12] and the Polish[13] Constitutional Courts in which the priority of the constitutional standards of fundamental rights protection over the European standards was expressly underlined. In the former case, which concerned *Slovak Pensions*, the Czech Constitutional Court expressly recognized that the interpretation of the standard of protection stemming from the ECJ jurisprudence was erroneous and for this reason should not be applied. In the latter case, the Polish Constitutional Court accepted its own competence to perform the constitutional review of EU Regulations on the basis of the constitutional guarantees related to the right to fair trial and consequently admitted theoretically its own prerogative to suspend the binding force of a European Regulation – in this case the Brussels I Regulation[14] – on the Polish territory, if its non-conformity with the Polish Constitution has been established.

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[10] It explains, to some degree, why the recent judgment of the ECJ in case *Google Spain and Google Inc.* (C-131/12), judgment of 18 May 2014, provoked such different reactions and commentaries in the Anglo-Saxon and continental newspapers. The former represent a culture more focused on the freedom of expression, while the latter – on the right to privacy.

[11] Cf. Judgments of German Federal Constitutional Court of 6 July 201, *Honeywell*, 2 BvR 2661/06, and of 24 April 2013, *Counter-Terrorisme Database*, 1 BvR1215/07.

[12] Cf. Judgment of Czech Constitutional Court of 31 January 2012, Pl. ÚS 5/12: *Slovak Pensions*.

[13] Cf. Judgment of Polish Constitutional Court of 16 November 2011, SK 45/09, *Brussels I*.

[14] Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

It is not my intention to present in these short remarks the complexity of the relations between the two legal orders. I would rather like to focus my observations on the issue of coexistence of the constitutional and the Charter standards of fundamental rights when the latter is applicable to the national legal provisions which implement EU law. In this field, a potential confrontation between these standards is clearly visible and the question of coexistence and its necessary premises becomes particularly important.

Possible scenarios

Theoretically, three different scenarios which describe the diverse approaches to the question of relations between the constitutional and the Charter standards of fundamental rights may be described. The 'sense or non-sense' of the dialogue between the national and European jurisdictions has to be examined, because in each of these scenarios there appears to be a different degree of potential risk of collision and tensions between the different courts. The distinguishing criterion is the scope of application of the Charter in the field covered by national legal acts[15] which are in principle the subject of the national constitutional review.

A *restrictive approach* limits the application of the Charter to the national provisions which have been adopted specifically for the purposes of the implementation of EU law.

An *abstract approach*, completely opposite to the above mentioned one, extends the application of the Charter to each part of the national law which generally belongs to the legal field covered by the European provisions, however, no concrete connection between national and EU law can be identified[16]. As an example one could refer to the bulk of environmental law, agriculture or public health.

A *functional approach*, located half way between the restrictive and the abstract approach, constitutes a kind of compromise between these two. From the restrictive approach this concept differs insofar as it concerns not only the specific provisions adopted specifically for implementation purposes but also other national provisions, which are necessary to ensure an effective application of the European provisions. From the abstract approach this concept differs because it does not content itself with a general and abstract connection between EU and national provisions but, quite to the contrary, requires

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[15] Cf. Art. 51(1) of the Charter reads as follows: "The provisions of this Charter are addressed (…) to the Member States only when they are implementing Union law. (...)". Cf. regarding Article 51 of the Charter, K. Lenaerts, *Exploring the Limits of the EU Charter of Fundamental Rights* in European Constitutional Law Review (2012), p. 375*;* and D. Sarmiento, *Who's afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe*, CMLR, 2013, p. 1267; and also M. Safjan, *Areas of application of the Charter of Fundamental Rights of the European Union: fields of conflict?*, EUI Working Papers, no. 22 (2011).

[16] Cf. Judgements in cases: *Maurin* (C-144/95) [1996] ECR I-2909 (para. 11-12); *Iida* (C-40/11) [2012] ECR (para. 79); *Ymeraga and Others* (C-87/12) [2013] ECR (para. 41); *Siragusa* (C-206/13), judgment of 6 March 2013 (para. 26-27) which can to same extend illustrate this approach.

the indication of a concrete, precisely identified rule of EU law applicable within the scope of national law, so that the Charter could be applied[17].

