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The Parameters of Constitutional Conflict after Melloni

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Abstract

Melloni makes clear that primacy of EU law is not about citizens' rights: even the core of their constitutional rights under national law has to be set aside in favour of the "primacy, unity and effectiveness" of EU law. Melloni extends the duty to set aside citizens' constitutional rights also to EU law that is not directly effective. The court finds it acceptable that a framework decision that "harmonizes" fundamental rights and falls short of the constitutional standards of a Member State must override constitutional rights if that EU act lives up to the minimum standards of the ECHR in abstract terms. This reopens a path to constitutional conflict in the area of fundamental rights protection that was expected to be closed since the entry into force of the Lisbon Treaty. The court's reasoning shows few signs of authentic "constitutional dialogue", by ignoring the fact that Melloni involved the core of a constitutional right affecting human dignity under Spanish constitutional law. Once again, Melloni also illustrates that constitutional conflict is not merely a matter between a Member State and the Court of Justice, but may exist also between Member State courts and executives, thus making the Court of Justice an arbiter of national constitutional conflict. The Spanish Constitutional Court, in its follow-up judgment, has refused to accept either the constitutional supremacy of EU law or, by implication, the Court of Justice unreserved position on art. E3 of the Charter, but managed to avoid actual and overt constitutional conflict by an overall lowering of its autonomous fundamental rights standard. Such practical backing off can hardly be expected to occur with constitutional courts with nationally stronger positions of legitimacy in more general constitutional terms, Melloni can be understood in the context of competing paradigms of rights, power and the relations between constitutional orders.

Introduction

European integration was the way to overcome the devastation that sovereign powers had brought Europe over centuries. The rationale to overcome the habits of sovereignty largely coincided with that of post-war constitutionalism in the European state orders. The constitutional concealings with power arrangements for the exercise of authority that dominated the "long 19th century" was to be effected by the paradigm of citizens' rights that came to dominate the post-war 20th century discourse, also that of EU law. The European Union is there primarily for its citizens and integration is realised through their rights. This is how the history of the Court of Justice's case law, from Van Gend & Loos and Costa v ENEL to the enunciation of European citizenship as destined to be "the fundamental status of citizens" (Grzelczyk and its progeny), is usually read. If this were a correct reading, the protection of citizens' fundamental rights would be of prime concern to the Court of Justice. We know, of course, that things are slightly more subtle, both historically and presently. And Melloni confirms this.

1 This article was first published by Thomson Reuters (Professional) UK Limited in European Law Review (2014) 39 E.L.Rev. 521.
3 Melloni v Ministerio Fisco (C-399/11) [2013] 2 C.M.L.R. 45.

1169 European Current Law Issue 10 2014
Fundamental rights protection was originally a matter on which national constitutional courts held the European Court of Justice to account; the Court of Justice in turn could only provide fundamental rights protection that was either substantively, or at the level of judicial scrutiny, equivalent to that provided by the national courts or by the European Court of Human Rights. In as far as the Union would not provide such protection, EU law remains that fundamental rights could not have legal effect domestically: in modern post-war European constitutionalism, only law that respects fundamental rights can be valid and effective. The Bundesverfassungsgericht marked off this area of potential constitutional conflict, and Sweden codified it in its Constitution, while many Member States either implicitly or explicitly supported the view that EU law must also respect fundamental rights standards to which autonomous Member State acts are subject. Since the Court of Justice began protecting ECtHR in accordance with minimum Strasbourg standards, and now that the Charter of Fundamental Rights preempts primary law,29 the principle of a subsidiarity test could be used to decide whether any proposition of the Court of Justice holds national authorities, including courts, to account as to the protection they provide for EU fundamental rights in national jurisdictions.30 Whenever Member State authorities act within the scope of EU law, they must observe EU fundamental rights—this is the unarguable message of Åkerberg Fransson.31

From the perspective of the protection of rights, this would appear to be a good thing: power is offset by rights—unless, of course, the standard of EU fundamental rights falls short of the national standard. In that case, we are back at the historical starting position: EU law does not guarantee rights as they are protected in a Member State but, to the contrary, infringes fundamental rights—power exercised by Member State authorities is no longer offset by the rights that citizens enjoy in the national legal order. Theoretically, the conflict could be solved by taking the route of the substantive values of constitutionalism, that is, by allowing for higher national standards, as is normally the case under international human rights law, and as, in one reading of this provision, would follow from art.53 of the Charter. However, the Melloni judgment of the Court of Justice of February 26, 2013, rejects that reading and holds that art.53 cannot allow for higher levels of national protection if this interferes with the privacy, unity and effectiveness of EU law, thus reducing art.53's meaning to insignificance. Thus, also, the court reopens the field of constitutional conflict as concerns fundamental rights protection—unless, of course, constitutional courts are willing to reduce their standards of fundamental rights to those of EU law. In this case, leave power can be read to have turned to the Court of Justice holds national authorities, including courts, to account as to the protection they provide for EU fundamental rights in national jurisdictions.32 Whenever Member State authorities act within the scope of EU law, they must observe EU fundamental rights—this is the unarguable message of Åkerberg Fransson.33

