Paths of Dialogue Between the ECJ and Constitutional Courts on Fundamental Rights Protection: A Still-Puzzling Scenario

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I. INTRODUCTION

The relationship between the national constitutional courts and the European Court of Justice (ECJ) is one of the classic topics of European Constitutional Law that has marked one of the most meaningful stages of

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EU integration,[1] and is the inevitable result of the struggle for supremacy between supreme interpretive authorities of different legal orders in a pluralistic,[2] multilevel[3] or interconstitutional[4] context.

Starting with the *Ammistrazione Delk Finanze Dello Stato v. Simmenthal S.P.A.* case,[5] one can argue that even if this story has witnessed earlier instances of intense infighting, until the Treaty of Lisbon, the relationship between supreme courts has been characterized by a sort of armed peace. Based on the fact that even if the alliance between the ECJ and state courts, in the name of the supremacy of EU law, had challenged the role of constitutional courts, the latter maintained their role "as guardians of the constitutions and as the ultimate interpreters of human rights."[6]

Nevertheless, after the entry into force of the Lisbon Treaty and within the context of the Euro Crisis, the interaction between supreme courts has flared up again and a new chapter of the so-called "judicial dialogue" seemed to have been opened.

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1. Starting from the early jurisprudence in Case 6/64, Costa v. Enel, 1964 E.C.R. 585, which affirmed the supremacy of EU law, until the most recent decisions of the Bundesverfassungsgericht in the *Solange*, *Maastricht*, *Banana*, and *Lisbon Urteil* cases, and even the recent case law on economic governance: the *Pringle* case of the Irish High Court, the decision on the EMS, and the OMT of the Bundesverfassungsgericht. Case C-370/12, Pringle v. Government of Ireland, 2012 Eur-LEX CELEX 62012CJ0370; BVerfG, 2 BvE 5/08, June 30, 2009; BVerfG, 2 BvL 1/97, June 7, 2006; BVerfG, 2BvR 2134/92, Oct. 12, 1993; BVerfG, 2 BvR 187/83, Oct. 22, 1986.

2. *See, e.g.*, Miguel Poiares Maduro, *Three Claims of Constitutional Pluralism*, *in* CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND 67, 68 (Matej Avbelj & Jan Komárek eds., 2012); Miguel Poiares Maduro, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, 1 EUR. J. LEGAL STUD. 1, 1 (2007), http://ejls.eu/2/25UK.pdf; *see also* NEIL MACCORMICK, QUESTIONING SOVEREIGNTY: LAW, STATE AND NATION IN THE EUROPEAN COMMONWEALTH 98 (2002); Jan Komárek, *European Constitutional Pluralism and the European Arrest Warrant: Contrapunctual Principles in Disharmony* 5 (N.Y. Univ. Sch. of Law Jean Monnet Working Paper No. 10, 2005), http://www.jcanmonnetprogram.org/archive/papers/05/051001.pdf; Neil Walker, *The Idea of Constitutional Pluralism*, 65 MOD. L. REV. 317, 319 (2002). For the different pluralistic theories, see KLEMEN JAKLIC, CONSTITUTIONAL PLURALISM IN THE EU (2013).

3. About the concept of multilevel constitutionalism, see Ingolf Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-Making Revisited*, 36 COMMON MKT. L. REV. 703, 707 (1999); Ingolf Pernice, *Multilevel Constitutionalism in the European Union*, 27 EUR. L. REV. 511, 514 (2002).

4. Leonard Besselink, *Multiple Political Identities: Revisiting the "Maximum Standard," in* CITIZENSHIP AND SOLIDARITY IN THE EUROPEAN UNION—FROM THE CHARTER OF FUNDAMENTAL RIGHTS TO THE CRISIS, THE STATE OF THE ART 235, 236 (Alessandra Silveira et al. eds., 2013).

5. Case C-106/77, Ammistrazione Delle Finanze Dello Stato v. Simmenthal S.P.A., 1978 E.C.R. 00623.

6. AIDA TORRES PEREZ, CONFLICTS OF RIGHTS IN THE EUROPEAN UNION: A THEORY OF SUPRANATIONAL ADJUDICATION 41 (2009).

After 2009, the first preliminary references were issued by the German Bundesverfassungsgericht (BVerfG),[7] the Spanish Constitutional Court,[8] and the French Conseil Constitutionnel,[9] all traditionally reluctant to engage in dialogue with their European counterpart. The Italian Constitutional Court also issued the first preliminary reference to the ECJ in incidental procedures in 2013,[10] after having already used that instrument in a principal procedure in 2008,[11] but also having excluded the same possibility in case of incidental procedures. Last but not least, the Slovenian Constitutional Court issued its first preliminary reference.[12]

Moreover, constitutional courts are getting more and more involved in other kinds of informal relationships with the ECJ, not necessarily encompassed in a preliminary reference. The decision of the BVerfG in the Counter-Terrorism Database Act case,[13] in reaction to the ECJ decision in *Åklagaren v. Hans Åkerberg Fransson*, is typical of this type of indirect communication.[14] Even the argument of the U.K. Supreme Court in the *R. v. Secretary of State for Transport & Another* (*HS2*) case, quoting from the above-mentioned decision of the BVerfG to clarify the relationship between U.K. constitutional law and EU law, represents a clear example of the net of judicial interaction between different jurisdictions that legal scholars call judicial dialogue.[15]

Looking closely at this dialogue, it seems that the turning point of this new course is represented by the entry into force of the Charter of Nice[16] as a legal binding instrument having the same value as the

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7. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 14, 2014, 2 BvR 2728/13, https://www.bundeserverfassungsgericht.de/sharedDocs/Entscheidungen/EN/2014/01/vs20140114-2bur272813en.html (Ger.).

8. S.T.C., June 9, 2011 (S.T.C. No. 86/2011), http://www.tribunalconstitucional.es/en/jurisprudencia/restrad/Pages/JCCJCC262014_en.aspx (Spain).

9. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2013-314P QPC, Apr. 4, 2013, J.O. 116 (Fr.); *see also* Henri Labayle & Rostane Mehdi, *Le Conseil Constitutionnel, le Mandat d'Arrêt Européen et le Renvoi Préjudiciel à la Cour de Justice*, 3 REVUE FRANÇAISE DE DROIT ADMINISTRATIF 461, 467 (2013).

10. Corte cost., 3 luglio 2013, n. 207, Giur. it. 2013, n. 30, http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/207-2013.pdf (It.).

11. Corte costituzionale [Corte cost.] [Constitutional Court], 13 febbraio 2008, n. 102, Giur. it. 2008, n.17, http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S2008102_Bile_Gallo_en.pdf (It.).

12. Ustavno sodišče [US] [Constitutional Court of Slovenia], Nov. 6, 2014, U-I-295/13-132 (Slovn.).

13. BVerfG, 1 BvR 1215/07, Apr. 24, 2013, https://www.bundesverfassungsgericht.de/SharedDocs/Entacheidungen/EN2013/04/vs20130424-1bvr121507en.html (Ger.).

14. Case C-617/10, Åklagaren v. Fransson, 2013 Eur-LEX CELEX 62010CJ0617.

15. R. v. The Sec'y of State for Transp. & Another [2014] UKSC 3, [111] (appeal taken from Eng.), https://www.supremecourt.uk/cases/docs/uksc-2013-0172-judgment.pdf.

16. Consolidated Version of the Charter of Fundamental Rights of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 2.

treaties.[17] The new efforts of the European Union in protecting fundamental rights have resulted in an expansion of EU influence in fields that traditionally constitute the core of national sovereignty, as stated decisively in the *Lisbon Urteil* case by the BVerfG.[18] This way, the protection of fundamental rights accorded by the Charter may overlap with that provided by national constitutions and "when these rights are interpreted differently by the constitutional court and the ECJ, potential conflicts might arise."[19] It is not surprising then that constitutional courts are looking today, more than ever, for a direct interaction with the ECJ: they try to preserve their role as guardians of the respect of constitutional rights and try to avoid the marginalization that the expansion of a supranational system of fundamental rights protection may imply.

The intensification of this dialogue, rather than clarifying the relationship between the different supreme jurisdictions, highlighted the knots and unsolved tensions between the different legal orders coexisting in the EU legal framework.

The aim of this Article is to address the theme of the judicial interaction between supreme courts in the EU area in order to show that what is called dialogue is in reality a tension, a systemic contrast[20]

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17. Consolidated Version of the Treaty on European Union art. 267, Oct. 26, 2012, 2012 O.J. (C 326).