It is clear that each of these theoretical approaches represent a different potential for the constitutional dialogue between the national and EU jurisdictions. The scope of application of the Charter, on the one hand, and the scope of application of the constitutional standards on the other hand constitute 'communicating vessels' in the sense that, in principle, the larger the application of the Charter, the narrower the field of operation left for the constitutional standards of fundamental rights, and *vice versa*. The two extreme approaches capture the interdependence perfectly: the *restrictive approach* to the Charter leaves a large space for the constitutional standards and the *abstract approach* in fact strongly limits the potential field of application of these standards. The functional approach makes the coexistence of the two systems of fundamental rights standards possible.

In recent ECJ case law, the trend towards a larger application of the Charter guarantees is rather evident. Nevertheless, the pure *abstract approach* was rejected. It is manifested by a series of judgments adopting a *functional approach* to the concept of implementation of European law into national legal orders[18]. The radiation of the EU law on the national legal systems allows for the application of the Charter to national provisions which were not established to implement EU law but are necessary to ensure an effective application of the European provisions. In that sense, the *Åkerberg Fransson* judgment[19] is the result, and the confirmation by the Great Chamber of the ECJ, of a consequent adherence to the functional approach in the case law established in the former ECJ jurisprudence[20].

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[17] Cf. Judgment of 5 October 2010 in case *McB.* (C-400/10 PPU) [2010] ECR I-8965, and in the case *DEB v. Bundesrepublik Deutschland* (C-279/09), above at (4).

[18] Cf. Judgment in case *McB.* (C-400/10 PPU), above at (17) and in the case *DEB v Bundesrepublik Deutschland* (C-279/09), above at (4).

[19] Cf. Judgment in case *Åkerberg Fransson* (C-617/10), above at (5).

[20] Cf. the case-law cited in *Åkerberg Fransson*. At the same time it would not be right to see some essential, revolutionary change in the scope of application of the fundamental rights guaranteed by the Charter in relation to the national regulations. The ECJ maintains a stance that, in accordance with its Art. 51, the application of the Charter always requires to establish which EU legal provision is applied and interpreted in the national legal order. Such requirements have not been met in case *Siragusa* (C-206/13), judgment of 6 March 2014, in which the ECJ declared its incompetence due to a lack of a sufficient linking point between EU law and Italian law concerning the landscape protection. This judgment is not a withdrawal from *Åkerberg Fransson* line but a confirmation of the criteria of the application of them Charter adopted therein. Similarly, the case *Pfleger e.a.* (C-390/12), judgment of 30 April 2014, in which the ECJ concluded it was unnecessary to carry out an analysis in the scope of the Charter in view of a possible infringement of Art. 56 TFEU by a national regulation (para. 60) – cannot be considered as a 'retreat' from the *Åkerberg Fransson* line. As for the requirement of a link between the Charter and European law, see also A. Rosas, *When is the EU Charter of Fundamental Rights applicable at national level*, Jurisprudence, vol. no. 4, p.1269, and '*Implementing' EU law in the Member States: some observations on the applicability of the Charter of Fundamental Rights* in *L'Europe des droits fondamentaux*, *Hommage à Albert Weitzel*, Pedone, 2013; and also A. Rosas, H. Kaila, *L'application de la Charte des droits fondamentaux de l'Union européenne par la Cour de Justice: un premier bilan*, Il Dritto dell'Unione Europea, 2011, 1, p. 8 and T. von Danwitz, *L'autonomie du droit de l'Union et la mise en œuvre de la Charte des droits fondamentaux de l`Union européenne*, in Mélanges en l'honneur de C. Blumann, Bruylant, in print.

It must be recalled that this judgment has been adopted with regard to Swedish law, which was the legal basis for two procedures: criminal and administrative, initiated against Mr Åkerberg Fransson, who infringed the duty to pay VAT and in this context also committed a fraud. With regard to the two procedures related to the same facts, the ECJ interpreted the *ne bis in idem* principle, despite the fact that the national legal acts have not been adopted for the purpose of the implementation of EU law[21]. The judgment expressly stresses that even national provisions adopted without any connection (direct or indirect) with EU law have to observe the Charter standards if they are to serve as national instruments in implementing European law[22], and in that sense it's a clear example of the functional approach to the application of the Charter in the case law. The consequence of this approach is that a high number of national laws could be covered by a potential application of the Charter. In such a landscape, is there still space for a dialogue between the European and national jurisdictions?