1 This did not occur until Hereward Conyngham's Commission (C-274/99 P) [2001] ECR I-4431, [2001] 1 MLR 58.
3 Åkerberg Fransson (C-437/10) [2013] 2 CMLR 46, on which see O. Waffall and B. van Breda, New Wipe into Old Whiskers: the Scope of the Charter of Fundamental Rights of the EU after Åkerberg Fransson (2013) 30 5 EIL Rev 866. For an attempt to differentiate the scope of EU law and the scope of the Charter, never rejected in France, see e.g. C. Landerstorfer, "Europäische Internationale Reichs" in The Protection of Fundamental Rights by the European Court of Justice. An Institutional and Comparative Analysis (Tübingen: University of Tübingen, 2012), Part A, para 3.1.4, p. 308.
4 ECtHR art 5: "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be enjoyed under the laws of any High Contracting Party in the exercise of such rights or freedoms, or any other rights or freedoms recognized by the European Court of Human Rights or any other related protocols, conventions, regulations or custom on the present that the present (Convent) does not recognize such rights or that it recognizes them in a lesser extent."

1170 European Current Law Issue 10 2014

we must not only pay attention to the Court of Justice's judgment, but also briefly outline how the proceedings ended in the Spanish Constitutional Court, which handed down its follow-up judgment on February 13, 2014.34

The case at the Court of Justice

Facts

Joaquín Melloni is a swindler who set up financial investment schemes in which the savings of some 1,800 persons are reported to have disappeared; Melloni also disappeared for a while. In his absence, he was convicted to 18 years' imprisonment, subsequently reduced to 10 years owing to the introduction of statutory limitations, a conviction confirmed in appeal and confirmed. After he had at last been arrested, his surrender to Italy was requested for execution of the prison sentence under a European Arrest Warrant in August 2008. This surrender was consented to by the Audiencia Nacional (Spanish High Court). This court rejected Melloni's contention that his rights to a fair trial under art.24(2) of the Spanish Constitution had been infringed, Melloni claiming, first, that he had revoked the appointment of the advocates that had defended him at first instance and, secondly, that his surrender should have been made conditional on the possibility of retrial. Melloni subsequently filed a constitutional complaint at the Spanish Constitutional Court, the Tribunal Constitutional, asserting that his rights of defence under art.24(2) of the Spanish Constitution were infringed, on the same grounds involved at the High Court.

Spanish constitutional protection of the right to a fair trial

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

The EAW Framework Decision

Framework Decision 2002/584 in its original version allowed, in principle, making surrender for execution of a conviction conditional on the possibility of retrial in cases of trial in absentia (art.5(1)).35 Significant differences in legal traditions regarding trial in absentia—what is regular

practice in one Member State is constitutionally barred in another—were reason to replace this provision with another set of more precise provisions of the amending Framework Decision 2009/299.

The amended Framework Decision specifies the conditions under which conviction in a trial in absentia cannot constitute a reason for non-surrender of the convicted person (art.4(a)(1) of the amended EAW Framework Decision). The surrender of the person cannot be refused—among other things—in the following circumstances:

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

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

The questions referred to the European Court of Justice

The first of the Tribunal Constitutional’s three questions was whether Framework Decision 2009/584 on the European Arrest Warrant, which does not explicitly allow for making the surrender conditional on retrial, precludes such a condition in order to guarantee the fundamental rights of defense of the person surrendered. Secondly, if the EAW Framework Decision does preclude such a condition, it was asked whether this is compatible with the right to a fair trial and the rights of defense under arts 47 and 48 of the Charter.

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

"Level of protection

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

The Tribunal Constitutional asked whether this provision allows a Member State,

"to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the requesting State, thus affecting (the right to a fair trial and the rights of defence) a greater level of protection than that deriving from European Union law, in order to avoid an interpretation which restricts or adversely affects a fundamental right recognised by the Constitution of the first-mentioned Member State?"

13 Melloni (C-399/12) [2013] 2 CMLR 63 at [64].
So, in reality, the question posed was whether the necessity of protecting fundamental rights could be considered as a general condition for the application of art.4(a)(1) of the Framework Decision. This is not an odd question. After all, the Framework Decision itself claims that it does not prevent the application of fundamental rights, which are, as the Spanish Constitutional Court emphasises, primary rules to which secondary law (the Framework Decision) is subject if an application of secondary EU law is subject to its being in conformity with fundamental rights. Thus, viewed, pieces of legislation of exclusive harmonisation are also always subject to an unwritten exception if they would lead under a particular set of circumstances to an infringement of fundamental rights. In other words, the Spanish Constitutional Court posed a question like that addressed in NO: does mutual recognition allow for fundamental rights exceptions not explicitly provided for in secondary legislation? This is a controversial question in EU law since, as is commonly held, it potentially undermines the notion of mutual recognition and restricts the minimum level of protection.