18. BVerfG, 2 BvE 2/08, June 30, 2009, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/en/2009/06/es20090630-2bve00208en.html:

> European unification on the basis of a treaty union of sovereign states may, however, not be achieved in such a way that not sufficient space is left to the Member States for the political formation of the economic, cultural and social living conditions. This applies in particular to areas which shape the citizens' living conditions, in particular the private sphere of their own responsibility and of political and social security, protected by fundamental rights, as well as to political decisions that rely especially on cultural, historical and linguistic perceptions and which develop in public discourse in the party political and parliamentary sphere of public politics. Essential areas of democratic formative action comprise, *inter alia*, citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing and all elements of encroachment that are decisive for the realisation of fundamental rights, above all in major encroachments on fundamental rights such as deprivation of liberty in the administration of criminal law or placement in an institution. These important areas also include cultural issues such as the disposition of language, the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, press and of association and the dealing with the profession of faith or ideology.

Id.

19. TORRES PEREZ, *supra* note 6, at 50.

20. Roberto Bin, *Nuove Strategie per lo Sviluppo Democratico e l'Integrazione Politica in Europa, Relazione Finale*, *in* NUOVE STRATEGIE PER LO SVILUPPO DEMOCRATICO E L'INTEGRAZIONE POLITICA IN EUROPA 497, 508 (Adriana Ciancio ed., 2013) (It.).

between supreme jurisdictions that are trying to define the boundaries of their different legal orders.

This contrast is not a pathological symptom, but is a natural consequence of the pluralistic nature of EU constitutionalism, in which no one should pretend to have the right to the last word on the superiority of one legal order over another.[21]

Of course, "since constitutional guardianship within the Union . . . has both national and European masters,"[22] disagreement may arise. The crucial question is how to address the possible conflicts arising between supreme jurisdictions without a hierarchical relationship among legal orders?

The solution is twofold: either the EU will develop into a classical federal constitutional order with a supremacy clause and a hierarchical structure, or it will remain a multilevel legal system. In the latter case, the constitutional courts and the ECJ will develop a real dialogical relationship, avoiding confrontational approaches, but being aware of the necessity of developing a cooperative approach and being open to a mutual recognition of their respective roles.

Looking at the most recent developments in the judicial dialogue, even if constitutional courts have softened their position towards the ECJ, the development of a real cooperative dialogue is still a long way away.

One might think that because there has been a significant development in the use of the preliminary reference by constitutional courts, they are adopting a more cooperative attitude towards the ECJ. However, I argue that to evaluate the cooperative approach of a court, it is not enough to consider the procedural aspects. Cooperation is both formal and substantial. Looking at the latter, we can argue that the relationship between constitutional courts and the ECJ is still dominated, in most cases, by an ultimate insistence on maintaining the right to the last word and by the fear of losing primacy in protecting constitutional rights. In other words, it seems that the ECJ and constitutional courts still lack a common language.[23] To develop this argument better, this Article will analyze two of the most significant interactions between supreme courts and their outcomes.

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21. *Id.*

22. Michelle Everson & Christian Joerges, *Who Is the Guardian for Constitutionalism in Europe After the Financial Crisis?* 1, 7 (London Sch. of Econ. & Pol. Sci. 'Europe in Question' Discussion Paper Series, Paper No. 63, 2013), http://www.lse.ac.uk/europeanInstitute/LEQS/LEQSPaper63.pdf.

23. Catherine Van de Heyning, *The European Perspective: From Lingua Franca to a Common Language*, *in* CONSTITUTIONAL CONVERSATIONS IN EUROPE 181, 198 (Monica Claes et al. eds., 2012).

In particular, this Article will examine one of the most intense cases of indirect dialogue, arising from the *Åkerberg Fransson* decision and the reaction of the BVerfG in the Counter-Terrorism Database Act case.[24] Second, this Article will consider one of the most controversial cases of a preliminary reference issued by a constitutional court.[25] The case is that of the first preliminary reference issued by the Spanish Constitutional Court, which represents a clear example of the resistance of both sides towards developing a truly cooperative approach.[26] Moreover, this Article will address the puzzling position of the Austrian Constitutional Court, which affirmed that the rights of the Charter of Nice constitute a standard of review in proceedings of constitutional complaints.[27] The selected cases, as it will be argued in the concluding remarks, shed light on the still problematic relationship between supreme courts, and on the fact that the game of protecting fundamental rights in the EU is destined to be played out in the context of a fragile equilibrium, which has to be developed case by case and through a constant process of dialogue over time.

II. A TERMINOLOGICAL REMARK

This Article uses the term "judicial dialogue" in order to describe the different levels of interaction between supreme courts in the EU area. It is a very specific and narrow meaning of the term. Dialogue between courts is, in fact, a very widely studied topic in constitutional studies, carefully examined by legal scholars.[28] As Guiseppe De Vergottini

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24. Case C-617/10, Åklagaren v. Fransson, 2013 Eur-LEX CELEX 62010CJ0617; BVerfG, 1 BvR 1215/07, Apr. 24, 2013, https://www.bundesverfassungsgericht.de/SharedDocs/Entacheidungen/EN2013/04/vs20130424-1bvr121507en.html (Ger.).

25. S.T.C., Feb. 13, 2014 (S.T.C., No. 26), http://www.tribunalconstitucional.es/en/jurisprudencia/restrad/Pages/JCCJCC262014_en.aspx (Spain).

26. Id.

27. Verfassungsgerichtshof [VfGH] [Constitutional Court], Mar. 14, 2012, U 466/11-18, https://www.vfgh.gv.at/cms/vfgh-site/attachments/9/6/0/CH0006/CMS1353421369433/grundrechtecharta_english_u466-11.pdf (Austria).

28. *See, e.g.*, SABINO CASSESE, I TRIBUNALI DI BABELE, (Donzelli 2009) (It.); Brian Flanagan & Sinéad Ahern, *Judicial Decision-Making and Transnational Law: A Survey of Common Law Supreme Court Judges*, 60 INT'L & COMP. L.Q. 1, 23 (2011); ELAINE MAK, JUDICIAL DECISION-MAKING IN A GLOBALISED WORLD: A COMPARATIVE ANALYSIS OF THE CHANGING PRACTICES OF WESTERN HIGHEST COURTS 80 (2013). For the specific dialogue within the EU space, see Giuseppe Martinico, *Judging in the Multilevel Legal Order: Exploring the Techniques of 'Hidden Dialogue,'* 21 KING'S L.J. 257, 258 (2010); Giuseppe Martinico & Filippo Fontanelli, *The Hidden Dialogue: When Judicial Competitors Collaborate*, GLOBAL JURIST, Oct. 2008, at 1; Marta Cartabia, *Taking Dialogue Seriously: The Renewed Need for a Judicial Dialogue at the Time of Constitutional Activism in the European Union* 5 (N.Y. Univ. Sch. of Law

argued in his fundamental book on the theme, when the phrase "judicial dialogue" is used, it could be describing very many different things.[29] No one can deny that some of the effects of globalization are the spread of the interaction between jurisdictions; the circulation of models and solutions to the same problems; cross-fertilization between legal orders; and transjudicial communication. In this context, the term "judicial dialogue" has been mainly considered to describe the use by judges in a decision of quotations from the jurisprudence or normative texts belonging to other jurisdictions, different from that in which the judge's decision will have effect.[30]

Within this general definition, it can distinguish different levels of judicial dialogue. One distinction is between the dialogue that takes place between courts acting in a supranational system, which can discern a sort of vertical relationship (but not hierarchical), as opposed to the type of dialogue that takes place between courts acting in a different legal order but in the same position (different national constitutional courts, for example).[31]

The scope of this Article deals with this first kind of interaction and with very specific cases: it will consider, in fact, only the relations between the ECJ and national constitutional courts. Of course, in considering just the relationship between the ECJ and other supreme courts, other sources of interaction are left aside, for example, between the ECJ and all the other judges, even those belonging to higher jurisdictions or between the ECHR and constitutional courts, but there are various reasons for this choice.

First, while the relationship between the ECJ and the lower national courts has developed "peacefully," thanks to the use of the preliminary reference ex article 267 of the Treaty on the Functioning of the European Union (TFEU) in a sort of alliance, this was not the case in the dialogue between the constitutional courts and the ECJ.[32] With the exception of some constitutional courts that have been cooperative since the very beginning (the Belgian Constitutional Court, for example), others, like the Italian Constitutional Court and the French Conseil Constitutionnel, have been reluctant to engage in a relationship with their European

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Jean Monnet Working Paper No. 12, 2007), http://jeanmonnetprogram.org/wp-content/uploads/2014/12/071201.pdf.

29. GIUSEPPE DE VERGOTTINI, OLTRE IL DIALOGO TRA LE CORTI 7 (2010).

30. *Id.*

31. *See* Allan Rosas, *The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue*, 1 EUR. J. LEGAL STUD. 1, 5 (2007), http://www.ejls.eu/2/24UK.pdf.