It would be very hard to deny that the national legal acts which are potentially the subject of evaluation from the Charter perspective could also be the subject of the constitutional review from the point of view of application of fundamental rights. Is it not a kind of a specific 'dictate' of the Charter standards imposed by the principle of primacy of EU law which can marginalize the role of the Constitutional Courts in their sphere of activity thus depriving them of the most important part of their prerogatives, that is, the interpretation of the fundamental rights standards that are to be applied in the course of the constitutional review?

The approach stressing the exclusive application of the Charter standards of fundamental rights in such a situation seemed, before the *Åkerberg Fransson* judgment, the only possible scenario.

From this perspective the importance of the *Åkerberg Fransson* judgment is significant because the space for the application of the national constitutional standards to the national provisions implementing EU law was expressly stated[23]. However, it does not concern all the potential situations (hypothesis) in which this specific overlap of the fundamental rights standards may appear.

Firstly, it may concern situations in which the European lawmaker has left a large margin of appreciation to the national legislators to shape adequate national instruments which are necessary for

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[21] Cf. Opinion of the Advocate General J. Kokott delivered on 15 December 2011 in the case *Bonda* (C-489/10) [2012] ECR, who stressed, that the notion of 'implementation' relates not only to the national acts which were adopted explicitly when the Member State implements EU law but also to the acts which already existed (see para. 20).

[22] Cf. Judgment in case *Åkerberg Fransson* (C-617/10), above at (5), (para. 29).

[23] Cf. Judgment in case *Åkerberg Fransson* (C-617/10), above at (5), (para. 29-30), reads as follows: "29. 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 (…). 30. For this purpose, where national courts find it necessary to interpret the Charter they may, and in some cases must, make a reference to the Court of Justice for a preliminary ruling under Article 267 TFEU."

the effective application of EU law. Exactly, such a situation occurred in the context of Swedish law in the *Åkerberg Fransson* case. EU law did not determine exhaustively the scope and the sanctions related to the responsibility for non-payment of VAT, imposing on the national lawmakers the duty to establish, in the framework of their own competence, the necessary legal acts including administrative or criminal procedures[24].

Secondly, the application of the national constitutional standards becomes possible when the threefold condition is met that primacy, unity and effectiveness of EU law are observed. This solution seems to allow achieving two different goals at once, a wide application of the Charter on the one hand, and room for the Constitutional standards, on the other hand. This opens a potential dialogue between the national and European courts in this field. While this approach is very appealing, we cannot avoid addressing complex questions which arise in this matter and which show not only the positive effects of this concept but also some negative ones or, at least, complicated dilemmas.

These questions relate, as indicated above, to the area where the national and the Charter standards of fundamental rights may potentially overlap. We should recall that the mere existence in the national order of a standard of protection of a fundamental right which would be higher than that under EU law, does not in itself determine the choice in favor of the national guarantees[25]. The concept adopted in EU law in this regard[26] differs from the European Convention of Human Rights[27], which automatically imposes the application of the higher standard of protection whenever there is competition between two standards, i.e. conventional and constitutional (national). The conditions mentioned in the *Åkerberg Fransson* judgment, necessary for the application of constitutional standards of fundamental rights, directly refer to the hypothesis in which a national standard was higher than the one adopted in EU law[28]. For this reason it must be asked whether not only the higher

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[24] *A contrario*, are not at issue national legal acts which constitute only a technical, necessary component of the legal rules contained in a EU legal act which decided upon all important elements of a given solution.

[25] Cf. Judgment in case *Melloni* (C-399/11), above at (6), in which this option was definitively rejected (para. 63).

[26] Cf. Art. 53 of the Charter which reads as follows: "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States 'constitutions'."

[27] According to Art. 53 ECHR the use of a higher standard of fundamental rights protection is a justification against the use of the ECHR standard. Cf. with reference: C. Ladenburger, European Institutional Report, in J. Laffranque (ed.), *The Protection of Fundamental Rights Post-Lisbon*, FIDE XXV Congress, Vol. 1, Tartu, Tartu University Press, 2012, at 175 and S. Iglesias Sánchez, *The Court and the Charter: The impact of the entry into force of the Lisbon Treaty on the ECJ's approach to fundamental rights*, (2012) 49 Common Market Law Review 1565, at 1605.