The Court of Justice sidesteps the issue by rephrasing the question, leaving out entirely the referring court’s explicit reference to the fundamental rights conditionality of secondary law and its application, saying that:

"The Tribunal Constitutional asks, in essence whether Article 4a(1) of Framework Decision 2002/584 must be interpreted as excluding the execution of a warrant in cases of secondary law being in conformity with fundamental rights. This, as the court points out, is a question of interpretation of a provision of the European Arrest Warrant Decision itself claims that it raises the question of interpretation of a provision of the European Arrest Warrant Decision. The court rejects this view, holding that, it should be noted that that argument, in reality, raises the question of the compatibility of Article 4a of Framework Decision 2002/584 with the fundamental rights protected in the legal order of the European Union."

The Advocate General in the relevant sections of his Opinion had established the intention of the legislature as apparent from the text of the Framework Decision. In other words, if the EU legislature provides an exhaustive list of cases in which it deems a fundamental right to be fully observed, this is the end of the matter and there can be no further appeal to fundamental rights whatsoever.

Finally, the court arrives at the core of the Spanish Constitutional Court’s question, i.e. the obligation to respect fundamental rights as enshrined in art. 6 Thl to which an application of the European Arrest Warrant Framework Decision is subject, and hence might, in appropriate cases affecting the core of a fundamental right, lead to a fundamental rights conditionality of surrender, also in cases covered by art. 4(a)(1) of the Framework Decision. The court concludes:

"The Advocate General’s interpretation of art. 4(a)(1) precludes the execution of a European arrest warrant issued for the purposes of executing a sentence conditional upon the conviction rendered in absentia being open to review in the issuing Member State."

The court’s conclusion on the first question is that art. 4(a)(1) precludes the execution of a European arrest warrant issued for the purposes of executing a sentence conditional upon the conviction rendered in absentia being open to review in the issuing Member State.

Is the Framework Decision contrary to the ECHR or the Charter?

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

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

19 McAslef (C-399/11) [2012] 2 CMLR 43 at [51].
22 McAslef (C-399/11) [2012] 2 CMLR 43 at [41]-[43].
23 McAslef (C-399/11) [2012] 2 CMLR 43 at [51].
24 Trade Agency Ltd v Strategic Imporers Ltd (C-463/19) September 4, 2012 at [52] and [55] (the Technical Assistance to Defendants granted by the Court of Justice in the Trade Agency case), concerning the ECHR, the Charter, and the Services Directive.
This is, the court states, in keeping with ECtHR case-law, and the court confirms the stated objective of the pending Framework Decision "to enhance the procedural rights of persons subject to criminal proceedings whilst improving mutual recognition of judicial decisions between Member States". On this basis, the court concludes:

"Article 4(a)(1) and (b) of Framework Decision 2002/584 lays down the circumstances in which the person concerned must be deemed to have waived, voluntarily and unambiguously, his right to be present at trial, with the result that the execution of a European arrest warrant issued for the purposes of executing a sentence of a person convicted in absentia cannot be made subject to the condition that that person may claim the benefit of a retrial at which he is present in the issuing Member State."22

The court then immediately concludes from this that art 4(a)(1) "does not disregard" the right to an effective remedy and the rights of defence under arts 47 and 48(2) of the Charter and is therefore compatible with these provisions.23

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

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

Whereas the referring Constitutional Court presented three interpretations of art 53 of the Charter,24 the Court of Justice cuts the judicial dialogue short and dismisses out of hand any interpretation which would allow a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law. According to the court, any such reading aims to subject surrender to conditions intended to avoid an interpretation which restricts or adversely affects fundamental rights recognised by its constitution, even though the application of such conditions is not allowed under Article 4(a) of Framework Decision 2002/584.25 This the court cannot accept:

"That interpretation of Article 53 of the Charter would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disobey EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution. It is settled case-law that, by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order (see Opinion 1/91 [1991] ECR I 6679, paragraph 21, and Opinion 1/99 [2011] ECR I 1137, paragraph 65), rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law on the territory of that State (see, to that effect, inter alia, Case 117/70 International Handelsgesellschaft v Warnow, [1970] ECR 1125, paragraph 3, and Case C-409/06Winner Wetten [2010] ECR I-8015, paragraph 61).

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."26

In support of this position, the court points out that a Member State is not allowed to refuse to execute a European arrest warrant when the person concerned is in one of the situations mentioned in art 4(a)(1) of the Framework Decision.27 This provision was intended to solve the difficulties in the area of recognition of verdicts rendered in absentia, and effects,

"a harmonisation of the execution of a European arrest warrant in the event of a conviction rendered in absentia, which reflects the consensus reached by all the Member States regarding the scope to be given under EU law to the procedural rights enjoyed by persons convicted in absentia who are the subject of a European arrest warrant."28

The court then refers to the considerations of unity and effectiveness:

"Consequently, allowing a Member State to avail itself of Article 53 of the Charter to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member State, a possibility not provided for under Framework Decision 2009/299, in order to avoid an adverse effect on the right to a fair trial and the rights of the defence guaranteed by the constitution of the executing Member State, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that framework decision, would undermine the principles of mutual trust and recognition which that decision purports to uphold and would, therefore, compromise the efficacy of that framework decision."29