32. *See Annual Rep. of the E.C.R. for 2014*, in particular figure n. 20, at 119 http://curia.europa.eu/jcms/upload/docs/application/pdf/2015-04/en_ecj_annual_report_2014_pr1.pdf.

counterpart, and for years, they did not consider themselves a "court or tribunal" within the meaning of article 267 TFEU. Other courts, like the German BVerfG, have shown an uncooperative approach to the ECJ by avoiding making a preliminary reference, yet engaging in an indirect dialogue with the ECJ.[33]

The second reason that makes this topic relevant is related to the aforementioned fact that the interaction between supreme courts at the supranational level transcends the issue of globalization and crossfertilization, involving more profound themes that concern constitutional pluralism, the relationship of legal orders, and the nature of the European Union itself. As has been argued, judicial interaction "represents a privileged perspective for studying the relations between intersecting legal orders, especially when looking at the multilevel and pluralistic structure of the European constitutional legal order."[34]

In other words, what is at stake is the never-ending debate about state sovereignty within the European Union, the nature of the European Union itself, and the definition of the respective spheres of competence,[35] in which the constitutional courts are deeply involved as supreme interpretive authorities within the national context.

In this context of constitutional complexity, the concept of judicial dialogue has an added value: it permits the management of conflicts over time in a process of constant, mutual accommodation without pretending to affirm the superiority of one legal order over another.[36] In other words, this Article argues that the ultimate issue of "who has the last word" within the EU legal system ought to be left open: the relationship between EU and national courts cannot be explained in hierarchical terms, but instead as a continuous exchange of points of view, which "harbours a sort of mechanism of facing mirrors."[37] The concept of judicial dialogue is the best instrument to achieve this.

III. ONE DIALOGUE OR MANY DIALOGUES?

After having defined the concept of judicial dialogue assumed by this Article, it highlights that it is improper to address the theme as singular. Looking at the different ways in which constitutional courts

33. The BVerfG case law from *Solange* to *Lissabon* is a clear example of indirect dialogue with the ECJ.

34. Martinico & Fontanelli, *supra* note 28, at 2.

35. This issue concerns the so-called "federal question," already evoked by Piet Eeckhout after the proclamation of the Charter of Nice. *See* Piet Eeckhout, *The EU Charter of Fundamental Rights and the Federal Question*, 39 COMMON MKT. L. REV. 945, 946 (2002).

36. Bin, *supra* note 20, at 508; *see also* TORRES PEREZ, *supra* note 6, at 183.

37. JEAN-BERNARD AUBY, LA GLOBALISATION, LE DROIT ET L'ETAT 111 (2010).

interact with the ECJ, it is better to speak in the plural about many dialogues.

The interaction between the ECJ and the national constitutional courts has been developed "one to one," on a voluntary basis and progressively in time. Each court has demonstrated a peculiar sensibility toward European integration over time and, in many cases, there has been an evolution in their approach toward the EU legal order and their interaction with the ECJ.

The Belgian Court, for example, since its first preliminary reference in 1997, has been the most prolific Constitutional Court in using the preliminary reference (in 2014, up to thirty preliminary references).[38] In addition, the Austrian Verfassungsgerichtshof has used the preliminary reference in a friendly relationship with the ECJ (five references by 2014).[39]

On the contrary, the Italian Constitutional Court, the French Conseil Constitutionnel, and the Spanish Constitutional Court have asserted that they were not entitled to refer a question to the ECJ, since they were not courts or tribunals according to article 267 of the TFEU.[40] In time, however, this position has changed. In 2008, the Italian Constitutional Court issued its first preliminary reference,[41] and the Spanish[42] and French[43] supreme courts did the same, respectively.

The evolution of the BVerfG was different still. It engaged in dialogue at a distance with the ECJ starting with the famous *Solange I*,[44] *Solange II*, *Maastricht*, *Lisbon*, and *Honeywell* cases, attempting to define the boundaries between the national and European legal order, until the latest decision on *Outright Monetary Transaction* (OMT) through which the court used the instrument of the preliminary reference for the first time in a very particular, challenging way.[45]

The constitutional courts of Eastern Europe, such as Poland and the Czech Republic, have also evolved in their own way. They have developed jurisprudence that is very critical of the European Union and

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38. Annual Rep. of the E.C.R., *supra* note 32.

39. *Id.* at 120.

40. Consolidated Version of the Treaty on the Functioning of the European Union art. 267, May 9, 2008, 2008 O.J. (C 115) 16 [hereinafter TFEU].

41. Corte cost., 3 luglio 2013, n. 207, Guir. It. 2013, n. 30, http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/207-2013.pdf (It.).

42. S.T.C. June 9, 2011 (S.T.C. No. 86/2011), http://www.tribunalconstitucional.es/en/jurisprudencia/restrad/Pages/JCCJCC262014_en.aspx (Spain).

43. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2013-314 QPC, Apr. 4, 2013, J.O. 116 (Fr.).

44. BVerfG 2 BVL 52/71, May 29, 1974.

45. 2 BvR 2728/13 (Ger).

the ECJ, culminating in the Czech Court's judgment, which declared the ECJ decision in *Marie Landtová v. Česká Spróva Socialniho Zabezpečoní* case as *ultra vires*.[46]

The forms of dialogue also vary significantly among the courts. Many national constitutional courts use dialogue in the very traditional sense, citing the decisions of the ECJ as a source of interpretation of national legal provisions.[47] For example, the Belgian Constitutional Court gives interpretive value to European law and to the decisions of the ECJ by establishing the meaning of constitutional provisions in order to review national measures.[48] As pointed out by the literature,

> Whether constitutional courts will explicitly refer to the Court's case law or to the Charter in their own decisions depends heavily on national traditions of referencing: the German Bundesverfassungsgericht and the [U.K.] Supreme Court, for example, have cited judgments handed down by the Court of Justice, whereas the French Conseil Constitutionnel has never quoted the European Court in its decisions.[49]

However, in this extremely varied landscape, variety depends on the political and judicial culture in which constitutional courts operate, on the functions recognized as belonging to the constitutional court, and the role and the place granted to EU law in the national legal system. Constitutional courts share a common situation: their "place in law and politics has been significantly transformed"[50] after the coming into force of the Charter of Nice and the strengthening of the EU commitment to protecting fundamental rights, and their role as guardian of constitutional rights has been challenged by a significantly broader interpretation of the ECJ as a human rights adjudicator.[51]

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46. Nález Ústavního soudu ze dne 31.01.2012 (ÚS) [Decision of the Constitutional Court of Jan. 31, 2012], Pl. ÚS 5/12 (Czech); Case C-399/09, Marie Landtová v. Česká Správa Socialního Zabezpečení, 2011 E.C.R. I-05573.

47. *See* Maartje DeVisser, *Natiqual Coustitutional Courts: The Court of Justice and the Protection of Fundamental Rights* (Post Charter Landscape, Research Paper No. 47, 2013).

48. *Id.* at 4.

49. Maartje deVisser & Monica Claes, *Courts United? On European Judicial Networks*, *in* LAWYERING EUROPE: EUROPEAN LAW AS A TRANSNATIONAL SOCIAL FIELD 87 (Antoine Vauchez, Bruno deWitte eds., 2013).

50. Jan Komárek, *Why National Constitutional Courts Should Not Embrace EU Fundamental Rights* 2 (London Sch. of Econ., Soc'y & Econ. Working Paper No. 23, 2014), http://papers.ssrn.com/su/3/papers.cfm?abstract_id+2510290.

51. Grainne De Búrca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*, 20 MAASTRICHT J. 168, 169 (2013).

IV. THE "SHIFTING SANDS" OF THE PROTECTION OF FUNDAMENTAL RIGHTS AFTER THE ENTRY INTO FORCE OF THE CHARTER OF NICE

The new phase of interaction between supreme courts has mostly been played out on the field of the protection of human rights, which seems to be a recurrent issue.

Moreover, this is not by chance: as already mentioned, the entry into force of the Charter of Nice has introduced a new binding source of rights that may overlap with those enshrined in the states' constitutions. It has forced the evolution of the ECJ toward being a "human rights adjudicator,"[52] setting up a basis for a new phase of judicial activism focused on the protection of fundamental rights and introducing a complex area of overlap between the ECJ and the constitutional courts.[53]

Even before the entry into force of the binding Charter, the jurisdiction of the ECJ over fundamental rights issues had developed through unwritten, general principles and primarily from the impulses of the member states. It was the insistence of the German courts that EU law respect fundamental rights, which was the original motivation for the protection of fundamental rights in the EU, and that was reflected in the ECJ's early jurisprudence in *Erich Stauder v. City of Ulm* and *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittes*.[54] Nevertheless, the advent of the Charter has written a new chapter in the relationship between the ECJ and national constitutional courts. In fact, while in the field of the protection of human rights, the latter traditionally serve the first, because the ECJ is a court of general jurisdiction, the application of EU law has recently carved out a margin of action for the ECJ itself in the field, reinforcing its nature as a human rights tribunal. As Gráinne De Búrca shows, the number of cases involving substantive human rights claims remained low for the first decades of the ECJ's jurisprudence: "[a]lthough this number has increased over the past decade or so since the Charter was first drafted, it is really since the coming into force of the Charter that there has been a sharp rise in the number of cases invoking human rights claims."[55]

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52. *Id.* at 169.