[28] The situation evaluated in the *Åkerberg Fransson* case was that the *ne bis in idem* protection of an individual by the Swedish law was stronger than the one required by the Charter. The guarantees steaming from the ECHR jurisprudence on Art. 4 of the Protocole 7 ECHR (Cf. ECtHR, case *Sergey Zolotoukhine v. Russia*, judgment of 10 February 2009, no. 14939/03, ECHR 2009), were enshrined in the Swedish constitutional system, what excluded the possibility of criminal and administrative proceedings in the same case. The standard elaborated on Art.50 of the Charter is not so protective, allowing – conformingly to the test established in the *Engel* judgment (Cf. ECtHR, case *Engel and others v. The Netherlands*, judgment of 8 June 1976, no. 5370/72, Series A, No. 22.) – parallel administrative and criminal

standards of protection of the human rights but also these which ensure the same or similar levels of protection may be applied, when the conditions established by the *Åkerberg Fransson* case are met? Should the answer be positive, another question arises, namely what are the criteria to qualify the standards as representing the same level of protection?

The answer is only apparently simple and evident. These questions do not cause complications only in the 'ideal legal space'. Different constellations have to be considered, for instance that the national constitution ensures the same content of the guarantees, but sets up its own unique hierarchy in relation to other fundamental rights; that the scope of protection is the same but the proportionality principle applied in the national context allows deeper interference into fundamental rights than would be admissible on the basis of the EU provisions; finally, that the normative content of the rights is similar although some components of a particular right are differently applied in the constitutional and European jurisprudence. A good example is the *ne bis in idem* principle itself, because – being expressed in some legal systems in the identical formula – it is frequently differently interpreted in such substantive elements as the notions of 'penalty' or 'criminal procedure'. These few examples show that perfect similarity, or even comparability, between the national and European level of protection is a hypothesis which is not easily attainable.

One thing seems to be uncontroversial: the level of protection in the national systems cannot be lower than the one guaranteed by the Charter. In this sense, even with the application of the national constitutional standards the Charter constitutes a very minimal level of protection which should be observed in all cases. But in reality even this thesis can face some of the above mentioned problems.

The approach adopted in recent ECJ jurisprudence has opened up a new perspective of coexistence between the national and European legal orders but it is not free from risk for the coherence and uniformity of the interpretation of fundamental rights in relation to EU provisions. However, it should be asked what its practical implications for the national judges could be.

Firstly, it is recommended to focus the analysis on the results of the application of fundamental rights and not on their normative and formal content. In fact, only the final effect of the application (meaning the degree of protection of a concrete fundamental right, taking into account its place in the entire legal system, established jurisprudence and admissible limitations according to the proportionality principle) should be relevant for the finding of similarity between the national and Charter standards of fundamental rights.

Secondly, the existence of a long and well-established line of jurisprudence in EU law regarding a particular fundamental right constitutes a strong argument or even a kind of presumption in favour of the application of the Charter rather than of the constitutional standards of fundamental rights. The risk

(Contd.)

proceedings. However, in the Swedish legal system the higher standard of protection of fundamental rights, based on a constitutional standard steaming from the *Zolotoukhine* jurisprudence, might be applied.

of a potential conflict between the requirements of the uniform application of fundamental rights would then be smaller.

A firm position of the ECJ, shaped during the long development of the jurisprudence, may constitute an important component of the common constitutional traditions of the Member States. However, when at the EU level there is no legislative consensus on the scale and the content of the protected values contained in the particular fundamental right the field of diversification of the fundamental rights standards becomes wide open because constitutional standards of protection of fundamental rights come into play. For this reason the following observation made by Koen Lenaerts can be accepted:

"(...) pluralism is not an absolute value, the level of protection granted to a fundamental right by a national legal order must comply with any constitutional consensus that exists at EU level (...) It is the existence or absence of an EU legislative consensus that indicates whether the Member States are developing at the same pace and in the same manner or whether national societies are evolving in accordance with their own scale of values. That being said, national diversity and EU legislative consensus must both comply with values which are regarded as pan-European, i.e. those that are the object of a constitutional consensus at EU level" [29].