The case at the Tribunal Constitutional

On February 13, 2014, the Tribunal Constitutional handed down its follow-up judgment in Meloni, which was published on March 11.30 In the third paragraph of the grounds of its judgment, the Tribunal notes that the answers of the Court of Justice are "very useful" (de gran utilidad), but nonetheless need to be supplemented with the doctrine laid down in the Tribunal's judgment in the Constitutional Treaty case of 2004.31 It reaffirms that the transfer of powers under the Spanish Constitution is subject to substantive limits, namely "respect of the sovereignty of the State, of our fundamental constitutional structures and of the system of fundamental principles and values consecrated in our Constitution, in which fundamental rights acquire their proper substance.32 It then rephrases, with reference to the 2004 judgment, that applying the primacy of EU law is based on the presupposition of respect for fundamental national constitutional structures, which includes fundamental rights.33 It recalls that it is not the Constitution but the

23 Meloni (C-399/11) [2012] 2 CMLLR 43 at 53 (emphasis added).
24 Meloni (C-399/11) [2012] 2 CMLLR 43 at 55-56.
26 Meloni (C-399/11) [2012] 2 CMLLR 43 at 56.
28 Meloni (C-399/11) [2012] 2 CMLLR 43 at 53 (emphasis added).
30 Meloni (C-399/11) [2012] 2 CMLLR 43 at 56.
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Treaties that are the framework of validity for Union legislation, "although the Constitution requires that the legislation be accepted as the result of the transfer to the abstract, values and principles. Moreover, of particular importance in the context of art.53 of the Charter, it repeats that, notwithstanding all this, the Tribunal has held that,

"in the unlikely case in which, in the ulterior development of European Union law, this law would prove to be irreconcilable with the Spanish Constitution, while the hypothetical infringement of European law [of primary European law] is not remedied by the ordinary channels provided [by that law], ultimately, the constitution of the sovereignty of the Spanish people and the supremacy of the Constitution which it has given itself could lead this Court to approach the problems which in such a case would arise, through the corresponding constitutional procedures, problems which under current circumstances are considered inadmissible."169

Next, the Tribunal recapitulates its doctrine on "indirect" infringements of the right to a fair trial under art.24 of the Spanish Constitution, as developed in its case law, but emphasises the importance of international human rights treaties, with which the constitutional value system coincides. The constitutional standard by which the order to surrender Mr Melloni needs to be judged includes, therefore, the human rights treaties to which Spain is a party, among which are the ECtHR and Charter of Fundamental Rights as interpreted by the competent organs established by the relevant treaties, and these interpretations in turn are:

"essential elements to interpret the absolute content of the right recognized in Article 24(2) of the Spanish Constitution, the disregard of which would constitute an indirect infringement of the fundamental right by the Spanish authorities."170

After examining the case law of the ECtHR (including more case law than the Court of Justice mentions in its judgment) and that of Court of Justice, the Tribunal concludes that these interpretations "coincide to a large extent" and can therefore provide it with the interpretative criteria to decide the case:

"Hence, we must now affirm, overruling the doctrine laid down in STC 9/2000, that a conviction in absentia does not involve an infringement of the absolute contents of the fundamental right to a fair trial, even if there is no remedy for the absent defendant, when this absence has been voluntarily and unambiguously decided by a defendant who was duly summoned, and has been effectively defended by an appointed Lawyer (Article 24.2 of the Spanish Constitution)."171

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

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

169 "El Tribunal ha sostenido, en la amparo 31/2000, que "un acto del Tribunal de Justicia de la Unión Europea que infrinja injustificadamente la garantía de un juicio equitativo, que ha sido voluntariamente y expresamente renunciado y no ha sido efectivamente defendido por un abogado nombrado expresamente", constituye 'una violación indirecta de derechos fundamentales' (STC 9/2000)." 170 "El Tribunal ha sostenido, en la amparo 31/2000, que "un acto del Tribunal de Justicia de la Unión Europea que infrinja injustificadamente la garantía de un juicio equitativo, que ha sido voluntariamente y expresamente renunciado y no ha sido efectivamente defendido por un abogado nombrado expresamente", constituye 'una violación indirecta de derechos fundamentales' (STC 9/2000)." 171 "El Tribunal ha sostenido, en la amparo 31/2000, que "un acto del Tribunal de Justicia de la Unión Europea que infrinja injustificadamente la garantía de un juicio equitativo, que ha sido voluntariamente y expresamente renunciado y no ha sido efectivamente defendido por un abogado nombrado expresamente", constituye 'una violación indirecta de derechos fundamentales' (STC 9/2000)."
Proceedings agencies various authors that art.53 applies to the Primacy of Protocol (No.36) on Lisbon one exception not to the Treaties. Mellon at that, moreover, Mellon must be understood as also entailing the obligation to set aside national constitutional standards.