53. *See* Aida Torres Perez, *The Challenges for Constitutional Courts as Guardians of Fundamental Rights in the European Union*, *in* THE ROLE OF CONSTITUTIONAL COURTS IN MULTILEVEL GOVERNANCE 49, 63 (Patricia Popelier et al. eds., 2013).

54. Case C-23/69, Erich Stauder v. City of Ulm, 1969 EUR-Lex CELEX 61969CJ0029; Case C-11/70 Internationale Handelsgesellschaft mbH v. Einfuhr, 1970 EUR-Lex CELEX 61970CJ0011.

55. De Búrca, *supra* note 51, at 170.

This, however, is only part of the story. The growth of the ECJ's role as a human rights adjudicator is also a consequence of the continued expansion of the scope of EU law and policy: "[a] significant part of the EU's legislative corpus now covers areas such as immigration and asylum, security and privacy, alongside many of the more traditional fields of EU policy, including competition and market regulation."[56] Moreover, "[f]undamental rights permeate other policy fields; every new legislative proposal is vetted for compliance with the 'fundamental rights check-list,' can be interpreted in light of the Charter rights and even struck down by the [Court of Justice of the European Union (CJEU)] for failure to accord due respect to fundamental rights."[57]

The evolution of the European Union as a community of rights and not only as a market has challenged the traditional monopoly of the constitutional courts in protecting human rights in the domestic domain. As Daniel Sarmiento pointed out, "the role of the Charter as a paramount reference of EU law grants new interpretive powers to the CJEU, but it does so in an area much cherished by national constitutional courts."[58]

One of the main problems relates to the scope of application of the Charter of Nice and its possible overlap with national catalogues of fundamental rights. This is the reason why the protection of fundamental rights is the most contentious issue and akin to shifting sands for all who try to approach it.

In particular, within the multilevel context of the protection of fundamental rights, one of the main issues still debated between the ECJ and the national constitutional courts is the definition of the respective boundaries of action in fundamental rights protection.[59] One of the most discussed aspects deals with a sort of structural ambivalence on the issue of human rights itself. The concept encompasses both a universal dimension and a local one: the first deals with the universal core of fundamental rights, and the second with their historical and cultural incarnations in particular legal contexts.

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56. *Id.* at 169.

57. Maartje de Visser, *National Constitutional Courts, the Court of Justice and the Protection of Fundamental Rights in a Post-Charter Landscape* (Oxford Legal Studies, Research Paper No. 47, 2013), http://papers.ssrn.com/so/3/papers.cfm?abstract_id=2319670.

58. Daniel Sarmiento, *Who's Afraid of the Charter?, The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe*, 50 COMMON MKT. L. REV. 1267, 1268 (2013).

59. Xavier Groussot, Laurent Pech & Gunnar Thor Petursson, *The Scope of Application of Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication* (Czech Soc'y for Eur. & Comp. L., Erik Stein Working Paper, No. 1, 2011), http://www.era-comm.eu/charter_of_fundamental_rights/kiosk/pdf/eu-adjudication.pdf.

The Charter of Nice contains a similar tension and "appears to embody two competing and almost contradictory impulses: one of a common Union, universality and unity; and another of diversity, particularity and the several traditions of the constituent parts of the whole."[60]

In other words, the Charter attempts to balance the tension between commonality and difference and to respect the existing balance between the EU and the member states' legal orders. The borderline between such a pluralistic framework, the supreme law being both applicable and the last interpretive authority, is not easy to discern.

This tension is clearly reflected in the definition of the field of application of the Charter, found in article 51, which states, "[T]he provisions of this Charter are addressed to the . . . Member States only when they are implementing Union law."[61] Such a formula does not help in unraveling the knot, since its interpretation is highly controversial.

Before dealing with the textual interpretation of this formula, it would be useful to highlight the main aspects of well-known ECJ doctrine on the scope of the application of fundamental rights (and specifically of the general principle of EU law), developed before the adoption of the Charter of Nice. Two paradigms were affirmed by the ECJ: the member states are bound to respect EU fundamental rights only when they implement EU law[62] or when they derogate from EU law.[63]

The literal formula of article 51 seems, prima facie, to restrict the scope of application of the Charter fundamental rights in respect to the previous jurisprudence: as noted, "the drafters were overly concerned with the risk of the Charter being used to erode Member States' competences, and they made it redundantly clear that the Charter would only affect the action of the EU."[64]

Nevertheless, the true meaning of this formula is debated in the doctrine, and even the ECJ's jurisprudence has not been unambiguous. First of all, the explanations of the Charter[65] seem to lead to a broader interpretation, stating that the Charter is binding on member states acting

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60. Paolo Carozza, *The EU Charter of Fundamental Rights and the Member States*, *in* THE EU CHARTER OF FUNDAMENTAL RIGHTS: POLITICS, LAW AND POLICY 35, 35–36 (Steve Peers & Angela Ward eds., 2004).

61. Filippo Fontanelli, *The Implementation of European Union Law by Member States Under Article 51(1) of the Charter of Fundamental Rights*, 20 COLUM. J. EUR. L. 193, 200 (2014).

62. Case C-5/88, Wachauf v. Federal Republic of Germany, 1989 E.C.R. 2609, 2639.

63. Case C-260/89, Tileorassi v. Pliroforissis, 1991 E.C.R. I-2951, 2965-66.

64. *See* Fontanelli, *supra* note 61, at 200.

65. Explanations Relating to the Charter of Fundamental Rights, 2007 O.J. (C 303/02, C 303/32).

"within the scope of Union law,"[66] codifying previous ECJ case law on the binding nature of the general principle of EU law for member states.

Secondly, ECJ case law has varied. In the *Iida v. Ulm*[67] case, for example, the court seemed to confirm a stricter interpretation of article 51, applying it only when a member state is implementing union law.[68] Also in the *Kreshnik Ymeraga v. Miistre du Travail* case, the court affirmed that the refusal by a national authority to grant a right of residence as a family member of a Union citizen is not "a situation involving the implementation of [EU] law within the meaning of art. 51 of the Charter."[69]

On the contrary, in the leading case on the issue, the *Aklaagaren v. Fransson* case, the ECJ stated that, whenever Member States act within the scope of EU law, they are bound to respect the fundamental rights framed in the EU Charter and that the ECJ represents the last interpretive authority.[70] The interpretation of article 51 in one of the most recent cases, the *Siragusa v. Sicilia* case, was once again different.[71] Here the ECJ affirmed that the concept of implementing EU law demands a "certain degree of connection between national legislation and EU law itself."[72] Looking at the result of the *Siragusa* case, "the Court declared it had no jurisdiction—the Court also seems to be willing to let fundamental rights cases be decided at the national level, when there is no convincing connection to EU law which would establish its own jurisdiction."[73]

As we can see, the space given to the interpretation of the scope of article 51 is quite wide, and the concept of "implementing EU law" remains indeterminate and vague, subject to the fluctuations of the Court. This uncertain interpretation of the scope of application of the Charter has been at the center of an intense "judicial dialogue" between the ECJ and the BVerfG. These dialogues originated in the widest interpretation

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66. *Id.* ("It follows unambiguously from the case law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law (judgment of July 13, 1989, Case C-5/88, Wachauf v. Bundesamt Für Ernahrung und Forstwirtschaft, 1989 ECR 2609; judgment of June 18, 1991, Case C-260/89 ERT, 1991 ECR I-2925; judgment of Dec. 18, 1997, Case C-309/96 Annibaldi, 1997 ECR I-7493).").

67. Case C-40/11, Iida v. Ulm, 2011 EUR-Lex CELEX 62011CJ0040, ¶ 78.

68. *Id.*

69. Case C-87/12, Kreshnik Ymeraga v. Ministre du Travail, 2013 EUR-Lex CELEX 62012CJ0087, ¶ 21.

70. Case C-617/10, Åklagaren v. Fransson, 2013 Eur-LEX CELEX 62010CJ0617, ¶ 19.

71. Case C-206/13, Siragusa v. Sicilia, 2014 EUR-Lex CELEX 62013CJ0206, ¶ 24.

72. *Id.*

73. Benedikt Pirker, Case C-206/13 Siragusa: A Further Piece for the Åkerberg Fransson Jigsaw Puzzle, EUR. L. BLOG (Mar. 12, 2014), http://europeanlawblog.eu/?p=2253.

of the scope of application of the Charter, the *Fransson* case, which deserves particular attention.[74]

V. INDIRECT INTERACTION: THE OPPORTUNITY GIVEN BY THE *ÅKERBERG FRANSSON* CASE

As a representative example of the indirect relationship between the ECJ and the national constitutional courts, we cannot help but mention the reactions of the BVerfG and the U.K. Supreme Court to the *Fransson* case.[75] In this decision, originating from a preliminary ruling issued by the Swedish Haparanda Tingsrätt, the ECJ tackled the issue of the application of the Charter of Nice to domestic situations.[76] In particular, the case dealt with the right to not be convicted twice for the same action (*ne bis in idem*), as protected by article 50 of the Charter.[77] Åkerberg Fransson was convicted for tax evasion and punished with both administrative sanctions (tax penalties) and criminal proceedings.[78] The case would have fallen within the purely domestic domain if not for the fact that tax evasions are connected, in part, to breaches of obligations to declare value-added tax (VAT).[79]

According to the ECJ, even if the Swedish legislation upon which tax penalties and criminal proceedings are founded had not been adopted to transpose Directive 2006/112, it constituted an implementation in a broad sense, and therefore of EU law, for the purposes of article 51.1 of the Charter.