In conclusion on this point, I would say that, in the current landscape, the dialogue between Constitutional and European Courts has become more useful and necessary than before. The existence of a grey zone of potential competition between two separate orders now is not only a hypothesis but actually part of the reality. One has to accept this 'grey zone' as an inevitable secondary effect of the recent jurisprudence of the ECJ if the approach of extending the scope of constitutional dialogue between the European and national jurisdictions is maintained. This dialogue is not easy because – as mentioned above – even the comparability of the guarantees present a great challenge for the judges who must decide on the national procedures.

It is worth noting that the effectiveness of the EU provisions is not a unique determinant for the choice between the Charter and constitutional standards[30]. In fact, some recent decisions of the ECJ confirm that the efficiency of the EU provisions must give way to the protection of substantive elements of the guarantees provided by the Charter[31]. This is why the primary criterion to gauge a standard of fundamental rights is the preservation of the essence of fundamental rights. One cannot preclude *a*

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[29] Cf. also K. Lenaerts, *EU Values and Constitutional Pluralism*, a lecture delivered at Warsaw University on 11 April 2014.

[30] Cf. M. Safjan and D. Düsterhaus, *A Union of Effective Judicial Protection*, 33 Yearbook of European Law (2014), forthcoming.

[31] Cf. in particular judgments in cases: *Krombach* (C-7/98) [2000] ECR I-1935; *Trade Agency* (C-619/10), above at (8); *Banif Plus Bank* (C-472/11) [2013] ECR I-0000. In these judgments the ECJ concluded that the fundamental elements constituting protection of the right to fair trial must be respected even at the cost of lower efficiency of a European regulation in a given case.

priori that the national constitutional standard can provide better guarantees for the preservation of the substance of a particular fundamental right than the Charter standard[32].

I believe that the recent jurisprudence of the ECJ has left a relatively large discretion to the constitutional courts, in which they may effectively operate and exert influence on the ECJ jurisprudence. The dialogue can guarantee the participation of the national supreme courts in the shaping of the standards of protection required by the Charter, which are to be interpreted with respect to the constitutional traditions of the Members States. In fact, Article 52(4) of the Charter imposes the respect for the constitutional traditions of the Member States when the Charter is applied.

However, so that the dialogue is efficient, at least two conditions are to be met. Firstly, according to para. 29 of the *Åkerberg Fransson* judgment[33], the exchange between the ECJ and national judges has to be initiated – this initiative belongs to the national courts. Secondly, openness and sensitivity to the arguments provided by the other party of the dialogue is needed, the exchange between the European and national jurisdictions is not to be transformed into a 'one-way message' – this requirement should be addressed first of all to the European courts.

Mixed beauty of the constitutional identity

The disputes related to the possible coexistence between the national and the Charter standards of fundamental rights concentrate rather on the interpretation of Article 51(1) of the Charter and not on the question of constitutional identity. However, in this context it seems to be especially important to answer the question of what possibilities the Member States would have if they wanted to replace the application of the Charter standards with their own constitutional standards, when their 'constitutional identity' is at stake. Ever since the *Melloni* judgment[34], the mere existence of a higher standard of a fundamental right in the national system is not a sufficient argument to refuse application of an established interpretation of a fundamental right standard, as interpreted by the ECJ and ECtHR, if this solution does not comply with the requirements of primacy, unity and effectiveness of EU law. Would then the preservation of the constitutional identity be a good and sufficient argument?

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[32] The recent judgment in the case *Digital Rights* (joined cases C-293/12 and C-594/12), judgment of 8 April 2014, on data retention by telecom companies, seems to illustrate that the analysis included in a judgment of a national constitutional court applying a fundamental right may precede an ECJ judgment. In the judgment on data retention the ECJ declared the EU directive invalid because it infringes the right to privacy. It was preceded by a judgment of the German Federal Constitutional Court, which reviewed national regulations implementing EU law, which were found incompliant with the German Constitution (BVerfG, 1 BvR 256/08 from 2.3.2010). It could also be noted that judgments of national courts referring to the protection of the right to privacy in the context of data processing by the Internet search engines (as for example the judgment by LG Hamburg in Mosley case; 24.1.2014 - 324 O 264/11) preceded the ECJ judgment in case *Google Spain and Google Inc.* (C-131/12) above at (10).

[33] Cf. case *Åkerberg Fransson* (C-617/10), above at (5), (para. 29).