Primacy

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

From Sorn Gel & Loss onwards, the doctrine of direct effect has been a judicial invention. There is only one exception to this: the text of the EU Treaty from Maastricht until Lisbon originally provided that Framework decisions 'shall not entail direct effect' (art.54(3) EU Treaty (2006)). However, also after Lisbon, this qualification still applies to the LW Framework Decision (including the amending Framework Decision 2009/299) under the primary law of Protocol 36 to the Lisbon Treaty. Holding that non-directly effective EU law entails the duty to set aside national law is something of a revolution in EU law, and may amount to setting aside primary law. This deserves closer scrutiny.

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

On its surface, Mellon does not seem to impose such a duty. The Court does not refer to Sommerville and it does not use the language of "setting aside" conflicting national law. Moreover, there is a curious treatment of "primacy, unity and effectiveness" when it comes to applying this tripartite formula to the case at hand. In fact, it seems that the court applies only two of the three essential characters of EU law: unity and effectiveness. At [63], the court explains that a reading of art.53 of the Charter that would allow the Spanish higher level of protection would "cast doubt on the uniformity" of the "Framework Decision." It does not say that it would infringe the primacy of EU law. And this might confirm the strict formulation by various authors that art.53 of the Charter is not a clause about primary law in the first place. In what follows, I briefly go into this view, which Mellon subtitles, before arguing that primary law is indeed...
on the basis of either EU law, both primary and secondary, as interpreted by the court. This nouvelle sees, however, that it recharacterizes the question of primacy and overrules the
essence of the Charter, at least since the Charter acquired primary law status, it is to be considered
secondary law by virtue of being superior to it. Secondary law, notwithstanding its primary vis-
vis national law, must merely be subject to the superior primary law of the Charter. In other
words, owing to its higher rank under EU law, the Charter can necessarily qualify secondary
law’s primacy, just as it can qualify its applicability and validity.

The fact is, of course, that Melloni sweeps aside any doubts that art.53 of the Charter might
raise about primacy, whether they were intended or not. As in Winner Wetten,21 the court
switches into a different mode when it thinks that primacy might be interfered with. Although at
63 of Melloni, the court seems only to have an eye to “unity” (“uniformity”) and “effectiveness”
(“efficacy”), it frames the totality of the argument in terms of primacy. Its answer to the question
on art.53 immediately presents the conclusion that the interpretation suggested by the Spanish
Constitutional Court “would undermine the principle of the primacy of EU law inasmuch as it
would allow a Member State to disobey EU legal rules which are fully in compliance with the
Charter where they infringe the fundamental rights guaranteed by that State’s constitution” 22; it
next states that it is “by virtue of the principle of primacy of EU law”23 that rules of national
law, even of a constitutional order, cannot be allowed to undermine the effectiveness of
(non-directive) EU law.

Moreover, Melloni not only holds to an absolute concept of primacy, it indeed entails the
duty to set aside national constitutional law. Although the court does not refer to Simmenholz, it
does refer to Winner Wetten, which, if anything, only reinforces the Simmental language (arguably
quite unnecessarily). Instead of more ironic approaches such as those of Omega24 and Sign
Wittgenstein,25 the ruling in Winner Wetten introduces the polemical term of “ousting effect”,
which the court found to be entailed by both primacy and the duty of Union loyalty of Member
States (in Winner Wetten, more specifically, the German Federal Constitutional Court). Winner
Wetten may well be read as an act of open war,26 and Melloni may well be considered its
continuation in a more overtly constitutional context. Winner Wetten concerned the perspective
overruling of Länder legislation on the basis of the general principle of legal certainty. Melloni
concerns the core of a constitutional fundamental right in a particular Member State. In Winner
Wetten, primacy is explicitly the primacy of directly effective secondary EU law, which has an
“ousting effect” regarding national law, even if that “ousting” creates a legal void and legal
uncertainty. Meloni is about non-directive effective EU law. Thus, the reference to Winner Wetten
[International Handelsgesellschaft] implies that this type of EU law also has the effect of
setting aside national law, in the sense that the Spanish norm concerning the rights of the
defence of a person convicted in absence must be disappplied, even if the court did not need to
say this in so many words in Melloni.

Fields of application and “primacy, unity and effectiveness”

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

Winzer Wetten GmbH & Co. VertriebsgesmbH v. Andreas Bachinger (C-409/06) [2008] ECR-I-8015;
21 Winner Wetten (C-399/11) [2013] 2 C.M.L.R. 43 at 98.
22 Meloni (C-399/11) [2013] 2 C.M.L.R. 43 at 98.
23 Meloni (C-399/11) [2013] 2 C.M.L.R. 43 at 98.
24 Omega (C-323/08) [2009] 2 C.M.L.R. 1369 at 1370; see also, his Opinion at 1371 and [119].
25 Winner Wetten (C-399/11) [2013] 2 C.M.L.R. 43 at 98.
26 Sign Wittgenstein, “Wirtschaftskrise oder Fehlentscheidung in der Bundesanstalt Baue (C-36/02) [2004]
28 For a more foreign reading prior to Melloni, see L. Benisti, “Respecting Constitutional Identity in the EU” (2012)
49 C.M.L.R. 673, 689-691.