In fact, recalling its case law, the ECJ states that "the fundamental rights guaranteed in the legal order of the European Union are applicable in *all situations governed* by [EU] Law, but not outside such situations."[80] In particular, according to the Explanations relating to article 51 of the Charter, "[T]the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they *act in the scope* of Union law . . . ."[81]

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74. Case C-617/10, Kreshnik Ymeraga v. Ministre du Travail, 2013 EUR-Lex CELEX 62012CJ0087, ¶ 21.

75. For an interesting comment made by Emily Hancox, see *The Meaning of Implementing EU Law Under Article 51 (1) of the Charter: Åkerberg Fransson*, 5 COMMON MKT. L. REV. 1411, 1411 (2013).

76. Case C-617/10, Åklagaren v. Fransson, 2013 Eur-LEX CELEX 62010CJ0617, ¶ 12.

77. *Id.* ¶¶ 4, 14.

78. *Id.* ¶¶ 12-14.

79. *Id.* ¶¶ 26-29 (i.e., one of the sources of the EU budget and the target of the Council Directive on the common system of value-added tax).

80. *Id.* ¶ 19 (emphasis added).

81. Explanations Relating to the Charter of Fundamental Rights, *supra* note 65, at C303/32.

The argument of the ECJ is highly controversial: the Court seems to extend the early jurisprudence developed on the scope of application of general principles of law to the scope of application of the Charter. Through this operation, it seems to have broadened the literal meaning of article 51 of the Charter to every situation in which national legislation has a certain degree of connection with EU law.

At least one legal scholar has argued that the ECJ simply "took the equivalence between the scope of application of the Charter and of general principles for granted, *pace* the theories which believed that the choice of the word 'implementation' reflected a deliberated curtailment of the acquis on fundamental rights, and should be interpreted restrictively."[82] On the contrary, the Advocate General has seen this broader interpretation as an expansive use of article 51, and he warned in his opinion:

> [T]he competence of the Union to assume responsibility for guaranteeing the fundamental rights vis-à-vis the exercise of public authority by the Member States when they are implementing Union law must be explained by reference to a specific interest of the Union in ensuring that that exercise of public authority accords with the interpretation of the fundamental rights by the Union. The mere fact that such an exercise of public authority has its ultimate origin in Union law is not of itself sufficient for a finding that there is a situation involving the implementation of Union law.[83]

Contrary to the Advocate General, the ECJ affirmed that "the applicability of European Union law entails the applicability of the fundamental rights guaranteed by the Charter" and whenever member states act within the scope of EU law, they are bound to respect the fundamental rights framed in the EU Charter and that the CJEU represents the last interpretive authority.[84] The latter ruling is, in the light of our research, the most critical in that it has the possible effect of further marginalizing the role of constitutional courts in protecting human rights.

It is not by chance and not unsurprising that the BVerfG lost no time in challenging this expansion of the ECJ, engaging in a sort of dialogue at a distance. The occasion was offered to the German judges by the Counter-Terrorism Database Act, adopted by the German

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82. Filippo Fontanelli, Hic Sunt Nationes*: The Elusive Limits of the EU Charter and the German Constitutional Watchdog*, 9 EUR. CONST. L. REV. 315, 320 (2013).

83. Case C-617/10, Åklagaren v. Fransson, 2012 Eur-LEX CELEX 62010CC0617, ¶ 40.

84. *Id.* ¶ 21.

government, the legitimacy of which, in particular regarding respect of the right to privacy, was challenged in the BVerfG.[85]

A The Prompt Counter-Offensive of the Bundesverfassungsgericht

Only two months after the *Fransson* decision by the ECJ, the BVerfG handed down its decision in the Counter-Terrorism Database Act case.[86]

In its judgment on the constitutional review of the national legislation regarding the exchange of data among the police and intelligence agencies, the German court did not hesitate to answer the ECJ.[87] Affirming that the case did not constitute an implementation of Union law, the BVerfG stated that the interpretation of the scope of application of the Charter given by the ECJ in *Fransson* could have been *ultra vires*, insofar as it challenges the member states' sovereignty and the core of their constitutional identity, which encompasses the protection of fundamental rights.[88] Quoting from the decision:

> As part of a cooperative relationship . . . this decision must not be read in a way that would view it as an apparent *ultra vires* act or as if it endangered the protection and enforcement of the fundamental rights in the member states in a way that questioned the identity of the Basic Law's constitutional order.[89]

The Senate acts on the assumption that the statements in the ECJ's decision are based on the distinctive features of the law on VAT and express no general view.[90]

It is not irrelevant that the case originated from a Verfassungsbeschwerde, a direct appeal by a German citizen against the legitimacy of the Counter-Terrorism Database Act.[91] In this case, the BVerfG adroitly avoided the use of a preliminary reference, affirming that the act in question pursues nationally determined objectives that could affect the functioning of the legal relationships under EU law

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85. BVerfG, 1 BvR 1215/07, Apr. 24, 2013, https://www.bundesverfassungsgericht.de/SharedDocs/Entacheidungen/EN2013/04/vs20130424-1bvr121507en.html (Ger.).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* (emphasis added).

90. *Id.*

91. *Gesetz zur Errichtung gemeinsamer Dateien con Polizeibehorden und Nachrichtendiensten des Bunds und der Lander*, DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] (Dec. 22, 2006), http://www.bmi.bund.de/SharedDocs/Downloads/DE/Gesetzestexte/Gemeinsame_Dateien_Gesetz.pdf?__blob=publicationFile.

merely indirectly.[92] Thus, the European fundamental rights are from the outset not applicable, and the ECJ is not the lawful judge according to article 101 section 1 sentence 2 of the Basic Law (*Grundgesetz*—GG).[93]

The result of the BVerfG decision is quite controversial. The Counter-Terrorism Database Act regulates an area in which the EU has already legislated with the Directive 2006/24/CE, which has recently been declared invalid by the ECJ.

Although the German legislation is not a mere implementation of such a directive, I argue that, nevertheless, the two issues are connected to at least a certain degree. The first one, in fact, not only aims at the harmonization of data treatment among the member states, but also against terrorism. The second, even if it concerns only the German authority, establishes a database of data regarding people suspected of being involved in terrorist organizations.

In light of this, I argue that the dialogue established by the BVerfG, citing *Fransson*, was extremely confrontational and aimed to slow down the advance that the ECJ had made with *Fransson*. By affirming that the conclusion of the ECJ applies only in the particular case of VAT, the BVerfG decision was clearly aimed at avoiding the possibility of making a preliminary reference to the ECJ in the case of data protection.

As was already pointed out, the BVerfG declared that it cared about conflict prevention and promoted a hermeneutic solution in the spirit of cooperative coexistence. However, it is possible that in its decision, the court "simply attempted to rationalise its reluctance to submit the Anti-Terror Database statute to the review of the ECJ."[94] The BVerfG made a similar decision[95] involving the Telecommunications Act and that came to the same result, but used a different argument.[96] This was an act of direct implementation of Directive 2006/24/EC.[97] In that case, the Court ruled:

> [A] referral to the European Court of Justice is out of the question, since a potential priority of Community law is not relevant. The validity of Directive 2006/24/EC and a priority of Community law over German fundamental rights that might possibly result from this are not relevant to

92. 1 BvR 1215/07 (Ger.).

93. *Id.*

94. Fontanelli, *supra* note 82, at 330.

95. 1 Bur 256/08 (Ger).

96. In this case, the challenged provisions were an implementation of the Directive 2006/24/EC. However, the BVerfG avoided making a reference to the ECJ, stating that the Directive left discretion to the member states on the measures to be adopted.

97. Directive 2006/24/EC, of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications network and amending Directive 2002/58/EC, 2006 O.J. (L105).

> the decision. The contents of the directive give the Federal Republic of Germany a broad discretion. . . . With these contents, the directive can be implemented in German law without violating the fundamental rights of the Basic Law.[98]

In both cases, the BVerfG, whether the national act was a direct implementation of the directive or not, seemed to wish to maintain its monopoly as guarantor of fundamental rights and ultimate interpretive authority in Germany and neglected to admit too much intrusion by the ECJ.[99] As we will see, this is the common approach used by other constitutional courts: all of them more or less try to preserve a role in the protection of fundamental rights. This is essentially a last-ditch resistance by the constitutional courts to accepting the supremacy of the ECJ in the field of the application of EU law.