[34] Cf. case *Melloni* (C-399/11), above at (6). Regarding the conditions for the applicability of constitutional standards, see also *Åkerberg Fransson* (C-617/10), above at (5), (para. 29).

It is worth recalling that the identification of 'constitutional traditions' as representing the 'constitutional identity' is an erroneous approach. Constitutional traditions of the Member States belong to the common heritage of European law and they are an essential component – as mentioned above – of the correct interpretation of the fundamental rights guaranteed by the Charter. In this sense the 'constitutional identity' is a specific sublimation of the common constitutional axiology of the Member States which is one of the criteria used by the ECJ in its interpretation of the content of the constitutional standards which should be respected in EU law.

For these reasons Constitutional traditions do not equal constitutional identity. The former is a general and abstract concept being the synthesis of the trends in the legal systems of the Member States, whereas the latter is attributed to a specific legal system. The sources of the 'constitutional identity' are located in a normative idea of 'national identity'[35]. The national identity constitutes an 'added value' to the idea of constitutional traditions and only jointly they constitute the constitutional identity[36].

There are certain crucial arguments in favour of respecting the specific constitutional values enshrined in the national legal systems. The European Union is created as a pluralistic organization and – as mentioned above – diversity is one of its strongest features[37]. Paradoxically, diversity in the EU is also the source of both strengths and weaknesses. As a matter of fact, on the one hand it ensures coexistence of different nations and cultures, but on the other hand it illustrates the fact that the process of the creation of a new and completely integrated European nation is complex and slow. The idea of constitutional identity expresses both of these faces of the pluralism of the EU. On the one hand, it potentially enhances flexibility in the application of EU rules and ensures better adaptation to the needs and specific culture of each Member State, but – on the other hand – it jeopardizes the coherent application of the Charter standards of fundamental rights.

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[35] Therefore, in this sense, 'national identity' is directly related to the fundamental structure of the state, also regarding its regional and local governmental structure.

[36] Art. 4(2) TEU states as follows: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.(…)".Cf. literature on constitutional identity, e.g. D. Ritleng, *Propos introductifs* in *Le droit constitutionnel national aux prises avec le droit européen: l'exemple de la Hongrie*, Revue des Affaires Européennes 2013/3, Bruylant, 2014, pp. 441-445; S. L. Shaelou, *'Nous les peuples'. L'identité constitutionnelle dans la jurisprudence tchèque, polonaise et lettone* in L'identité constitutionnelle saisie par les juges en Europe, Cahiers Européens (1), Pedone, Paris 2011; V. Constantinesco, *La confrontation entre identité constitutionnelle européenne et identité constitutionnelles nationales. Convergence ou contradiction ? Contrepoint ou hiérarchie ?* in L'Union européenne: Mélanges en l'honneur du professeur P. Manin, 2010, pp. 79-94; B. Guastaferro, *Beyond the 'exceptionalism' of constitutional conflicts: the 'ordinary' functions of the identity clause*, Yearbook of European Law, 31 (2012), pp. 263-318.

[37] Cf. K. Lenaerts, *EU values and constitutional pluralism*, as above at (29); and also *Human Rights protection through judicial dialogue between national courts and the European Court of Justice,* in Liberae Cogitationes, Liber amicorum Marc Bossuyt, (eds.) André Alen and others, Intersentia, Cambridge-Antwerp-Portland, 2013, pp. 367-377. In this matter cf. also N. Walker, *The idea of constitutional pluralism*, 3 The Modern Law Review (2002), p. 317.

No doubt, an unlimited and overly broad use of the idea of constitutional identity would become damaging for the very concept of EU law and it could even cause the collapse of the entire system. In particular, the risk would appear in two hypothetical situations.

Firstly, if a constitutional court wished to act only as the ultimate jurisdictional arbitrator in establishing the borders imposed by the concept of the constitutional identity. It would *de facto* decide about admissibility of the implementation of European law into the national order.

Secondly, the notion of constitutional identity would cover a very large spectrum of constitutional rules[38] (in particular in the matter of the fundamental rights) including their interpretation in the constitutional jurisprudence[39]. A broad concept could for instance legitimize refusal to implement EU provisions or become a final defence argument, a specific '*ultima ratio*' in the proceeding for failure of a Member State to fulfil obligations under the Treaty. In some sense, it would be a return to the situation pre-existing the cases of *Internationale Handelsgesellschaft* [40] or *Costa v. E.N.E.L*[41]. In fact, the principle of primacy of EU law would be evacuated.