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

The Melloni judgment clarifies what this means in as much as it recognises that when Member
State authorities implement EU law, they are also bound by national fundamental rights
provisions.

“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,”29

So, in the court’s view, the scope of EU law and that of national constitutional law overlap in the
case of implementation of EU law. When implementing EU law, Member State authorities both
act squarely within the scope of EU law and are also subject to national standards: the fields of
application overlap, and both national and EU fundamental rights standards apply.

This approach of the court gainsays Interpretations which suggested that each of the
fundamental rights sources only apply within their own ambit, so that the matter of “higher level
of protection” would not be a matter of conflict, but rather one of delimiting the respective fields
of competence which are essentially juxtaposed, each unique within its own sphere and to which
separate standards apply. A suggestion along these lines in the Opinion of A. Botê is clearly
rejected by the court.

The court adds that such an application of national higher standards is, however, dependent on
two conditions. The first is that the national standard can only apply if it does not fall below the standard of the Charter, “provided that the level of protection provided for by the
Charter, as interpreted by the Court... is thereby compromised”20. This condition is self-
 evident and not problematic: the Charter is a minimum standard and does not obstruct a
national standard providing protection over and above the Charter standard.

The second condition specifies, however, that the national standard can only apply
“provided that ... the primacy, unity and effectiveness of EU law are not thereby compromised.”22. If
the application of a national standard would compromise the “primacy, unity and effectiveness” of EU law, the EU standard is the maximum standard, which sets aside national standards even if they are higher; this second condition merits further reflection, but I first make some
remarks on the case of co-applicability of national and EU standards.

If there is sufficient discretion for Member States in the implementation of EU law—or if
EU law otherwise allows for diversity—primacy, unity and effectiveness are not at stake. Such
discretion and diversity exist when a directive can be implemented in various ways, such as in
cases of minimum harmonisation, or explicit references to national standards;30 or if
primary law allows for differentiation on the basis of national standards, as is the case in the
restriction of free movement rights.31 Another example close to the issues at stake in Melloni is
the “public policy” exception in secondary law as we find it in the area of civil law in the Brussels
I Regulation, which can be invoked to refuse recognition of a judgment “if such recognition is
manifestly contrary to public policy in the Member State in which recognition is sought.49 The Court of Justice has stated that the standard of proof that this burden must be met is one that is "higher than the ordinary standard of proof" and requires "special attention" to the circumstances of the case.50

The "primary, unity and effectiveness" exception to fundamental rights applies only when a piece of EU law is a statute that applies or should apply uniformly throughout the European Union. This leads us to reflect on the threshold expression "primary, unity and effectiveness", which is enunciated in Melloni and has rarely been used before.51 This has the potential to become a magic formula.52 The novelty of the formula here resides in the element of "unity" in combination with primary and effectiveness—a renovation of the more classic expressions "uniformity" or "uniform effect".

Seemantically, the difference might be significant, since "the unity of EU law is not immediately at stake if there is no "uniformity.""53 The best example of this might be in the field of public interest exceptions to the free movement provisions; as found in Inomata, where the court held that uniformity in the protection of fundamental rights that restrict free movement is not required.54 This is not, however, cause for optimism about the constitutional diversity which the court allows in the Union, by speaking of "unity" rather than "uniformity": one swallow does not make a summer.

First, the court itself, within two paragraphs, switches back from the "unity" of EU law at [60] to the "uniformity" of EU law at [61]—which is the language of 1970 (Internationale Handelsgeellschaft).55

Secondly, in contrast to that of the economic free movement rights, the context of second-level legislation is different. The relevant provisions of the EAW Framework Decision can be interpreted in Melloni require "uniformity", rather than "unity"; as we saw, the possibility of allowing fundamental rights exceptions in the application of the relevant provisions is rejected. The court's explanation is that the Framework Decision aims to establish uniformity, and that the court takes at face value: no cases covered by the letter of art.4(1) of the Framework Decision could ever be an infringement of a fundamental right. This unchristian acceptance of

51 A digital fork not worth in English is the publicly accessible case law of the ECJ on so-called "primary unity and effectiveness" leads to the result that it was not used in this particular combination prior to Melloni, and that has been seen as explained (ECJ T-283/12 [March 6, 2014] at [12]): the expression "unity and effectiveness" (of community law or treaties) was used in Commission v. Republique dominicaine (C-330/03 [2005] [197] C.ER. 3) [1986] 3 CMLR at [11]; Minerva (C-307/94) [1996] 1 C.ER. 253 at [11]; the notion of "unity and effectiveness" (of the Community treaties) was used in the Breda Court of First Instance (C-9/03) [2005] 3 CMLR at [11]. In the present case, the "unity of European Union law" was used in Azaro Nieder (C-290/05) [2006] 6 CMLR at [11]; and in the 2009 Framework Decision (C-57/09) [2010] 9 CMLR at [11].
52 On the differences between the "unity" case law; see e.g., Fall, "Case—Law—Law—Case—Law—Law" (2008) 2008 1; and for an Illustration of how the Court of Justice of the European Union Constru (Legal Argument)" (2013) 2 European Constitutional Law Review 285.
53 This would be analogous to the distinction made by A.G. Kolintz in his Opinion in Strup (C-57/12/RX-E.11/E.15 15-13 [March 29, 2014]) in his definition of "the unity and consistency" of EU law as a general review order (art.245) and (3) E.105. It must be found that this unity of European law is manifestly affected, in particular, when the General Court has misconstrued rules or principles of EU law which have particular importance whereas the consistency of EU law is already affected where the General Court has misconstrued existing case law of the European Union.
54 See Inomata (C-24/02) [2004] 6 CMLR at [69].
55 Melloni (C-9/03) [2005] 3 CMLR at [20].
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Advocate General comes to the conclusion that they are not [at [317]-[415] of the Opinion]. To that effect, he states:

"Apart from the fact that the determination of what constitutes the 'essence' of the right to defend oneself remains contested in the Tribunal Constitutional, the King's Spanish identity is not at stake in the hearing, relying inter alia on the exceptions in Spanish law to the holding of a retrial following a judgment rendered in absentia, that the participation of the defendant at his trial is not covered by the concept of the national identity of the Kingdom of Spain."

This is a rather unconvincing approach on both counts.

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

Holding subsequently that it was "the Kingdom of Spain itself" that had stated that rights of the defence in a trial in absentia do not belong to the national identity of Spain is rather naïve. It was the government speaking, not the Member State—the same government that had violated its Constitution (as it was then interpreted) when agreeing to the Framework Decision. The situation was similar to that faced by the Court of Justice in Landtová,26 where the Czech Government had a fundamental—and outspoken—constitutional conflict with the Czech Constitutional Court.27 One would expect the Court of Justice to be alert to such problems. Perhaps the court avoided getting into the quagmire of arbitrating between national constitutional institutions by avoiding the issue of constitutional identity altogether—but it had got itself into it already by total deference to the Council's (i.e., the Member State government) intentions with the 2009 Framework Decision. Indeed, the Council in its (in case exclusive) legislative function had stated an important task to respect national constitutional identities. This could possibly legitimate deference by the court towards the legislature. However, when the Court cannot do so because one of its members chooses to act in conflict with a constitutional obligation, resulting in a failure for the European Union to respect its obligation under art 4(2) TFEU, such deference is problematic.

A different way to look at the court's silence on the issue of constitutional identity is that this may still be an option out of future constitutional conflict in the context of art 53 of the Charter.28 This would lead to a quite different understanding of primacy: although EU primacy is the "normal" case of a conflict between a national and an EU fundamental rights standard, this would occur if the national standard pertains to constitutional identity of a Member State; and this escape route of constitutional identity is left open in Melloni.29

The Charter states that the European Union and the Member States shall respect the primacy of the Charter. This means that, unlike art 53 of the Charter only applies to the uncontroversial case of Member State discretion, but the higher national standard can only apply when national constitutional identity is at stake. In this last case, it is not art 53 of the

26 Opinion of the Advocate General in Melloni (C-399/09) (2011) ECR 1011, ECJ, 8 April 2011, para 92, [93].
28 C-399/09 Landtová v. Czech Republic, para 92, [93] (the Court held that only a court of the Member State can be responsible for the determination of the national identity of the kingdom of Spain).
29 Melloni judgment (C-399/11, 2013) 50 C.M.L R, 1215.

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

The judicial dialogue

The Court of Justice's Melloni judgment has been received critically in the literature, in particular as regards the quality of the court's reasoning, which has been characterised by one German scholar with epithets such as "a too global analysis", "astonishing", "an inadequate approach of the problem", "unsounded", "half-hearted".30 On the quality of the judicial dialogue on the part of the Court of Justice, a Spanish scholar cautiously remarked that "the institutional empathy shown by the court is equivalent to that of a potato";31 he remarked on "the striking absence of a balanced assessment of the arguments put forward by the referring court, which is a prerequisite of legal empathy": "if there is any clear manifestation of deadness or the Asperger syndrome of the Court of Justice, it is this."32 However, the reproach of a refusal to engage in a serious dialogue was made to the Spanish Constitutional Court too, notably in the concurring opinion of Judge Encarnación Roca Trías in the follow-up judgment, in which she complains that the majority failed to engage in "an effective and not merely apparent judicial dialogue".

The series of judicial utterances in Melloni ended with the Spanish Constitutional Court generally lowering the standard of protection previously provided by art 24 of the Spanish Constitution, both in cases of surrender within the European Union and in cases of extradition to any other non-KU state.33 The Constitutional Court found a basis for doing so in an important provision of the Spanish Constitution, which provides that:

"The norms concerning fundamental freedoms and liberties recognized by the Constitution shall be interpreted in conformity with the universal Declaration of

31 Roger (2011) 50 C.M.L R, 1215.
35 Rodriguez, "Cuestor De Una Muerte Anunciada. Summary A. La Sentencia Del Tribunal De Justicia (Sala 3), de 26 de Febrero de 2013, Stefan Melloni, C-399/11 (2013). Revista General De Derecho Europeo 30, 36: "La empatía constitucional mostrada por el T, similar evidentemente a la de tribunales de primera instancia federados en E.U.A."
36 Marín Rodríguez, "Cuestor De Una Muerte Anunciada. Summary A. La Sentencia Del Tribunal De Justicia (Sala 3), de 26 de Febrero de 2013, Stefan Melloni, C-399/11 (2013). Revista General De Derecho Europeo 30, 36: "The Constitutional Court has shown empathy".
37 This was rejected in some of the concurring opinions to the judgment of the Tribunal Constitutional.
Human Rights and with international treaties and agreements on the same matter ratified by Spain.