B. The Åkerberg Fransson Decision Seen from the U.K. Supreme Court

The German reaction to the *Åkerberg Fransson* case is also recalled by the U.K. Supreme Court in the *HS2* case, which concerned the procedure through which a project for the construction of a high-speed line had been approved.[100] The appellants claimed that the procedure infringed on EU law and specifically Directive 2011/92/EU.[101]

The U.K. Supreme Court decision, while it did not deal directly with fundamental rights protection, is interesting because it defined the boundaries between national and EU law.[102] In doing so, it quoted the above-mentioned German decision.[103] In the *HS2* case, the English judges stated that the supremacy of EU law is grounded on the European Communities Act of 1972. Therefore, the contrast between a constitutional principle and EU law has to be addressed by the court as a matter of constitutional law.[104] Given this premise, the U.K. Supreme Court quoted the German decision:

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98. Bundesverfassungsgericht Press Release 11/2010, Data Retention Unconstitutional in Its Present Form, Apr. 24, 2013, https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2010/bvg10-011.html.

99. *Id.*

100. *See* Paul P. Craig, *Constitutionalizing Constitutional Law: HS2* (Oxford Legal Studies Research Paper No. 45, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2460838.

101. R. v. Sec'y of State for Transp. & Another [2014] UKSC 3, [15] (appeal taken from Eng.), https://www.supremecourt.uk/cases/docs/uksc-2013-0172-judgment.pdf.

102. *Id.* ¶ 79.

103. *Id.* ¶ 111.

104. Craig, *supra* note 100, at 9.

> It appears unlikely that the Court of Justice intended to require national courts to exercise a supervisory jurisdiction over the internal proceedings of national legislatures of the nature for which the appellants contend. There is in addition much to be said for the view, advanced by the German Federal Constitutional Court in its judgment of 24 April 2013 on the Counter-Terrorism Database Act, 1 BvR 1215/07, para. 91, that as part of a co-operative relationship, a decision of the Court of Justice should not be read by a national court in a way that places in question the identity of the national constitutional order.[105]

VI. DIRECT DIALOGUE THROUGH THE INSTRUMENT OF THE PRELIMINARY RULING

The main source of dialogue among national courts and the ECJ is the instrument of the preliminary ruling ex article 267 TFEU.[106] Nevertheless, as previously mentioned, it has mainly been used by ordinary judges rather than by constitutional courts. The German, Italian, and Spanish Constitutional Courts and the French Conseil Constitutionnel have been reluctant to use this instrument of dialogue with the ECJ. The reasons for this are varied but underlying this attitude is the fear that asking for interpretive clarifications from the ECJ would have weakened their position as ultimate interpretive authorities.[107]

Only recently did the constitutional courts give in to the use of the preliminary ruling. If this new attitude suggests a new Euro-friendly phase, I argue that this is not necessarily the case.

When examining the *Melloni v. Ministerio Fiscal* saga (and the OMT case which is, however, not addressed in this Article), it is clear that the Supreme Court did not give up their claim to having the last word.[108] Rather, the preliminary reference was used to stress their role as a watchdog in respect of constitutional fundamental rights.[109]

The *Melloni* case, where the Spanish Constitutional Court, after having issued a preliminary reference to the ECJ, did not renounce its right to proclaim the validity of the counterlimits to EU expansion, is a good example of this.[110]

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105. *Sec'y of State for Transp. & Another*, [2014] UKSC 3, ¶ 111.

106. TFEU, *supra* note 40.

107. *See* Jan Komarek, *The Place of Constitutional Courts in the EU*, 9 EUR. CONST. L. REV. 432 (2013).

108. Case C–399/11, Melloni v. Ministerio Fiscal, 2013 EUR-Lex 62011CJ0399.

109. *Id.* ¶¶ 57-63.

110. S.T.C., June 9, 2011 (No. AUTO 86/2011), http://hj.tribunalconstitucional.es/en/Resolucion/Show/22561 (Spain).

A. The First Preliminary Reference of the Spanish Constitutional Court: The Melloni *Case*

Among the most reluctant constitutional courts in terms of involving the ECJ in interpreting EU law is the Spanish Constitutional Court. This Court made its first preliminary reference to the ECJ in 2011[111] on an issue concerning the interpretation of the provision of a European Arrest Warrant (EAW) Framework decision.[112] The case concerned the obligation to execute the EAW in case of conviction in absentia and its compatibility with the right to a fair trial, as provided for in the Charter of Nice.[113] Moreover, the Court asked the ECJ

> whether article 53 of the Charter must be interpreted as allowing the executing Member State to make the surrender of a person convicted in absentia conditional upon the conviction being open to review in the issuing Member State, in order to avoid an adverse effect on the right to a fair trial and the rights of the defense guaranteed by its constitution.[114]

The case originated in the *recurso de amparo* of Melloni, an Italian citizen who had been convicted in absentia by Italian judges for bankruptcy fraud, although defended by two lawyers of his choice.[115] The Court of Appeal of Bologna issued an EAW for the surrender of Melloni, who had been detained in Spain.[116] The Audencia National decided to execute the EAW and to surrender Melloni to the Italian authorities.[117] Melloni brought an individual claim to the Spanish Constitutional Court (*recuros de amparo*), claiming the violation of article 24.2 of the Spanish Constitution, which provided the right to a fair trial.[118] He argued that this right was violated because he was convicted in absentia.[119]

The Spanish Constitutional Court made a preliminary reference for the first time, after having avoided doing so in a similar case in 2009.[120] Although the Court did not explain this change in its approach to the ECJ, we can try to identify some reasons. First, I argue that the entry into

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111. *Id.*

112. *Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States*, 2002 O.J. (l 190/1).

113. *See* Luís Arroyo Jiménez, *Sobre la Primera Cuestión Prejudicial Planteada por el Tribunal Constitucional*, 4 INDRET 11 (2011), www.indvet.com/pdf/1850_es.pdf.

114. Case C–399/11, Melloni v. Ministerio Fiscal, 2013 EUR-Lex CELEX 62011CJ0399, ¶ 55.

115. *Id.* ¶ 13.

116. *Id.* ¶ 14.

117. *Id.* ¶ 17.

118. S.T.C., June 9, 2011 (No. AUTO 86/2011), ¶ 3, http://hj.tribunalconstitucional.es/en/Resolucion/Show/22561 (Spain).

119. *Id.*

120. S.T.C., Sept. 28, 2009 (B.O.E. n. 254, No. 199, p. 96) (Spain).

force of the Treaty of Lisbon forced the Court to take into account the level of protection guaranteed by the Charter of Nice. In addition, the fact that the Belgium Constitutional Court issued the reference on the EAW may have influenced the decision of the Spanish judges.[121] The first preliminary reference of the Italian Constitutional Court may have also have started a new era of judicial cooperation, followed by the other constitutional courts.

Even if the Court did not explain the reasons, it was nevertheless indicative of a new awareness of the possible overlap between the fundamental rights at the EU and national levels and of an acknowledgment by the Spanish Constitutional Court of the "authority of the ECJ as a counterpart in dialogue for the interpretation of fundamental rights interpretation."[122]

Apart from the question concerning the interpretation of the framework decision, the most relevant question issued by the Spanish Constitutional Court dealt with the interpretation of article 53 of the Charter.[123] In particular, the Court asked the ECJ if that article could be interpreted, as article 6 of the European Convention on Human Rights (ECHR) had been, as setting a minimum floor of protection that member states could overcome in providing a higher standard of protection in constitutional rights provisions.[124]

The ECJ rejected this interpretation, ruling that "such an interpretation of article 53 of the Charter cannot be accepted."[125] That interpretation would undermine the principle of the primacy of EU law inasmuch as it would allow a member state to disapply EU legal rules that are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution.[126]

Even if the ECJ seems to reject the interpretation of the Spanish Constitutional Court, its position is less strict than that of Advocate General Bot.[127] The ECJ recognized the possibility for member states to apply a higher standard of protection of fundamental rights in two

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121. Aida Torres Perez, *Spanish Constitutional Court: Constitutional Dialogue on the European Arrest Warrant*, 8 EUR. CONST. L. REV. 105, 123 (2012).

122. *Id.* at 125.

123. On this point, see Miryam Iacometti, *Il Caso Melloni e l'Interpretazione Dell'Art. 53 Della Carta dei Diritti Fondamentali dell'Unione Europea tra Corte di Giustizia e Tribunale Costituzionale Spagnolo*, OSSERVATORIO ASSOCIAZIONE ITALIANA DEI COSTITUZIONALISTI [AIC] (Oct. 2013), http://www.osservatorioaic.it/download/6hbr2RP0TScjpL6dG5vOOU8Mk6QmVAlE_acS8qs8Pro/nota-iacometti.pdf (It.).

124. C–399/11, Melloni v. Ministerio Fiscal, 2013 EUR-LEX 62011DJ0399, ¶¶ 55-56.

125. *Id.* ¶ 57.