Nevertheless, I could not accept that the reference to the idea of constitutional identity would be subordinated to the same conditions which are generally required for the application of the national constitutional fundamental rights standards (meaning primacy, effectiveness and unity of EU law) as it has been stressed in the recent jurisprudence of the ECJ. We have to recall that these conditions have been settled on the basis of Art. 53 of the Charter, which concerns, *inter alia*, the relations between the fundamental rights standards guaranteed by the national constitutions and EU law, but it does not include a reference to the idea of constitutional identity. Finally, those judgments do not establish whether primacy, effectiveness and unity have 'absolute significance' and – consequently – whether they are applied also to the standards which are determined by the concept of the constitutional identity. In this sense the question could be treated as still being open.

The solution has to be found between two 'extremes' i.e. absolute respect for the constitutional pluralism of the EU Member States and the fully integrated European legal space. It is not the first

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[38] According to this approach, each constitutional regulation carries the idea of national identity. It is worth noting that such an approach towards constitutional identity was criticized by the Advocate General P. Maduro in the opinion delivered on 8 April 2008 in the case *Michaniki* (C-213/07) [2008] ECR I-9999, (para. 33) and also by the Advocate General N. Wahl in the opinion delivered on 10 April 2014 in the case *Torresi* (joined cases C-58/13 and C-59/13). For example, in the latter, the Italian court referred to the Italian national identity resulting from the Italian Constitution, which requires that a special state exam should be passed by the candidates who wish to be registered as Members of the Italian Bar. According to the Advocate General not any rule enshrined in a national constitution can limit the uniform application of EU provisions, let alone constitute a parameter for the legality of those rules (cf. para. 100).

[39] Cf. the judgment of the Constitutional Tribunal on the Treaty of Lisbon (Polish Constitutional Court; judgment of 24 November 2010, K 32/09, *Treaty of Lisbon*) and the position of the German Federal Constitutional Court (Judgment of 30 June 2009, 2 BvE 2/08, *Treaty of Lisbon*). Such a wide approach poses an obvious risk of confrontation, especially because it leaves out the fact that EU law has a constitutional consensus (e.g. the standard of individual fundamental rights as interpreted by the ECJ), which should be treated as a relevant point of reference when assessing the compliance of national solutions with EU law. Cf. also K. Lenaerts, *EU values and constitutional pluralism*, as above at (29).

[40] Cf. Judgment in case *Internationale Handelsgesellschaft* (C-11/70) [1970] ECR-1125.

[41] Judgment of 15 July 1964 in case *Flaminio Costa v. E.N.E.L* (C-6/64)) [1964] ECR-1141.

time that the EU legal order, or rather the idea of integration itself is confronted with challenges which require a combination of the components which seem to be, by their own nature, in opposition. However, it is an inherent feature of the EU legal space and the result of experience collected for over 60 years that an apparently non-existent solution may be found through dialogue because of the will and determination of all parties to find a consensus. The same mechanism shall be applied to the dispute between the 'constitutional identity' and the principle of primacy of EU law. The dialogue between national and European jurisdictions is a unique instrument in order to achieve consensus in this fragile matter.

The Court's jurisprudence has sent some signs which confirm that the idea of constitutional identity may be used as a ground for justification in the framework of the so-called derogation clauses. Even in the absence of any direct reference to constitutional identity, the *Omega* case[42] (human dignity *vs* freedom to provide services) is one of the best examples. However other cases, such as *Sayn-Wittgenstein*[43] (republicanism *vs* free movement) or *Runevič-Vardyn and Wardyn*[44] (national language *vs* free movement) confirm the trend. The solutions in these cases are rather well received by the doctrine[45]. Generally the concept of application of the substantive values of the constitutional system through the use of the derogation clauses is largely accepted[46]. Nevertheless, the crucial point of the debate is who – and according to what criterion – should decide on the selection of the substantive components of the constitutional system. This is particularly so when only a very general definition of the constitutional identity of a Member State is provided by its constitutional doctrine or jurisprudence.