This provision—art.12(1) of the Constitution—also takes on board EU law whenever that is relevant to the Spanish legal order. As the Court of Justice acknowledged in its considerations of the admisibility issue, it is precisely in the autonomous interpretation by the Spanish Constitutional Court of the meaning of the Spanish Constitution's provisions relevant to the Mollen case that the Court of Justice's interpretation of the Charter and the RAW Framework Decision comes in; that is to say, within the autonomous interpretation by the Constitutional Court of national constitutional law.

This setting can also explain why the Constitutional Court found it legitimate to "supplement" its interpretation of the Constitution with its remarks about the prevalence of the Spanish Constitution in cases where EU law would conflict with it. For all intents and purposes, this means that if EU law conflicts with the fundamental rights standard of the Spanish Constitution, and this conflict cannot be solved otherwise, the latter will prevail. In sum, the interpretation of art.53 of the Charter by the Court of Justice in Mollen will not, if it really came to it, be followed by the Constitutional Court. That this is not a fanciful interpretation of the Constitutional Court's final judgment in Mollen is witnessed by the concurrent opinion of Justice Encarnación Roca Trías, which criticises the majority precisely for making this interpretation at least possible if not the only one intended. For her, the dialogue would have been successful if the Constitutional Court had simply accepted and followed the line of reasoning of the Court of Justice, even though that would seem to be the one-way traffic of "obedience" rather than a plurilateral "dialogue."

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

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

Conclusion

The Precaution to the EU Charter of Fundamental Rights states that the Union "places the individual at the heart of its activities". That is not apparent from the Court of Justice's judgment in Mollen. The court was evidently less concerned with protecting the fundamental rights of individuals granted by primary law than with safeguarding the intentions of the legislators, notably governments, when they made secondary legislation.

To ensure for the primary of secondary law, even though it was not directly effective, led to a mode of judging which is more like that of making a statement than that of careful consideration of various arguments. As the court's later judgment in Strasbourg makes clear, in an obiter dictum, citing Melloni as authority, the objective of fundamental rights protection is not the concern for the rights of the individual but, "the need to avoid a situation in which the level of protection of fundamental rights varies according to the national law involved in such a way as to undermine the unity, primacy and effectiveness of EU law."

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

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

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

In terms of the general constitutional situation in Europe, we may understand this state of affairs in terms of shifts within constitutional paradigms. The paradigm of rights prevailing in post-war Western European states, and in Middle and Eastern European Member States since the fall of the Berlin Wall, is in the context of European integration shaped by the paradigm that dominated the "long 19th century" of European constitutionalism, that of power allocation: the primacy of the Court of Justice is the main concern of the Court of Justice not only in the age of the early establishment of EU law (the 1960s and 1970s) but even in the 21st century. This may explain the strongly doctrinaire reflex in Mollen that fits into a line of more or less recent cases like Winter Witten, of the polemic tone contrasts with the more ironic, accommodating and conciliatory approach of Omega and Soym-Wittgenstein. It may also be an indication that the constitutional paradigm of the 21st century will unavoidably be that of neither rights nor powers in the exclusive terms it had in the 19th century, but that of relations between constitutional orders.

47 Strasbourg (C-206/12) March 6, 2014 at [31]-[32].
48 So, White, "Article 53 of the Eu Charter of Fundamental Rights (2014).", 19.2014. Similarly, Opinion of A.G. Bot in Hoffmann-Landis (C-385/13) (2015) C M.B.E. 43 at [19]. The Charter thus covers the effect of requiring Member States to have the level of protection of fundamental rights guaranteed by their national constitutional in cases which fall outside the scope of European Union law. Article 53 of the Charter also expresses the idea that the adoption of the Treaty should not serve as a pretext for a Member State to reduce the protection of fundamental rights in the field of "primary" or "national law."
49 Strasbourg (C-206/12) March 6, 2014 at [31]-[32].
50 See Muys, "Article 53 of the Eu Charter of Fundamental Rights (2014).", 19.2014. Similarly, Opinion of A.G. Bot in Hoffmann-Landis (C-385/13) (2015) C M.B.E. 43 at [19]. The Charter thus covers the effect of requiring Member States to have the level of protection of fundamental rights guaranteed by their national constitutional in cases which fall outside the scope of European Union law. Article 53 of the Charter also expresses the idea that the adoption of the Treaty should not serve as a pretext for a Member State to reduce the protection of fundamental rights in the field of "primary" or "national law."