126. *Id.* ¶¶ 57-58.

127. C-399/11, Opinion of AG, 2012 EUR-Lex CELEX 62011CJ0399.

situations: (1) when the level of protection provided by the constitutional provisions do not compromise the level of protection provided by the Charter[128] and (2) when the constitutional provisions do not undermine the unity, the primacy, and the effectiveness of EU law.[129] In other words, the ECJ confined its case law to the issue of respecting the primacy of EU law, which is an essential feature of the EU legal order, already settled in the landmark decision *Internationale Handelsgesellschaft*.[130]

Quoting from the decision:

> 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.[131]

Moreover, the argument of the ECJ touches on the specific feature of the Framework decision, and, in particular, its harmonization purpose:

> That framework decision effects a harmonisation of the conditions of execution of a European arrest warrant in the event of a conviction rendered in absentia, which reflects the consensus reached by all the Member States regarding the scope to be given under EU law to the procedural rights enjoyed by persons convicted in absentia who are the subject of a European arrest warrant. 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 . . . 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.[132]

The ECJ does not seem to show a particular sensibility towards or concern about a possible clash between the rights recognized at the EU level and rights rooted in the national constitutions. As has been pointed out, in the case of such a possible clash, the ECJ "should have been more

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128. C-399/11, Melloni ¶ 60.

129. *Id.*

130. Case 11/70, Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel, 1970 E.C.R. 1126.

131. Case C–399/11, Melloni ¶ 60.

132. *Id.*

responsive to the claims and arguments regarding rights interpretation voiced by the Constitutional court."[133]

In other words, the ECJ maintained its rock-like position, in the name of the unity and effectiveness of EU law, in some ways blind to the Spanish request to interpret the Charter along with the Spanish Constitution, or even to try to balance the different interpretations proposed by the national court. As it has been argued,

> It is not rights themselves that are important, primacy is the real issue. Fifty years after *Costaal v. ENEL*, the Court settles for absolute primacy as a greater concern than substantive rights. It is not the citizen and his rights that moves the Court, it is the primacy of EU law over national law, even non-directly effective EU secondary EU law over national constitutional law.[134]

The decision looked like a test of the strength of the European judges and presented the Spanish court with a delicate choice: either they accepted the will of the EU judges, renouncing the idea of the counterlimit in defense of the national standard of protection of fundamental rights, or they affirmed the supremacy of the constitutional standard of the protection of rights over the EU Charter, triggering an open conflict with the ECJ. The solution the Spanish Constitutional Court opted for was to a certain extent a middle course: the Spanish judges did not refuse to execute the ECJ decision but, at the same time, they reevaluated the counterlimit doctrine.

B The "Yes, but. . ." of the Spanish Constitutional Court

After the categorical answer of the ECJ, the premise of the dialogue seemed to vanish. The decision of the Spanish Constitutional Court did not seem to be friendly, and, after having celebrated the beginning of an historic dialogue with the first preliminary reference,[135] it seems that the Spanish court reverted to a sort of monologue. This is the impression that comes from reading the decision, in which the Spanish Court mentions the ECJ ruling,[136] which is not taken as a fundamental parameter or a binding precedent for the national decision.

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133. Aida Torres Perez, *Melloni in Three Acts: From Dialogue to Monologue*, 10 EUR. CONST. L. REV. 308, 318 (2014).

134. Leonard Besselink, *The Parameters of Constitutional Conflict After Melloni*, 39 EUR. L. REV. 531, 552 (2014).

135. 2 BvR 2728/13 (Ger.).

136. S.T.C., Feb. 13, 2014 (No. 26, 2014), http://www.tribunalconstitucional.es/en/jurisprudencia/restrad/Pages/JCCJCC262014_en.aspx (Spain).

Even if the Spanish judges did accept the interpretation given by the ECJ and the lowering of the national standard of fundamental rights protection, they did not mention the interpretation of the ECJ, but considered their new approach as a revival of the previous case law. In this sense, it is meaningful that the Spanish judges simply stated that the ECJ decision "will be of great use when determining the content of a right to a process with full guarantees (article 24.2 of the Spanish Constitution) deploying ad extra effects."[137] However, before affirming its new approach, the Spanish Court defined its interpretive horizon, i.e., the existence of the counterlimits:

> Before determining the content of the right to a fair trial deploying ad extra effects, we should however complete the response given in the Judgment of the European Court of Justice delivered in the Melloni case, with the criteria laid down in our Declaration [in Spanish: Declaración del Tribunal Constitucional (hereinafter DTC)] 1/2004, of 13 December.[138]

In that decision, the Court declared the existence of the counterlimits to the transfer of competences to the European Union, according to Article 93 of the Constitution. This transfer should be conducted only respecting the fundamental principles of the Spanish Constitution and, in particular, the principle of the sovereignty of the State, the constitutional structure, and the system of fundamental values and principles.[139]

After stating the existence of the counterlimits, the Court overruled its previous case law, stating that while Spanish public powers are unconditionally bound *ad intra* by fundamental rights, the binding content of fundamental rights when projected *ad extra* is more limited:

> Thus, regarding to the right to a fair trial, its content does not include all the guarantees established by Article 24 of the Spanish Constitution, but only those contents that constitute the very essence of the notion of fair trial and that, as such, can be used in the assessment of the conduct of foreign public

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137. *Id.*

138. *Id.*

139. Declaración del Plano del Tribunal Constituticional 1/2004, B.O.E. n.3, Dec. 13, 2005. Notwithstanding, the Constitutional Court also upheld:

> In the unlikely case where, in the ulterior dynamics of the legislation of the European Union, said law is considered irreconcilable with the Spanish Constitution, without the hypothetical excesses of the European legislation with regard to the European Constitution itself being remedied by the ordinary channels set forth therein, in a final instance, the conservation of the sovereignty of the Spanish people and the given supremacy of the Constitution could lead this Court to approach the problems which, in such a case, would arise. Under current circumstances, said problems are considered inexistent through the corresponding constitutional procedures.

Id. at 11-12.

> authorities, determining if necessary the "indirect" unconstitutionality of the Spanish authorities which, in fact, is the only object of our control.[140]
>
> . . . .
>
> After having referred to our case-law on indirect infringements of fundamental rights and its specific application to a fundamental right to a fair trial, we must overrule the way how this Court has construed the notion "absolute contents" of the right to a fair trial.[141]

The ECJ identified the content of the right to a fair trial with the standard of protection offered by article 6 of the ECHR, which is lower than the Spanish standard of protection.[142]

In overruling its treatment of the notion of "absolute contents," the Spanish Court did not specifically adapt its judgment to the ECJ decision, but presented its change of mind as a voluntary overruling of its previous case law, not as a reversal as a consequence of the ECJ decision.[143] In the end, the *Melloni* saga represents a clear example of the difficult and controversial relationship between the supreme national and supranational courts in the field of human rights protection.

VII. THE PUZZLING APPROACH OF THE AUSTRIAN CONSTITUTIONAL COURT IN CASE U-466/11

With such an intense dialectic activity among courts on the issue of the boundaries of the Charter of Fundamental Rights (CFR), the Austrian position looks quite singular, testifying to the fact that each court has adopted an unusual approach toward the EU.[144] It is not unknown that the Austrian Constitutional Court (Verfassungsgerichtshof) has developed a truly cooperative approach with EU institutions, and with the ECJ in particular, since issuing its first preliminary reference in 1999.[145]

With decisions U 466/11 and U 1836/11 of March 4th, 2012,[146] it seemed to move a step forward, abstaining from the dialogue with the ECJ by assuming the CFR as a standard of review of proceedings before the Constitutional Court. This means that in such proceedings,

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140. S.T.C., Feb. 13, 2014.

141. *Id.*

142. *See* Torres Perez, *supra* note 133, at 322.

143. *Id.* at 330.

144. *See* Giuseppe Martinico, *Preliminary Reference 2nd Constitutional Courts: Are You in the Mood for Dialogue?* (Tilburg Inst. of Comp. 2d Transnat'l L., Working Paper n. 4, 2010).

145. VfGH [Constitutional Court], Mar. 14, 2012, U466/11-18, https://www.vfgh.gv.at/cms/vfgh-site/attachments/9/6/0/CH0006/CMS1353421369433/grundrechtecharta_english_u466-11.pdf (Austria).

146. Verfassungsgerichtshof [VfGH] [Constitutional Court], Mar. 10, 1999, B 2251/87; B2594/92, https://www.vfgh.gv.at/cms/vfgh-site/attachments/9/6/0/CH0006/CMS1353421369433/grundrechtecharta_english_u466-11.pdf (Austria).

individuals can rely upon the rights provided by the CFR when challenging the lawfulness of national legislation.[147] This appears as a dissonant voice compared to that of other constitutional courts, much more willing to open the door to the influence in domestic situation of EU law. However, on closer examination, the Austrian position regarding the ECJ is not as friendly as might appear.