I believe that an approach which makes a clear division between the European and national levels of jurisdiction and attributes competence in this matter to one or the other jurisdiction would be an unjustified simplification. Of course, national courts are in the best position to identify the elements of constitutional identity of a given Member State. No doubt, the characteristics of constitutional identity of a given Member State may not be set out discretionally in the ECJ jurisprudence. Reference to these

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42 Judgment of 14 October 2004 in case *Omega* (C-36/02) [2004] ECR I-9609.

43 Judgment of 22 December 2010 in case *Sayn-Wittgenstein* (C-208/09) [2010] ECR I-13693.

44 Judgment of 12 May 2011 in case *Runevič-Vardyn and Wardyn* (C-391/09) [2011] ECR I-3787.

45 Cf. K. Lenaerts, *The EU Charter of Fundamental Rights: scope of application and methods of interpretation* in *De Rome à Lisbonne: les juridictions de l'Union à la croisée des chemins*, Mélanges en l'honneur de Paolo Mengozzi, Bruylant, 2013, and also K. Lenaerts and J.A. Gutiérrez-Fons, *The Place of the Charter in the EU constitutional edifice* in *The EU Charter of Fundamental Rights – A Commentary*, (eds.) S. Peers and others, Hart Publishing, Oxford and Portland, Oregon, 2014, pp. 1559-1593; A. von Bogdandy and S. Schill, *Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty* in (48) Common Market Law Review 1417, (2011); V. Belling, *Supranational fundamental rights or primacy of sovereignty? Legal effects of the so-called opt-out from the EU Charter*, European Law Journal, n° 2, March 2012, pp. 254-255.

46 One has to bear in mind that the derogation allowing for the application of different solutions in the national legal system cannot infringe the general principles of the EU law; Cf. the judgment in case *ERT* (C-260/89, 18 June 1991, I-2925), see also the Explanation relating to Art. 51 of the Charter [2007] OJ C303/17. However, this judgment did not concern the constitutional identity.

characteristics must be made by the national judges. However, this 'national concept of the constitutional identity' must be confronted with the goals and values of the European legal order. The search for the equilibrium between two legal orders belongs to the European judges.

It has to be underlined that the values expressed in Art. 2 TEU may constitute – from an EU law perspective – the 'ultimate line' behind which the observance of the constitutional identity would become impossible[47] because it should not reach the point where the axiological construction on which the European Union has been built, would be undermined. In other words, it is the constitutional identity of the European Union that should create the framework for the potential dialogue between the judges. European identity is not an abstract concept because it stems from the constitutional traditions of the Member States and the European Convention of Human Rights[48]. The space to look for common points is therefore quite large and it is this aspect which provides for the strength and the sense of the judicial dialogue.

This ideal of a rational equilibrium will never be reached without a dialogue and a necessary degree of openness manifested by the parties of the debate. I strongly believe that the framework for this dialogue has been well determined by the values and axiology which are expressed by the formula of Article 2 TEU and which have been shared by all the courts participating in the debate. Instead of continuing a never ending debate about 'which court is the court of the last word', rationality requires focussing the debate on the real issues and, above all, on the question of what kind of European Union is needed in the future.

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[47] In this sense, it is sometimes debated whether the concept of constitutional identity of the European Union could provide a basis for the application of a 'reverse *Solange*-like' reasoning, which would delineate – with reference to national legal orders – the borders outside which national solutions would be an *ultra vires* form in respect to EU law. It would allow for an adequate reaction to the risk of authoritarian trends that might occur in some Member States. Cf. M. Kumm in a panel discussion: *In the Era of legal pluralism. The relationship between the EU, national and international courts, and the interplay of the multiple sources of law*, at FIDE Congress in Copenhagen, May 2014. Apart from the constitutional identity context, the supposition based on the assumption that each national legal system observes the fundamental rights, may be overturned. For example in the *N.S.* judgment, above at (3), the ECJ evaluated the practice of national authorities in the procedures applied to refugees.

[48] Cf. also B. de Witte, *Article 53, Level of protection* in *The EU Charter of Fundamental Rights – A Commentary*, (eds.) S. Peers et al., Hart Publishing, Oxford and Portland, Oregon, 2014, pp. 1523-1538, who says: "In interpreting the relevant provisions of the Charter, the Court of Justice and the courts of the Member States must have due regard to the level of protection offered by similar rights contained in international human rights conventions such as the ECHR and in the common constitutional traditions of the member states."