To clarify this point better, it is useful to summarize the case at stake. Complainants of the joined cases,[148] including Chinese citizens asking for asylum in Austria, claimed a violation of article 47 of the CFR, providing the right to an effective remedy and to a fair trial, because the Asylum Court took the appeal in order to review the decision after the Federal Asylum Agency refused the applications, abstained from holding an oral hearing requested by the applicants, and issued a decision for expulsion.[149]

Because the applicants exclusively claimed a violation of article 47 of the CFR, the Constitutional Courts had to first clarify if the CFR could be considered a standard of review for proceedings according to article 144a of the Federal Constitution Act.

Contrary to its previous case law, which denied the nature of standard of review to EU law, the Court affirmed that the rights guaranteed by the CFR, the latter being "markedly distinct from the 'Treaties,'" may be invoked as constitutionally guaranteed rights and "constitute a standard of review in general judicial review proceedings in the scope of application of the Charter of Fundamental Rights."[150]

Moreover, relying on the equivalence doctrine,[151] the Asylum Courts affirmed "that under Union law, rights which are guaranteed by directly applicable Union law must be enforceable in proceedings that exist for comparable rights deriving from the legal order of the Member States."[152]

The Court, reinforcing its argument, stated, "It would counter the notion of a centralized constitutional jurisdiction provided for in the Austrian Federal Constitution if the Constitutional Court were not competent to adjudicate on largely congruent rights, such as those

147. Reinhard Klaushofer & Rainer Palmstorfer, *Austrian Constitutional Court Uses Charter of Fundamental Rights of the European Union as Standard of Review: Effects on Union Law*, 19 EUR. PUB. L. 1, 4 (2013).

148. U-466/11-18, ¶ 16.

149. U-466/11-18, ¶¶ 1-14, 50, 61.

150. *Id.* ¶ 35.

151. *See* Case 33/76, Rewe-Zentralfinanz eG v. Landwirtschaftskammer für das Saarland, 1976 E.C.R. 1989.

152. VfGH, Mar. 14, 2012, U 466/11-18, ¶ 29, https://www.vfgh.gv.at/cms/vfgh-site/attachments/9/6/0/CH0006/CMS1353421369433/grundrechtecharta_english_u466-11.pdf (Austria).

contained in the Charter of Fundamental Rights."[153] However, the Court warned that this is true only if the guarantee contained in the CFR is similar to the rights that are guaranteed by the Austrian Federal Constitution.[154]

This approach gives the Austrian Constitutional Court a prominent role in protecting fundamental rights, even those enshrined in the CFR, and has the potential effect of marginalizing the role of the ECJ as the ultimate interpretive authority of EU law.

Assuming that the rights of the CFR (which have an equivalent in the Austrian constitution) can be considered as standards of review by the Constitutional Court—like those provided by the ECHR which has constitutional force in Austria—implies that the Constitutional Court is the ultimate interpretive authority of those rights, except where the Court has a doubt as to interpretation. In future cases, the Court will have a duty to issue a preliminary reference to the ECJ.

The effects of such an argument are quite controversial in the context of the theme of judicial cooperation in Europe, and in particular the role of the ECJ in interpreting EU law. This is clear in the case in comment. The Constitutional Court interprets article 47 of the CFR in the light of its counterpart in the ECHR (article 6), even if the latter has a narrower meaning than the former.[155] As the Court recognized, "proceedings rendering decisions on asylum and on residence of aliens in the territory of a state do not fall within the scope of application of article 6 ECHR."[156]

As has been observed, although article 47 of the CFR was held to be different from articles 6 and 13 of the ECHR, the Constitutional Court "nevertheless refers to ECtHR case law on the latter articles. Owing to this lack of compatibility, the Court was on its own to decide under which conditions an omission of an oral hearing in Asylum proceedings would not violate article 47 CFR,"[157] neglecting the role of the ECJ in interpreting EU law.

In conclusion, even as apparently Euro-friendly as the Austrian Constitutional Court seems, it discloses a possible threat to the authority and the supremacy of the ECJ, revealing that adjudicating rights is a zero sum game if it is not enshrined in a genuine and cooperative dialogue, rather than in unilateral statements.

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153. *Id.* ¶ 34.
154. *Id.*
155. Klaushofer & Palmstorfer, *supra* note 147, at 7.
156. U-466/11-18, ¶ 59.
157. Klaushofer & Palmstorfer, *supra* note 147, at 1.

VIII. CONCLUSIONS

In the light of the analyzed cases, we can try to draw conclusions on the status of this very peculiar feature of EU integration: the interactions between supreme jurisdictions. Moreover, we can move a step forward in asking what will or should be the future of judicial dialogue in Europe and that will be the direction in which this dialogue will move in relation to the definition of a real European constitutional space.

Addressing the two issues, we cannot but start from the new era of relationships between the ECJ and national constitutional courts, as witnessed by the cases examined. However, we cannot be too optimistic: the same case law showed that the constitutional courts still exhibit a resistance to giving up the last word in the protection of fundamental rights to the ECJ. The answer of the Spanish Constitutional Court in the *Melloni* case is typical of this attitude. Even the first preliminary reference of the BVerfG in the *OMT* case,[158] which has not been addressed in this article, showed a confrontational attitude rather than a cooperative one.

In other words, it seems that the dialogue between the ECJ and the constitutional courts is still a struggle rather than a mutual exchange of views in search of a resolution of divergences in the name of the best protection of fundamental rights.

As Roberto Bin argued, what we are used to calling dialogue is in reality an "*actio finium regondurum*," in order to define the boundaries between legal orders.[159] This is the dialogue at this stage of the EU integration process. In what ways, however, will this relationship move forward?

Until the EU becomes a real constitutional space, the dialogue between the ECJ and constitutional courts will probably remain episodic and discontinuous, based on the will of each individual court. I argue that the constitutional courts and the ECJ have to become more and more aware of the pluralistic framework in which they operate and try to avoid unilateral statements aimed at imposing the primacy of one or other system of rights protection. At this stage, the principle goal of the dialogue between the constitutional courts and the ECJ should be aimed at "promoting what could be described as 'incompletely theorized agreements': the possibility of agreeing on particular legal outcomes

158. *See* Niels Petersen, *Karlsruhe Not Only Barks, but Finally Bites—Some Remarks on the OMT Decision of the German Constitutional Court*, *in* 15 GERMAN L.J. 321, 322 (2014).

159. Bin, *supra* note 20, at 508.

without an agreement on the fundamental values that may justify those outcomes."[160]

Because we cannot describe the relationship between the EU and national legal orders in terms of hierarchy but of competence, we cannot identify general rules for the solution of the conflicts that may arise, but we have to allow space for genuine interaction between the different courts, inspired by the principles of subsidiarity and mutual recognition. Given the contrast between the principles involved, it is difficult to predict the path future dialogue will take, let alone whether or not it will have a successful outcome: it will depend on the attitude of both national courts and the ECJ. As argued, "despite the weaknesses of the case law and the problems that still lay ahead, the ECJ's first attempts in addressing the Charter's constitutional challenges show that the Luxembourg court and its national supreme and constitutional counterparts have much to lose through conflict, and a lot more to gain by way of loyal cooperation."[161] In other words, constitutional courts should set aside their confrontational attitude and the ECJ should be flexible and open to the different sensibilities expressed by the different national courts and to developing a "stone by stone" jurisprudence.[162]

Even if this kind of dialogue made up of so many different voices might seem discordant or messy at this crucial stage of EU integration, only a persistent and genuine interaction between the supreme courts and the ECJ can contribute to define more clearly the boundaries of and the interconnections between the different legal orders.

We should consider the dialogue between the ECJ and the constitutional courts as a shared activity, one that should be a mutual exchange of points of view in order to find the best protection of fundamental rights[163] in a continuous exchange of arguments developed case after case, to give "meaning to parallel and overlapping rights"[164] and

160. Miguel P. Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, *in* SOVEREIGNTY IN TRANSITION 501 (Neil Walker ed., 2003).

161. Sarmiento, *supra* note 58, at 1301.

162. Koen Lenaerts, *The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice*, *in* JUDGING EUROPE'S JUDGES 13, 46 (Maurice Adams et al. eds., 2013).

163. It is true that the multiplication of locations of human rights protection does not necessarily mean a higher level of protection of the individual and collective rights. *See* Andrea Guazzarotti, *La Cedu e l'Italia: Sui Rischi dell'Ibridazione Delle Tutele Giurisdizionali dei Diritti*, 2013 GIURISPRUDENZA COSTITUZIONALE 3657 (It.).

164. Torres Perez, *supra* note 133, at 329.

to implement the protection of human rights, without—however—"*dreaming of systems so perfect that no one will need to be good*."[165]

165. T.S. Eliot, *Choruses from the Rock*, *reprinted in* THE COMPLETE POEMS AND PLAYS 1909-1950, at 96, 106 (1971).